

(1912) 06 CAL CK 0044

Calcutta High Court

Case No: None

Sundar Das Khetry, and on his
Death, His Heirs And Legal
Representatives Shambhu Nath
Khetry and Another

APPELLANT

Vs

Raghunath Das and Others

RESPONDENT

Date of Decision: June 4, 1912

Acts Referred:

- Insolvency Act, 1848 - Section 7

Citation: 15 Ind. Cas. 288

Hon'ble Judges: Teunon, J; Chitty, J

Bench: Division Bench

Judgement

1. This appeal arises out of a suit brought by the plaintiffs to establish their title to and recover possession of certain lease-hold properties along with the colliery, engines, machinery, tools, plant and whatever else there might be standing thereon, The contest is between the plaintiffs as purchasers from the Official Assignee of Bengal and the defendants as purchasers in execution of a decree.

2. The facts are shortly as follow?: On 1st December 1909, the defendants granted a potta of coal lands to Atul Nath Chatterjee and Rojindra Nath Chatterjee at an annual jama of Rs. 3,623-11-10 and a salami of Rs. 4,000. The lessees were two of four brothers, the others being Aghore Nath Chatterjee and Chandra Nath Chatterjee. The four brothers, who were members of a joint family, became heavily indebted to several creditors. On 6th December 1903, the present defendants filed a suit against their lessees for rent under the pitta, and on 23rd June 1904, obtained a decree against them for Rs. 3,090 10-6 and costs Rs. 350-7. The other two brothers were also parties to that suit as pro forma defendants. On 13th July 1901, the defendants applied for execution of their decree by attachment of the Immovable properties belonging to the judgment-debtors. The lease-hold property was

accordingly attached and 5th September 1904 was fixed for " sale. On that day, the judgment-debtors Nos. 1 and 2 applied for time to enable them to raise money by sale of the attached property, and the sale was accordingly adjourned until 10th September. On 8th September, all four brothers filed their petition in the Court for the Relief of Insolvent-debtors at Calcutta and on the same day, the Court made the usual vesting order u/s 7 of the Indian Insolvent Act. On 30th September 1904, the defendants applied to the Subordinate Judge of Burdwan to substitute the Official Assignee in the place of the judgment debtors in the execution proceedings under their decree. On 23rd November, notice was ordered to issue to the Official Assignee, to show cause why he should not be substituted in the place of the judgment-debtors and it was made returnable on 22nd December 1904. On 10th January 1905, the Subordinate Judge, finding that Mr. Miller had been duly served with the notice, ordered that he be substituted in the place of the judgment-debtors and 6th March 1905 was fixed for the sale of the attached property. On that day, the property was sold and purchased by the defendants, the decree-holders. On 18th April 1905, the sale was confirmed and on 14th June 1905 an order was made for delivery of possession to the defendants as purchasers and they accordingly took possession under it. Meanwhile, on 23rd May 1905, the Official Assignee applied to the Insolvency Court and obtained an order that he should be at liberty to sell either by public auction or private contract to the best purchaser the properties of the insolvents including the leasehold premises in question. He did not, as a matter of fact, sell at that time; but on 24th March 1908, he sold the premises now in question to Harmusji Pistonji Banker, alias Bilimoria, a Parsee gentleman of Asansole. On 24th June 1908, three months later, Banker sold the property to the present plaintiffs. On 16th July 1908, this suit was instituted to recover possession of the property.

3. The learned Subordinate Judge has decreed the plaintiffs' suit and the defendants have appealed.

4. The first question is one of fact, whether the notice for substitution was duly served on the Official Assignee in the execution case. The Judge says that it is shown to have been served on a clerk of the Official Assignee, and, in the absence of evidence to show that this amounted to service on the Official Assignee, or that the clerk had authority to receive it, he finds that it was not properly served. This finding appears to us to be entirely against the evidence on the record. The clerk of the Official Assignee, Lakhinarain Dhar, states that he has been an assistant of the Official Assignee's office for 29 years. He admits that the notice was served in that office and that he signed acknowledging the receipt. He states that he received the notice on behalf of the Official Assignee, and made over the copy to Mr. Langer, the Head Assistant. The Small Cause Court bailiff (who has been bailiff for 30 years and who served the notice) says that he has known Lakhi Narain Babu as the head clerk or Bara Babu for 20 years and that he served notices for the Official Assignee upon him 20 or 30 times. He states that he always served notices for Mr. A. B. Miller on

Lakhi Narain Dhar in this manner. There can be no question on this evidence that the notice was served in the Official Assignee's office in the usual way; and, in the absence of any evidence to the contrary, we must presume that Lakhi Narain Dhar was a person authorized to receive such notices within the meaning of Section 75 of the Code of Civil Procedure, 1882. It would have been simple for the opposite party to have called evidence from the Official Assignee's office to disprove this, had it been incorrect. We, therefore, hold that the notice for substitution was duly served on the Official Assignee.

5. The next question is, what was the effect of the sale in execution as against the Official Assignee. It was argued for the appellants (1) that the Official Assignee was bound by the execution proceedings and by the sale which took place as we have stated; (2) that the lease-hold interest did not vest in the Official Assignee because he did not take possession, and (3) that the decree being one for rent, the decree-holders were entitled to sell the lease-hold interest of the insolvents and to give a good title.

(1) With regard to the first question, it must be conceded that the order for substituting the Official Assignee in place of the judgment debtors in the execution proceedings was incorrect; see the case of *A. B. Miller v. Budh Singh Dudhuria* 18 C. 43 but the Official Assignee having been added and having taken no exception to the procedure, the sale must be regarded as having taken place in his presence and as binding upon him. The fact that a person, who was not the representative of the judgment-debtors, was brought upon the record as such representative would not affect the validity of the sale see *Malkarjun v. Narhari* 25 B. 337 : 27 I.A. 216 : 2 Bom. L.R. 927 : 5 C.W.N. 10 : 10 M.L.J. 868. The Official Assignee having taken no steps to have that sale set aside in the manner provided by law, the sale must be taken to be good as against him.

(2) We cannot accept the second contention raised by the learned Pleader for the appellants that the property had not vested in the Official Assignee. It is true that in cases of lease-hold property, the Official Assignee has the right to elect whether or not he will accept the property under the vesting order. If he does so, there is no question that his acceptance relates back to the date of the vesting order see *Abdul Razak v. J. G. Kernan* 22 B. 617. That was the converse case and the question there was whether the Official Assignee could be made liable for the rent of the lease-hold property. It was held that, inasmuch as he had taken possession, he must be regarded as having elected to take over the property. Here, he paid no rent nor did he take actual possession; but the property did vest in him by the vesting order, and that he regarded it as having vested in him, is made plain by the application which he made to the Insolvency Court on 23rd May 1905 for leave to sell the property. He could not sell it unless it were vested in him. That being so, we must hold that the sale was effective as against the Official Assignee and also against the plaintiffs who claim through him. The plaintiffs are in fact in a dilemma. If the property had not

then vested in the Official Assignee, it was sold away before the Official Assignee acquired any title to it if it, had vested in him, and we think that it had, it was sold in his presence and the sale was binding on him.

6. It is not necessary, under these circumstances, to discuss the "third point raised by the learned Pleader for the appellants, that the decree being a decree for rent, it gave the defendants a first charge on the property. But we may say that we cannot understand how that could be the case with regard to a decree of this kind which was for rent of coal lands and not agricultural lands.

7. The appeal must be allowed and the plaintiffs' suit dismissed with costs in both Courts.