

(1927) 03 CAL CK 0004**Calcutta High Court****Case No:** None

Maharaj Bahadur Singh

APPELLANT

Vs

Karani Mai

RESPONDENT

Date of Decision: March 15, 1927**Acts Referred:**

- Bengal Tenancy Act, 1885 - Section 153, 174
- Civil Procedure Code, 1908 (CPC) - Section 115, 47

Citation: AIR 1927 Cal 633**Hon'ble Judges:** Roy, J; Mukerji, J**Bench:** Full Bench**Judgement**

Mukerji, J.

This appeal arises out of proceedings held for setting aside a rent sale. The application to set aside the sale was dismissed by the Munsiff, There was an appeal preferred from this order to the District Judge and the learned Judge has ordered the sale to be set aside. From the order of the learned District Judge the present appeal has been preferred by the decree-holder. An application u/s 115 of the CPC directed against the said order, has also been filed on his behalf. The sale was held in execution of the decree which had been obtained in a suit for rent and the said decree as well as the order refusing to set aside the sale were passed by a Munsiff, who, it is conceded, had final jurisdiction to deal with the matter u/s 153 of the Bengal Tenancy Act.

2. The first ground that has been urged on behalf of the decree-holder is to the effect that the order which was passed by the Munsiff in the present case was one from which no appeal lay. It has been contended on behalf of the respondent that the order is covered by the exception contained in Section 153 as it decides a question relating to title to land or to some interest in land as between parties having conflicting claims thereto; in other words, it has been urged that the

question as to whether the sale should or should not be set aside is a question which relates to title to land or to some interest in land as between the decree-holder who is the auction-purchaser in the present case and the judgment-debtor on the other and that, therefore, the order is covered by this exception. On behalf of the appellant it has been pointed out that by reason of the explanation to Section 153 a question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. On behalf of the respondent in support of the contention that an appeal did lie from the decision of the Munsiff reliance has been placed upon the Full Bench decision of this Court in the case of *Kali Mandal v. Ramsarbaswa Chakravarti* [1905] 32 Cal. 957. In this case it was decided by a Full Bench of this Court, one of the learned Judges who sat in that Bench dissenting, that an order setting aside or declining to set aside a sale in execution of a decree for rent, the decree-holder being the purchaser, falls-within the proviso to Section 153 of the Bengal Tenancy Act, and is appealable although there could be no appeal from the decree in the suit on account of the prohibition contained in that section. The answer that is given on behalf of the appellant is that this decision is met by the explanation which was subsequently introduced by Section 153 of the Bengal Tenancy Act to which I have already referred. The respondent relies upon certain decisions of this Court to which I shall presently refer for establishing the position that notwithstanding the introduction of this explanation the effect of the aforesaid Full Bench decision has not been altogether nullified. The first case relied upon is that of *Beni Madhab Ray v. Bissessur Bharati* 17 C.W.N. 84. This was a case in which a question arose as to whether a sale held in execution of a decree for rent was to be set aside on the ground that the judgment-debtor had applied for setting it aside after making the necessary deposit in compliance with the provisions of Section 174 of the Bengal Tenancy Act. In deciding this case the learned Judges observed thus: The explanation provides that a question as to regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto.

In the case before us, no question arises as to the regularity of the proceedings in publishing or conducting the sale. The question raised is whether the judgment-debtor has complied with the requirements of Section 174 for reversal of the sale, We are therefore of opinion that the case is not covered by the explanation and that the rule laid down in *Kali Mandal v. Ramsarbaswa Chakravarti* [1905] 32 Cal. 9857 governs the matter.

3. It will be seen that the ground upon which the sale was sought to be set aside in that case was not one which can be said to relate to the regularity of the proceedings in publishing or conducting the sale but that something had been done

after the sale was over which under the law, entitled the judgment-debtor to claim that the sale should be set aside. The next case that has been referred to in this connexion is that of *Arjun Das v. Gunendra Nath Basu Mallik* 18 C.W.N. 1266. In that case a sale was sought to be set aside u/s 47 and Order 21, Rule 90 of the CPC and one of the grounds of irregularity alleged in the case was that there was no proper service of notice under Order 21, Rule 22 of the Code. The Court of first instance in that case refused to set aside the sale and that order was upheld on appeal by the District Judge. From the decision of the District Judge in that case an application in revision had been filed before this Court and in dealing with that application the learned Judges observed:

We may finally add that although the application must be deemed to have been made u/s 47 of the Code of 1908, a second appeal may at first sight seem barred u/s 153, B.T. Act, as the claim in the suit for rent was under Rs. 100; but a second appeal does lie in this case of the authority of the decision of the Full Bench in *Kali Mandal v. Ramsarbaswa* [1905] 32 Cal. 957 the effect of which, as explained in *Beni Madhab v. Bissessur* 17 C.W.N. 84 has not been completely nullified by the explanation added to Section 153.

4. With the utmost deference to the learned Judges I must say I do not find anything that was said in *Beni Madhab v. Bissessur* [17 C.W.N. 84] as supporting the view that the learned Judges took. If the question that arose under Order 21, Rule 22 is not a question relating to the regularity of proceedings in publishing or conducting the sale, it is not within the explanation, but as a question u/s 47 Civil Procedure Code. I find it extremely difficult to regard it as a question relating to title to land or to some interest in land as between parties having conflicting claims thereto.

5. The third decision to which our attention has been drawn is the case of *Nabin Chandra Chowdhury v. Bepin Chandra Roy Chowdhury* [1915] 22 C.L.J. 244, in which one of the learned Judges expressed an opinion that the question as to fraud in publishing or conducting a sale is not covered by the Explanation to Section 153 of the Bengal Tenancy Act and that the Explanation only applies to cases where there is a question of irregularity in publishing or conducting a sale. This view was not approved by the other learned Judge who dealt with the case and he proceeded on the footing that when the Munsiff had dismissed an application made more than thirty days after the sale on the ground that Section 18 of the Limitation Act could not be availed of by the petitioner that was not a finding upon a question as to the irregularity of the proceeding in publishing or conducting a sale and the Explanation to Section 153 of the Bengal Tenancy Act consequently did not apply. With the greatest respect to both the learned Judges I am unable to agree in the view that was taken by either of them. I am not prepared to accede to the proposition that fraud in publishing or conducting a sale is meant to be kept separate from irregularities in the publication or conduct thereof for the purpose of the Explanation to Section 153 of the Bengal Tenancy Act nor am I able to subscribe to

the proposition that because the Explanation to Section 153 does not cover the case of decision on the question of limitation, the said decision, therefore, necessarily amounts to a decision on a question of title or conflicting claims as between the decree-holder and the judgment-debtor.

6. Personally I do not feel pressed by these decisions and I am inclined to take the view that in a case like this no appeal lay from the decision of the learned Munsiff; and if the Full Bench has really decided otherwise it will, perhaps, on a proper occasion, be necessary for a much larger Bench to consider the question. In the view that I have taken of the matter I do not propose to pursue the discussion any further because I am of opinion that whether an appeal did lie to the District Judge or not the appellant is not entitled to any relief at our hands. If no appeal lay from the decision of the Munsiff then having regard to the facts to which I shall presently refer we shall not be justified in setting aside the order of the District Judge in the exercise of our powers u/s 115 of the Code of Civil Procedure. If an appeal did lie to the District Judge then there is a second appeal to this Court and possibly also, as has been held in some cases, if no, appeal lay to him an appeal lies from his decision to this Court. On such an appeal it is possible to interfere with his findings on the facts.

7. The learned Munsiff found in the case that the evidence about service of writs of attachment and sale proclamation was very meagre and that the price fetched at the sale was grossly inadequate and the value was grossly misstated in the sale proclamation. Though he came to this finding he dismissed the application to set aside the sale on the ground that it was barred by limitation. On the question of limitation the learned Munsiff appears to have taken a wrong view as he did not take into account the principle that if there has been wilful suppression of the sale notices an inference might be drawn to the effect that there was fraud; and if fraud was established then it was for the decree-holder to establish that the petitioner had knowledge at a time which would disentitle him to avail of the provision of Section 18 of the Limitation Act. The learned District Judge's findings are to the effect that there are indications to show that a decree was obtained against a dead man, and that the execution proceedings were certainly started against a dead man. As regards service of notices under Order 21, Rule 22 and Order 21, Rule 66, the learned Judge has found that there was no proper service of these notices. He has recorded a finding to the effect that the gross under statement of value in the sale proclamation and suppression of the notices reveal a deliberate falsehood on the part of the decree-holder. These findings are proof against appeal as well as revision.

8. In this view of the matter the appeal must be dismissed with costs, hearing fee being assessed at two gold mohurs and the application in revision must be rejected.

Roy, J.

9. I agree.