

(1869) 04 CAL CK 0015

Calcutta High Court

Case No: Special Appeal No. 1282 of 1868

Samiraddi Khalifa

APPELLANT

Vs

Harischandra alias Hari Mohan
Kurmokar and Another

RESPONDENT

Date of Decision: April 26, 1869

Judgement

Loch, J.

It appears that Sham held two decrees against one Shamat Ali; one for debt passed by the Small Cause Court, the other for rent passed by the Collector, under Act X, 1859. Sham executed the decree of the Small Cause Court first of all and caused the rights and interests of his debtor in a certain jumma, which is the subject of this suit, to be sold, and they were purchased by the plaintiffs. Sham subsequently put up the same tenure for sale in execution of his decree for rent, when it was purchased by the special appellant, Samiraddi Khalifa. Plaintiff then brought the present action to set aside the second sale, and to obtain possession of the property which he had purchased, and the lower appellate Court setting aside the judgment of the Moonsiff, held that the second sale was fraudulent, and gave plaintiff a decree for possession. The defendant, the purchaser at the second sale has appealed specially, and contends that, so far as he is concerned, no collusion has been proved against him, that he is a bona fide purchaser for valuable consideration; that his purchase, being under a decree for rent, was a purchase of the tenure, while that of the plaintiff was merely of the rights and interests of the judgment-debtor.

2. In this case it may be assumed that both purchasers were bona fide purchasers for good consideration, and that the second purchaser was not aware of the purchase of the former a few days before he bid for the property at the second sale. A case was cited, Khoobaree Rai v. Roghoobur Bai 2 W.R. 131, in which it was held by a Division Bench of this Court that the purchaser, at a sale in execution of a decree, purchased only the right and interests of the debtors in the tenure put up for sale, which consisted in the right to hold the tenure as a heritable transferable tenure, subject to payment of certain rent to the zamindar. The new purchaser stood in the

exact position of the old ryots, and whilst he succeeded to their privileges, was bound by their engagements to the zamindar, the first of which was the payment of rent, and as the purchaser had neglected to discharge it, the zamindar was justified in bringing the tenure to sale. The circumstances of the case just quoted do not appear to be similar to that which is before us. It does not appear in that case that the decree-holder, in execution of whose decree for debt the rights and interests of the tenants were sold, was the zamindar, as in the present case, nor can we ascertain how long an interval elapsed between the first and second sale. We concur with the Judges in the opinion expressed by them, but this opinion is based apparently on a different state of facts not similar to those before us. In the case before us the zamindar in execution of a decree for debt sold the right and interest of his debtor in the tenure under dispute, and almost immediately after again put up the tenure for sale for arrears of rent due by the same debtor, knowing, as he must have done, that at that time the debtor had no interest in the tenure, it having been already sold and purchased by plaintiff, who does not appear to have been aware of this demand for rent due from the defaulting tenant. The case quoted, therefore, is not applicable to the present case. In another case, *Gopal Mundul v. Suboodra Boistobee* 5 W.R. 205, the Judges threw out an opinion to the effect that the purchaser of a tenure under Act X would have a good title as against the respondent, who was a purchaser at a prior sale in satisfaction of a decree for debt. In that case, however, we are unable to discover whether the decree-holder, at whose instance the two sales took place, was one and the same person. A third case, *Mussamut Sufooroonissa v. Saree Dhoopee* 8 W.R. 384, has also been quoted to us; but in that case also there is apparently a different state of facts. It does not appear that the party who caused the rights and interests of the debtor in the tenure to be sold in execution of his decree for a debt, was the zamindar who caused the tenure to be sold u/s 105, Act X of 1859, in execution of a decree for arrears of rent. But it was further urged that, under the provisions of section 112, Act X of 1859, the tenure of the ryot was hypothecated for the rent. This is a mistake. The produce of the land is held to be hypothecated, and a zamindar, instead of bringing a suit for the arrear, may recover the same by distraint and Bale of the produce. In another case, *Pran Bundhoo Sircar v. Surbo Soonderee Debia* ⁽¹⁾, it was held that, at the date of the sale by the Deputy Collector in execution of his decree against Mohammed Ishak, the tenure in question had duly passed away from Mohammed Ishak to Earn Sankar and become the property of Ram Sankar. The interpretation we put upon section 105 leads us to hold that the Deputy Collector had no power by law at that time to sell the tenure which is the subject of suit; and consequently the defendant obtained no title by being a purchaser at the Deputy Collector's sale, the previous title of the plaintiff must therefore prevail against him. In the case just quoted, the purchase by Ram Sankar was in satisfaction of a decree of the Civil Court.

3. Now, the case we have to deal with is much stronger; for in this the decree-holder must have known perfectly well, when he made the second sale, that the right and

interest of the tenant in the tenure, which is the subject of this suit, had only a short time before been sold by him in execution of a decree for debt. I think therefore, that the judgment of the lower appellate Court should be affirmed, and the special appeal dismissed with costs.

Mitter, J.

I concur with my learned colleague. The case of *Pran Bundhoo Sircar v. Surbo Soondery Debia* ⁽¹⁾ is exactly in point, and I entirely agree with the learned Judges who decided that case in holding that, when a tenure has been once sold in execution of a decree passed by the Civil Court, the Collector's Court has no power to put it up again for sale, as the property of the former tenant, whose right, title, and interest therein have been already extinguished by the previous sale held by the Civil Court. The sale held by the Revenue Courts in this case, was not held for any arrears of rent due on account of the tenure subsequent to the date of the plaintiffs' purchase, and no question arises as to the effect of the provision relating to the registration of the purchaser's name in the zamindar's sherista laid down in section 27, Act X of 1859. Under such circumstances it is difficult to make out how the subsequent purchaser can possibly pretend to have acquired a title superior to that of the plaintiff, the purchaser at the prior sale. There is no law that I am aware of which lays down that the tenure itself is hypothecated for the rent, nor has it been shown to me that there was any such stipulation in the original lease by which this tenure was created. The mere existence of a decree for arrears of rent did not and could not subject the tenure to any lien or hypothecation, and the purchaser under the Civil Court decree must be therefore held to have acquired a full and complete title before the sale held by the Collector. I do not wish to express any opinion as to the correctness or otherwise of the decisions relied upon by the special appellant beyond remarking that the facts are not analogous.

¹ Before Mr. Justice Phear and Mr. Justice Hobhouse.

Pran Bandhu Sircar (one of the Defendants) v. *Sarbasundari Debi and Others* (Plaintiffs). [4th December, 1868.]

Phear, J.--It appears to us that this case lies within a very small compass. It seems that the plaintiffs' ancestor, through whom she claims, purchased the tenure, which is the subject of suit, at a sale which took place on the 2nd of December 1865, in execution of a decree of a Civil Court passed against the then owner, Mohammed Ishak. On the 23rd of August 1866, the defendant, appellant, bought the same tenure at an auction-sale, which was held in execution of a decree made by the Deputy Collector against the same Mohammed Ishak. This decree had been obtained by the zamindar on account of arrears of rent due to him from Mohammed Ishak, before the sale by the plaintiffs' ancestor, in December 1865. Now the sale of the plaintiffs' ancestor, Ram Sankar, is not in any way impeached

before us. The first decree against Mohammed Ishak, for all that has been made out before us was a valid decree of the Civil Court, and that Court, therefore, had power, in execution, to sell Mohammed Ishak's rights and interest in this property, because, by the very case of the defendant himself it was a transferable tenure. That being the case, the only question before us is, whether the Deputy Collector had power by law in proceeding to execute his decree against Mohammed Ishak which was passed before this sale to Ram Sankar, to seize the tenure, which had become the property of Ram Sankar, and to sell it.

The power which a Revenue Court has in this behalf, is given to it by the provisions of section 105, Act X of 1859, and we think that those provisions only enable the Revenue Court to seize and sell that which at the time is the property of the judgment-debtor. There is nothing in the whole Act, as we read it, to indicate that the Legislature contemplated for a moment that the property of any other person, than the judgment-debtor, should be sold for the debt of the latter, even though that property had previously been the property of the judgment-debtor. And we observe that, in the latter part of section 105 itself, there is language used, which, by implication, satisfies us that the Legislature, in giving this power of sale to the Court, intended it to apply only to the existing property of the debtor. The words which we refer to are these:--"If, after sale of an under-tenure, any portion of the amount decreed remains due, process may be applied for against any other property, moveable or immoveable, belonging to the debtor." It seems to us obvious that, in using the words "other property," the Legislature clearly showed that it regarded the tenure which it had made liable to sale, as being the property at the time of the judgment-debtor.

Taking it on the facts of this case, as they have been read to us, that at the date of that sale by the Deputy Collector, in execution of his decree against Mohammed Ishak, the tenure in question had duly passed away from Mohammed Ishak to Ram Sankar, and become the property of Ram Sankar; the interpretation which we put upon section 105 leads us to hold that the Deputy Collector had no power by law at that time to sell the tenure, which is the subject of suit, and consequently the defendant obtained no title by being a purchaser at the Deputy Collector's sale. The previous title of the plaintiff must therefore necessarily prevail against him.

The appeal consequently is dismissed with costs.