APPELLATE CIVIL.

Before R. C. Mitter J.

1935

July 11, 12.

MAHADEB PAL

v.

SHIBUCHARAN PAL.*

Bengal Tenancy—Landlord and Tenant—Rent decree against transferee of non-transferable holding after its transfer, if good—Bengal Tenancy Act (VIII of 1885), s. 116A.

It is a fundamental principle of law that a lessee must have enjoyment and possession of the property at the time of the institution of rent suits against him.

A suit for rent by the landlord against the transferee of a non-transferable holding (and not against the registered tenant), such transferee not being in and not entitled to possession, of the same at the time of institution of the suit, cannot be a suit for rent against a person representing the holding; and a purchaser of that holding in the execution sale of a rent decree passed in such a suit gets nothing by the purchase.

SECOND APPEAL by the defendant Mahadeb Pal.

The material facts of the case and the arguments in the appeal appear in the judgment.

Panchanan Ghosh for the appellant.

Bijaykumar Bhattacharjya, Risheendranath Sarkar, Subodhchandra Datta and *Ramendrachandra Ray* for the respondents.

R. C. MITTER J. The subject matter of this suit is a part of a non-transferable holding, namely, the land described in schedule *kha* of the plaint, which is a part of the lands of schedule *ka*, which represent the entire holding. Defendant No. 10 is the Fort Gloster Jute Manufacturing Co., Ltd., the admitted landlord, and the recorded tenant was one Roopchand Pal. Roopchand sold the land to one Becharam Pal, who

*Appeal from Appellate Decree, No. 2004 of 1933, against the decree of Paziruddin Ahmad, Additional Subordinate Judge of Howrah, dated Aug. 14, 1933 reversing the decree of Maneendranath Mukherji, First Munsif of Uluberia dated Aug. 13, 1932.

again sold it to one Tarinicharan Sardar, on the 16th November, 1904. The defendant company did not recognise either Becharam or Tarini as their tenant. Tarini died sometime before the year 1921 and the finding is that he died without any male issue, leaving him surviving two widows Amodi and Nistarini *alias* Subasmoyee. Neither Amodi nor Nistarini was recognized as tenant by the landlord company. On the 26th April, 1921, Amodi, claiming to be entitled to the whole of the property left by Tarini, sold the holding to defendant No. 5. The conveyance was in the names of defendants Nos. 5 and 7; but it is admitted that defendant 7 has no beneficial interest, the sole beneficial owner being defendant No. 5. In this document there is mention of the fact that Tarini left another widow Nistarini *alias* Subasmoyee. About three months later Nistarini assumed the role of the sole surviving widow of Tarini and in that assumed character sold the holding to defendant No. 4. In fact, then Amodi was alive and she was alive for a considerable number of years thereafter. In 1924, defendant No. 5 sold the land to the plaintiff. Before this sale by defendant No. 5 to the plaintiff the landlord company had not recognized defendant No. 5 as tenant, apparently they proceeded on the footing that they would not recognize any of the transferees but would hold their recorded tenant Roopchand responsible.

In the year 1929, however, the landlord company brought a suit for rent against defendant No. 5 and recovered a decree. This was the first act of recognition, as the evidence on the record shows, of defendant No. 5 as tenant by the landlord. When they obtained the decree they put it up for execution and, at the execution sale, defendant No. 1 purchased the holding. On that the plaintiff has instituted the present suit for a declaration that the rent decree passed in that suit, namely, Rent Suit No. 766 of 1929, is not a rent decree at all, and the sale in execution thereof is void and cannot affect his interest. He accordingly prayed for *khâs* possession of the land described in schedule *kha*,

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his possession being disturbed. In the plaint, however, he recites the facts by which he claims title to the whole tenancy, namely, the land of schedule *ka* and confines his relief to a portion thereof, namely, the land of schedule *kka*, because from it he has been dispossessed by the auction-purchaser. There are other allegations in the plaint as to the nature of the interest of one Uttam who was in possession of the land of schedule *kha*. This question need not be determined, inasmuch as, according to the findings arrived at by the courts below, if the plaintiff has title, and if the sale in execution of the decree passed in the rent suit has not affected his interest in the land, he is entitled to a declaration of title to the lands of schedule *ka* and possession of the lands of schedule *kha*, the only other question being whether he has title to the whole of it or only to a part as co-sharer with defendant No. 4. So far as the landlord company are concerned they took up a very curious attitude. They admitted that they instituted the suit for rent against a wrong man, that is to say although they instituted the suit for rent against defendant No. 5, they maintain in the present suit that defendant No. 5 is not their tenant. This defence is in effect an admission with regard to a good part of the claim as made by the plaintiff.

So far as the defendant No. 1 is concerned he took up the position that the rent suit was a competent suit and the decree passed therein was a valid rent decree, and the sale in execution of that decree passed the entire holding to him. He supports this defence on the following grounds: He says that the holding is a non-transferable holding, and it is in fact so. Then he says that, on the transfer of such a holding, it is open to the landlord either to recognize the transferee as his tenant or not and if there be transfers to many persons, it is open to the landlord to recognize any of the transferees whom he chooses. The landlord company instituted the suit for rent in 1929 against defendant No. 5 and thereby recognized defendant No. 5 as their tenant. The suit, therefore, was against

the tenant who represented the holding in the landlords' *sheristâ*, and the decree passed therein was a decree for rent and the sale was a valid sale of the holding. This is the argument which is urged on behalf of defendant No. 1.

The position of defendant No. 4 is very peculiar and the attitude which he has taken in this suit can be figuratively put as an attempt on his part to kill two birds with one stone. He says, in the first instance, that the decree obtained by the landlords in the suit of 1929 is not a rent decree, because they could not have at that time recognized defendant No. 5 as their tenant. Here he makes a common cause with the plaintiff to put out the claim of defendant No. 1, but he goes further and says that defendant No. 5 had no subsisting interest in the property at the date of the suit, Amodi having died before the institution of the suit. He puts forward this ground on the basis that there were two widows, they could no doubt deal with their life estates separately, but if an alienation is to be made for legal necessity, it is absolutely necessary that the two co-widows must either join, or the alienation, if made by one of the two co-widows, must be by her either as an agent of the other co-widow or with her express or implied consent. In this case he says that Amodi did not act either as an agent of Nistarini or with the consent express or implied of Nistarini, and for this purpose he relies on the well known case of *Gauri Nath Kakaji* v. *Gaya Kuar* (1).

Feeling the difficulty that the same argument may be turned against him, because he also purchased from Nistarini at a time when Amodi was alive, Nistarini having ignored Amodi, he relies upon the provisions of section 43 of the Transfer of Property Act. He says that in the deed which Nistarini executed in his favour she represented that she was the owner of the whole, the sole widow of Tarini. Since Amodi is dead, says he, and Nistarini has got the whole of the property by survivorship, Nistarini was bound to make good the terms of the conveyance and by reason

(1) (1928) L. R. 55 I. A. 399.

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of section 43 of the Transfer of Property Act he has acquired the whole of the property. This defence if accepted would put the plaintiff out of court altogether, and, therefore, I have described his attitude as an attempt of a man who wants to kill two birds with one stone.

It is necessary to deal with the second line of defence first, and I shall deal with the other defence later on, a defence which really supports the case of the plaintiff. The answer to the second line of defence adopted by defendant No. 1 lies in certain proceedings which took place between defendant No. 4 and defendant No. 5 in 1923. A suit was instituted but it ended in a compromise. They, the defendant No. 5 and defendant No. 4, agreed to divide the property half and half on the basis that there were two widows and each of the widows had transferred an absolute estate to each of them. The result was that each of them took a moiety of the property absolutely. The plaint, the petition of compromise and the decree passed on the petition of compromise of that suit, *viz.*, Exhibits D, 4 and E respectively, are on the record of this suit. Having regard to this fact, it is not open to defendant No. 4 to turn round, ignore the *inter partes* decree and say that defendant No. 5 has no title to the land in suit. In this view of the matter, it is not necessary to consider whether defendant No. 4 can really, for the first time, in this Court rely on the provisions of section 43 of the Transfer of Property Act. It is quite clear from the written statement that, on the case which he made in the court of first instance, it would not have been possible for him to base his contention on the provisions of section 43 of the Transfer of Property Act. But, inasmuch as the rights of defendants Nos. 4 and 5 *inter se* have been clinched by the compromise decree, Exhibit E, it is unnecessary to consider further the question raised in this Court, based on the provisions of section 43 of the Transfer of Property Act.

The court of first instance dismissed the plaintiff's suit finding that defendant No. 5 had been recognized

by the landlord company as tenant and the rent suit was a good suit. The lower appellate court has reversed that decision and has come to a finding that the plaintiff has got eight annas share in the property. The learned Subordinate Judge held that the landlord company were not entitled to institute the suit for rent against defendant No. 5 and the sale in execution of that decree had not affected the interest of the plaintiff. For the purpose of coming to this conclusion the learned Subordinate Judge has relied on the provisions of section 146A of the Bengal Tenancy Act, but I do not think that that section has any relevancy in this case, and I do not follow the reasonings of the learned Subordinate Judge. But although, the reasons of the learned Subordinate Judge may not be sound, I do not think that the decree passed by him is an erroneous decree, and the short reason for that is this: that, in the year 1924, defendant No. 5 had parted with his interest in the holding in favour of the plaintiff and the landlord could not, in my judgment, recognize defendant No. 5 as their tenant and proceeding on that footing they could not institute a suit for rent against him. In the case of non-transferable holding, it is no doubt the law that, if there is a sale of the entire holding, the landlord is at liberty either to recognize the transferee or not. But the option must be exercised at a time when the transferee has still an interest in the property. If the transferee transfers his interest in its entirety to another person he drops out of the scene altogether, and, after this further act of transfer, if the landlord intends to recognize a transferee as tenant, the second transferee can be recognized as tenant, but not the person who was a prior transferee but who had no concern with the land at the date of the so-called recognition. It is the fundamental principle that a lessee must have enjoyment of the property, that is to say, the word "tenancy" implies possession of the land by a person claiming a subordinate interest. By no stretch of imagination can defendant No. 5 be called a tenant of the land after he

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had parted with his right to possess and enjoy the land in favour of the plaintiff by his sale in the year 1924. In the year 1929, defendant No. 5, therefore, was a complete stranger to the land, and the landlord company cannot recognize a man of the street as their tenant, and on the basis of that recognition institute a suit for rent. This is exactly what has happened in the present case. Therefore, the suit which was instituted by the landlord in 1929 against defendant No. 5 cannot be a suit for rent against a person representing the holding, by any stretch of imagination.

In this view of the matter, I hold that the sale in execution of the decree passed in the so-called suit for rent filed in 1929 has not affected either the interest of the plaintiff or defendant No. 4, that is to say, defendant No. 1 has got nothing by the purchase at the execution sale. It is for these reasons and not for the reasons given in the judgment of the learned Subordinate Judge that I confirm his decree.

The result is that this appeal is dismissed with costs. The plaintiff respondent is entitled to the costs of this appeal. So far as defendant No. 4 respondent is concerned he must bear his own costs of this appeal.

Prayer for leave to appeal under section 15 of the Letters Patent is refused.

Appeal dismissed.

A. K. D.