

## APPELLATE CIVIL.

*Before Cunliffe and Henderson J.J.*

1935

Nov. 28, 29 ;  
Dec. 6.

RAMESH CHANDRA GUHA

v.

DEENA NATH MISTRI.\*

*Landlord and Tenant—Suit against recorded tenant—Decree for rent—Tenant whose interest had been sold prior to landlords' suit, if may resist ejection.*

The interest of S in a holding had been sold in execution of a money-decree to K, who did not obtain actual possession. The landlords, in ignorance of such sale to K, filed a rent suit in which they impleaded all the recorded tenants, including S. In execution of the decree in the last named suit, the plaintiff purchased the entire holding and served the usual notice under s. 167 of the Bengal Tenancy Act. In the plaintiff's suit for *khas* possession, S took the plea that since in the landlords' suit K had not been made a party, the decree passed was not a rent-decree but a mere money-decree.

*Held* that without obtaining a declaration in the presence of both the plaintiff and K that K had an interest in the tenure and is liable for rent, the defence taken was not open to S.

SECOND APPEAL by the plaintiff.

The facts of the case appear fully from the judgment.

*Gunada Charan Sen and Abinash Chandra Ghosh* for the appellant. Kunja's purchase of Shashee's tenure was not confirmed until after the landlords' suit and sale under the decree passed therein. Kunja had never paid in the landlord's fee, nor had he given any notice. In the circumstances, the decree against the recorded tenants has the effect of a rent-decree and the sale passes the whole tenure. *Profulla Kumar Sen v. Salimulla* (1).

\*Appeal from Appellate Decree. No. 198 of 1933, against the decree of Abinash Chandra Ghosh Hazra, Second Subordinate Judge of Bakarganj, dated Sep. 19, 1932, reversing the decree of Bilash Chandra Banik, Additional Munsif of Perojpur, dated March 18, 1931.

*Sateendra Nath Ray Chaudhuri* for the respondent. Under s. 65 of the Civil Procedure Code, the tenure vested in Kunja from the date of his purchase, which was prior to the landlords' suit. There was no question of the payment of landlords' fee until the sale is confirmed. Therefore, the decree obtained by the landlord in the absence of Kunja is a mere money-decree and cannot be executed as a rent-decree. Kunja's interest cannot pass by the sale in execution.

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*Faridpur Loan Office, Limited v. Nirode Krishna Ray* (1). See also *Barada Prosad Roy Chowdhury v. Tarak Nath Mandal* (2).

The decision in *Profulla Kumar Sen v. Salimulla* (3) has no application.

*Abinash Chandra Ghosh* in reply. In any event Shashee cannot use Kunja as a shield, Kunja is not resisting the plaintiff's claim to *khâs* possession.

*Surajit Chandra Lahiri* for the Deputy Registrar.

*Cur. adv. vult.*

HENDERSON J. This is an appeal against the decree of the lower appellate Court dismissing the plaintiff's suit for *khâs* possession. It was originally argued before Mr. Justice R. C. Mitter and it has now come before us on a reference by him. The substantial point urged before us is whether a decree, in execution of which the plaintiff alleges that he purchased a certain tenure, was a rent-decree or a money-decree.

The landlords instituted the suit against the recorded tenants on April 15, 1920. They put up the holding to sale and it was purchased by the plaintiff on April 7, 1922. He obtained possession on July 21, 1922. It appears that the interest

(1) (1928) I. L. R. 56 Cal. 462.

(2) [1926] A. I. R. (Cal.) 844 ;  
 94 Ind. Cas. 147.

(3) (1918) 23 C. W. N. 590.

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of one of the tenure-holders, Shashee, was put up to sale in execution of a money-decree and purchased by one Kunja on November 12, 1919. The sale, however, was not confirmed till September 7, 1922 (that is to say, after the plaintiff's purchase) and he did not obtain delivery of possession until December 2, 1922. The contesting defendant No. 1 had an interest, which was annulled by the plaintiff, by the service of a notice under the provisions of s. 167 of the Bengal Tenancy Act.

Now, it is not suggested that the landlords knew of Kunja's purchase in the execution-sale. It has, accordingly, been contended on behalf of the appellant that, inasmuch as the recorded tenants were all made parties to the rent-suit, the tenure passed at the sale. In support of this contention reliance was placed upon the decision in *Profulla Kumar Sen v. Salimulla* (1). On the other hand it is contended on behalf of the contesting respondent that only the right, title and interest of the judgment-debtors passed on the authority of the case *Faridpur Loan Office, Limited v. Nirode Krishna Ray* (2).

It is to be observed that, although Kunja's purchase took place before the institution of the rent suit the sale was not confirmed until long after. But the property vests in a purchaser from the date of the sale and not from the date of the confirmation and he would be liable for the rent from the date of sale.

The point at issue is whether the landlord in order to obtain a rent-decree must sue all the actual tenants or whether it is enough if he sues those whose names are recorded in his *sheristá*. The case of *Profulla Kumar Sen v. Salimulla* (1) decided by N. R. Chatterjea and Newbould JJ. is an authority in

(1) (1918) 23 C. W. N. 590.

(2) (1928) I. L. R. 56 Cal. 462.

favour of the appellant. The learned Judges observed as follows:—

The property sold was described as an entire tenure; and as the decree was obtained by the plaintiff against the recorded tenants, we think that what was intended to be sold and was sold was the tenure itself, and not merely the interest of the defendants Nos. 1 to 5. . . . . We are of opinion that the entire tenure including the interest, if any, of defendant No. 6 passed by the sale to the plaintiff.

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On the other hand, the case of *Faridpur Loan Office, Limited v. Nirode Krishna Ray* (1), which was decided by Rankin C. J. and Page J., lays down that it is not enough for the landlord to implead the recorded tenants if, in fact, the interest of any of them passed to a third person unless there are circumstances to show that the tenants impleaded represented the whole estate.

In this connection we need only say that, as at present advised, we should be disposed to agree with the judgment of Page J. But, in our opinion, it is not necessary to pursue the matter any further or to consider whether we should refer the case to a Full Bench, as we are not satisfied that it was open to the defendant No. 1 to raise this defence at all.

The defendant No. 1 does not claim through Kunja. The effect of the decision of the lower appellate Court is that Kunja is liable for the rent, although Kunja was not a party to the suit. The defendant No. 1 has no direct interest in the matter and merely wishes to put forward Kunja as a shield.

Now, there is a most important question on which the Courts below differed. The contention of the plaintiff is that Kunja was a mere *benâmdâr* and the learned Munsif found in his favour: but this decision was reversed by the learned Subordinate Judge. No doubt the question whether the transaction was *benâmi* or not is a question of fact. But we find it

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difficult to say that the judgment of the learned Judge is a proper judgment of reversal. All he says is this :—

I am afraid there is no evidence in the circumstances to hold that Kunja was a *benâmdâr* for Shashee.

There was certainly circumstantial evidence to justify an inference that Kunja was a mere *benâmdâr* and unless the final Court of fact considers that evidence, it cannot be said that he has properly reversed the decision of the trial Judge. It is, therefore, not possible to hold that this question of fact has been properly determined. Had it been necessary to decide the point, we should have been compelled to remand the case for further consideration. There can be no doubt that, if the finding of the learned Munsif is correct, the tenure passed to the plaintiff. The delivery of possession to Kunja was only symbolical and he could not recover possession from the plaintiff without instituting a suit for declaration of his title. It does not appear that he has ever attempted to do so and it may well be that such a suit has now become barred by limitation. In these circumstances, it would be rather strange if defendant No. 1 could defeat the plaintiff's claim by a mere assertion that Kunja has an interest in the holding.

We are of opinion that without obtaining a declaration in the presence of both the plaintiff and Kunja that Kunja has an interest in the tenure and is liable for rent, such a defence is not open to him.

The result is that this appeal must be allowed, the decree of the lower appellate Court set aside and that of the Court of first instance restored. The defendant No. 1 will pay the costs to the appellant in all Courts.

CUNLIFFE J. I agree.