APPELLATE CIVIL.

Before Khundkar J.

1938

Jan. 24;
Feb. 1, 2, 15.

NARENDRA NATH ACHARJYA

v.

HIRENDRA NATH ACHARJYA.*

Landlord and Tenant—Decree for arrears of rent—Transferee of a share of the tenure not made party to suit but joining in a compromise for setting aside the sale which is subsequently confirmed—Sale, if passes the entire tenure—Estoppel—Bengal Tenancy Act (VIII of 1885), ss. 12, 13, 146A, 173(1)—Indian Trusts Act (II of 1882), s. 88.

In the absence of evidence to the contrary, there is a presumption that the procedure laid down in ss. 12 and 13 of the Bengal Tenancy Act was duly followed when there is a transfer of the tenure.

Jitendranath Ghosh v. *Manmohan Ghosh* (1) followed.

The question of applicability of s. 146A of the Bengal Tenancy Act cannot be raised for the first time in Second Appeal, if the materials on the record are insufficient.

A co-sharer tenure-holder was not a party to a decree for rent obtained by the superior landlord of the tenure. The said co-sharer tenure-holder was permitted without any objection to become a party to a compromise for setting aside the sale under sub-s. (*3*) of s. 174 of the Bengal Tenancy Act describing himself as a judgment-debtor and the sale was set aside by the trial Court. But on appeal by the auction-purchaser under s. 174(*5*), Bengal Tenancy Act, the said co-sharer tenure-holder was not made a party in spite of objection. The appeal was allowed and the sale was confirmed.

Held that the said co-sharer tenure-holder was not estopped from showing that the said decree is not a rent decree.

Rajunder Narain Rae v. *Bijai Govind Sing* (2); *Uttam Chandra Krithy* v. *Khetra Nath Chattopadhya* (3) and *Kunti* v. *Gajraj Tiwari* (4) distinguished.

A defaulting tenant purchaser under s. 173(*1*) of the Bengal Tenancy Act, as such, is not a "person bound in a fiduciary character" within the meaning of s. 88 of the Indian Trusts Act.

Deo Nandan Prashad v. *Janki Singh* (5) distinguished.

APPEAL FROM APPELLATE DECREE preferred by the defendants.

*Appeal from Appellate Decree, No. 1965 of 1936, against the decree of S. P. Bose, Fourth Subordinate Judge of 24-*Parganás*, dated Aug. 13, 1936, reversing the decree of E. Rahaman, First Munsif of Baruipur, dated April 8, 1936.

(1) (1930) I.L.R. 58 Cal. 301; L.R. 57 I.A. 214.
(2) (1839) 2 M. I. A. 181.
(3) (1901) I. L. R. 29 Cal. 577.
(4) (1924) I. L. R. 46 All. 847.
(5) (1916) I. L. R. 44 Cal. 573.

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The plaintiff-respondent brought this suit for the declaration of his title, confirmation of possession and for injunction. The plaintiff's allegations were that he was a co-sharer of the tenure in suit by private purchase; the defendant-appellant was the purchaser in execution of a decree in respect of the rent of the said tenure. But the said decree was not passed against the plaintiff and he was no party to it. Plaintiff's case was that the defendant purchased in execution of a money-decree and, as such, plaintiff's title was not affected by the purchase. The defendants contended that the suit was not maintainable and that the plaintiff was not entitled to any relief. The trial Court dismissed the suit. The lower appellate Court allowed the appeal by the plaintiff and decreed the suit. Hence this Second Appeal by the defendants. The other facts appear from the judgment.

Bibhuti Bhusan Bhattacharjya for the appellants. It was a rent-decree according to the provisions of s. 146A of the Bengal Tenancy Act and the sale was a rent-sale. Plaintiff joined in the compromise as a judgment-debtor and is estopped from denying that it is a rent-sale. I rely on *Rajunder Narain Rae* v. *Bijai Govind Sing* (1); *Uttam Chandra Krithy* v. *Khetra Nath Chattopadhya* (2) and *Kunti* v. *Gajraj Tiwari* (3). Section 88 of the Indian Trusts Act has no application to the present case.

Hira Lal Chakravarti and *Syama Das Bhattacharjya* for the respondents. It was clearly a money-decree and a money-sale. I rely on the observation of the Judicial Committee in *Jitendranath Ghosh* v. *Manmohan Ghosh* (4). Again, the purchaser has been found to be a *benâmdâr* of the judgment-debtor and, as such s. 88 of the Indian Trusts Act applies and purchase must inure to the benefit of the respondent. I rely on *Deo Nandan Prashad* v. *Janki Singh* (5). There is no estoppel on the facts of the

(1) (1839) 2 M. I. A. 181.
(2) (1901) I. L. R. 29 Cal. 577.
(3) (1924) I. L. R. 46 All. 847.
(4) (1930) I. L. R. 58 Cal. 301; L. R. 57 I. A. 214.
(5) (1916) I. L. R. 44 Cal. 573.

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present case and the decisions cited by the other side do not apply to the facts of the present case.

Bibhuti Bhusan Bhattacharjya, in reply.

Cur. adv. vult.

KHUNDKAR J. This appeal relates to the respondent's interest in a certain tenure recorded as a permanent tenure liable to enhancement of rent. The names of the recorded tenure-holders at a time which is material were:—(1) Kedar Acharjya, (2) Chandi Charan, (3) Shashi, (4) Bijay, (5) Khoka and (6) Shailen. In the year 1920, the interest of Shashi, Bijay and one Kali, who was the father of Khoka, and Shailen was purchased by one Manindra Kumar Basu at a sale held in execution of a mortgage-decree. Manindra got himself recorded as a tenure-holder and then, on January 26, 1931, sold his interest to the present respondent.

On April 14, 1931, the landlords instituted a suit for rent and obtained a decree against Kedar, Chandi Charan, Shashi, Bijay, Khoka and Shailen, without impleading either Manindra or the respondent as defendants. In the petition for execution it would seem that only Kedar, Kedar's wife Giribala, and Chandi Charan were made parties. In execution of the decree obtained in that suit the tenure was purchased on April 9, 1934, by the present appellants, who are the sons of Kedar. Thereafter the judgment-debtor, Chandi Charan, applied under s. 174(*3*) of the Bengal Tenancy Act to have the sale set aside. In this proceeding, a compromise was mooted, in which the respondent came forward and offered to join. It is significant that he was permitted, without any objection, to become a party and a compromise petition was filed, whereby it was agreed that, on payment of certain sums to the landlords and to the auction-purchasers within a specified time, the sale would be set aside. The entire amount was, however, not deposited within the time agreed, and an application for an extension

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of time was made which was allowed. The balance of the stipulated amount was then paid and the sale was set aside. Against this order, the auction-purchasers appealed, but, in their appeal, they did not implead the present respondent, although the order setting aside the sale was one by which he had clearly benefited. At the hearing of that appeal, the judgment-debtors pointed out that the matter could not be disposed of in the absence of the present respondent, who was a party to the compromise, but this objection was over-ruled. The appeal was allowed and the sale was confirmed. The respondent then filed the suit, out of which the present appeal has arisen, for declaration of title, confirmation of possession and a perpetual injunction. The suit was dismissed by the trial Court, but was decreed on appeal.

Against that decision the auction-purchasers have appealed, and on their behalf the first contention advanced is that they are purchasers in a rent-sale which has been confirmed. This is strenuously disputed by the respondent upon the ground that he was not a party either in the suit for rent or in the appeal from the order setting aside the sale. Paragraph 4 of the plaint in the present suit contains a clear averment that the sale was not a rent-sale, and *prima facie* this would seem to be so, because the plaintiff had admittedly acquired the interest of some of the recorded tenure-holders by a purchase. In the case of *Jitendranath Ghosh* v. *Manmohan Ghosh* (1), it was declared that their Lordships of the Judicial Committee would presume, in the absence of evidence to the contrary, that the procedure laid down in ss. 12 and 13 of the Bengal Tenancy Act was duly followed, and that the proper statutory notice was given to the landlords of incumbrances and sales. Had the appellants invoked the provisions of s. 146A of the Bengal Tenancy Act, they might perhaps have been able to show that the

(1) (1930) I. L. R. 58 Cal. 301 (309); L. R. 57 I. A. 214 (221).

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entire body of co-sharer tenants in the tenure was represented by the persons whom the landlords had impleaded as defendants in their suit for rent. This they did not attempt to do either in the suit or in first appeal. They, however, now contend that the defendants in the landlord's suit must have fallen within one or other of the descriptions contained in cls. (*i*) to (*iv*) of sub-s. (*3*) of s. 146A of the Bengal Tenancy Act. Had that been their contention in the Courts below, the plaintiff-respondent would have had an opportunity of showing that the defendants in the landlord's suit did not satisfy any of those descriptions. The appellants, not having invoked the provisions of s. 146A in the Courts below, the materials now upon the record are not such as to enable me to say that the entire body of tenants was represented in the landlord's suit for rent. In the circumstances established, I must hold that the decree obtained by the landlords is not shown to have been a rent-decree.

The defence which the appellants actually put forward in the Courts below, and which they also raised in this appeal, was based upon the fact that the respondent had joined in the compromise and had submitted to its terms. To put it shortly, their case was and is that the respondent, by participating in the compromise, had recognised the decree obtained by the landlord as a rent-decree, and he is, accordingly, estopped from disputing its character as such. In this connection it is pointed out that the compromise petition describes the respondent as a judgment-debtor. In support of the argument, reliance has been placed on the following decisions:—

In *Rajunder Narain Rae* v. *Bijai Govind Sing* (1), it was held that a deed of agreement to compromise conflicting claims entered into in the presence of witnesses and solemnly acknowledged in Court, by parties who were mutually ignorant of their

(1) (1839) 2 M. I. A. 181.

respective legal rights, cannot afterwards be set aside upon the plea of ignorance of the real facts, when the party seeking to avoid the deed had the means of ascertaining those facts within his reach.

The principle enunciated in this decision is not in question in the present matter, because it is nobody's case that any of the parties here were acting in ignorance of their legal rights.

In *Uttam Chandra Krithy* v. *Khetra Nath Chattopadhya* (1), a compromise petition was filed in a proceeding to set aside a sale, whereby the judgment-debtor bound himself to pay up the full decretal amount by a certain date. It was agreed that if this was not done the sale should stand good. The entire amount not having been paid by the specified date, the judgment-debtor, in spite of opposition by the decree-holder, obtained an extension of time to pay the balance. When this was tendered the decree-holder refused to accept it. It was held that the judgment-debtor was bound by the terms of the compromise, and was estopped from contesting the validity of the sale.

The facts of the present appeal are undoubtedly somewhat similar, but in the case cited the order confirming the sale was made in a proceeding to which the judgment-debtor was a party. Moreover, in the case cited, the judgment-debtor was held to have been estopped from contesting the validity of the execution sale. In the present case it is contended that he is estopped not only from that, but also from challenging the character of the decree itself, which is a very different matter.

In *Kunti* v. *Gajraj Tiwari* (2) it was laid down that when parties, agreeing not to go to law and not to fight out their disputes, by a mutual arrangement carry into execution their mutual promises, so that the original contract by which they decided to terminate the disputes becomes an executed contract

(1) (1901) I. L. R. 29 Cal. 577. (2) (1924) I. L. R. 46 All. 847.

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on both sides, and nothing remains to be done, the parties continuing each in the enjoyment of the interest which the other agreed that he should take, the Courts in India, applying the rule of equity and good conscience, will not permit either party who has bound himself by the contract and by its performance to repudiate what he has done and will also prohibit any person claiming under him from attempting the same thing.

This decision relates in terms to the legal consequences of a contract by which the parties thereto have bound themselves not to go to law, and which has been acted upon, and the principle to which it gives expression is too well-known to need elaboration. The question which has to be determined in the present appeal is, whether from the decisions, to which reference has been made, it is possible to extract a rule which will estop the respondent from denying that the appellants have obtained this tenure in a rent execution sale. Now, as already stated, the respondent was not impleaded as a party in the landlord's suit for rent. During the execution-proceedings he voluntarily came forward, and offered himself as a party to a compromise, the sole object of which was to prevent the tenure from being sold. True, it is that he allowed himself to be described as a judgment-debtor. But this presumably he had to do in order to acquire *locus standi* as a party to the compromise. Can it be said that he thereby surrendered for all time, and in all circumstances, his right as a purchaser of saying that the landlord's decree did not affect his interest since it was passed behind his back? I think not. The compromise was effected in execution-proceedings, and it was clearly outside the scope of those proceedings for any person described as a judgment-debtor to question the character of the decree. Moreover, the respondent was agreeing to no more than this that the sale under the decree, such as it was, would stand if money was not paid in time. This would not alter the legal incidents of the sale so as to transform what was

really a money-sale into a rent-sale. The respondent saw in the compromise only a convenient gateway out of unnecessary turmoil. Had he successfully escaped from turmoil, and acquired any benefit through or under the compromise, equity might bar him now. But the position was otherwise. The sale was at first set aside by an order passed in his presence. The sale was later confirmed by an order passed in his absence. If estoppel there was, it seems to me arguable that it operated also against the appellants. They as auction-purchasers had in the compromise agreement recognised the respondent as one occupying the status of a judgment-debtor in the execution-proceedings. Yet, in an appeal which they took from an order subsequently passed in those execution proceedings, they threw the respondent over-board and omitted to implead him as a party.

In view of the limitations under which the respondent lay in the matter of the compromise, as well as in the appellant's appeal against the order setting aside the sale, it is not possible to say that the respondent is estopped from impugning the character of the landlords' decree.

There is one other matter to which reference may be made. The lower appellate Court has held as a fact that the appellants were mere *benâmdârs* of their father Kedar, and on this finding has rightly concluded that their purchase was voidable under s. 173, sub-s. (*1*) of the Bengal Tenancy Act, but not void. On behalf of the respondent, I have been invited to hold that the purchase by the appellants falls within s. 88 of the Indian Trusts Act, and inures to the benefit of the respondent, and the case of *Deo Nandan Prashad* v. *Janki Singh* (1) has been cited in this connection. Kedar, merely because he was a co-sharer in the tenure, does not, in my judgment, come within the language of s. 88 of the Indian Trusts Act as a "person bound in a fiduciary "character" to protect the interest of the respondent.

(1) (1916) I. L. R. 44 Cal. 573.

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It seems to me that, in a case where s. 88 of the Indian Trusts Act does not in terms apply, the entire circumstances of the transaction have to be looked at for the purpose of determining whether an interest acquired by one person is an advantage which he may not be permitted to hold to the prejudice of another. In the case cited an interest in a revenue-paying estate was subject to an usufructuary mortgage in favour of a person who undertook to pay the Government revenue for the mortgaged share. A default in such payment having occurred, the property was put up for sale and was purchased *benâmi* for the mortgagee. It was held that as the mortgagee had a duty to perform, which was inconsistent with his becoming a purchaser in the way he did, his title could not operate to the exclusion of his co-owners, who were entitled to equitable relief. The case is distinguishable, because the tenant defendant, Kedar, in the landlord's suit lay under no contractual obligation to save the tenure from sale. This branch of the argument, if it helps the respondent at all, does so by bringing into further relief the equities in his favour.

Upon a consideration of the proved facts and entire circumstances of the case, I am constrained to hold that the execution-sale, which was confirmed as a consequence of the auction-purchaser's appeal, passed the right, title and interest of only those tenants who were impleaded in the landlord's suit.

This appeal must be dismissed with costs, and the decree of the lower appellate Court made in the respondent's favour must be upheld.

Leave to appeal under s. 15 of the Letters Patent is asked for and is refused.

Appeal dismissed.

N. C. C.