courtkutchehry.com

Company : Sol Infotech Pvt. Ltd.

Website : www.courtkutchehry.com

Printed For :

Date : 24/08/2025

Basanta Kumar Boss and org. Vs Khulna Loan Co.

Court: Calcutta High Court

Date of Decision: April 3, 1914

Final Decision: Allowed

Judgement

1. The subject-matter of the litigation which has culminated in this appeal is a sum of money, the surplus proceeds of a putni taluk sold under the

Putni Regulation of 1819. The rival claimants are the mortgagees from the putnidar and the landlords zemindars who have obtained a decree for

arrears of putni rent. The cir- cumstances under which the conflict of claims has arisen may be briefly stated:-The mortgagees took a mortgage of

the putni taluk on the 13th September 1897 and obtained a decree thereon on the 3rd November 1906. Meanwhile, the putnidar had defaulted to

pay rent to the zemindars and on the 19th January 1906, the latter obtained a decree for arrears of rent for the years 1308 to 1311 (B.S.). Default

was subsequently made in the payment of rent for 1313, with the result that the landlords took proceedings under the Regulation and the putni was

sold on the 15th May 1907. After satisfaction of the dues of the zemindars, a sum of about Rs. 1,350 remained in deposit with the Collector. The

zemindars proceeded against this sum to satisfy the rent-decree they had previously obtained. The mortgagees also sought to avail themselves'' of

this sum in satisfaction of the mortgage-decree they had obtained. A summary order was made on the 9th March 1908 in favour of the zemindars

with the result that they took away the money in deposit with the Collector. On the 8th March 1909, the mortgagees instituted the present action

for declaration that they were lawfully entitled to the money taken away by the zemindars. The first three Defendants to the suit are the landlords,

the fourth Defendant is the putnidar and the fifth Defendant is the purchaser of the putni at the sale held under Regulation VIII of 1819. The

question for determination is whether the mortgagees or the zemindars are entitled to preference in respect of the surplus sale-proceeds. The

Courts below have concurrently decided in favour of the mortgagees and the present appeal has been preferred by the zemindars.

2. Before we deal with the question in controversy, it is necessary to advert for a moment to a preliminary argument addressed to us on behalf of

the Plaintiffs-Respondents. It has been contended that there is no evidence to show that the putni taluk was of such a character as to be subject to

the operation of the Bengal Tenancy Act; in other words, that as there is no evidence to show that the putni was granted for realisation of rent from

agricultural tenants, the tenure is not governed by the provisions of the Bengal Tenancy Act. In support of this view, reliance has been placed upon

the decision in Promatho Nath Mitter v. ''Kali Prosanno Choudhury ILR 28 Cal. 744 (1901) and Omrao Bibi v. Mohammed Rojabi 4 C.W.N. 76

: s.c. ILR 27 Cal. 205 (1899). In our opinion, the Plaintiffs-Respondents are not entitled to urge this ground for the first time in second appeal, as it

involves the determination of a question of fact. The case proceeded in both the Courts below on the assumption that the provisions of, the Bengal

Tenancy Act were applicable to the particular tenure; and a reference to the description of the property given in the schedule to the plaint indicates

that the property is situated in various villages which prima facie would contain agricultural lands. The Respondents have, besides, not even been

able to assure us that there is a real foundation for the theory that this putni does not include any agricultural land at all. Under these circumstances,

this appeal must be decided on the assumption on which the case was tried in both the Courts below.

3. As regards the question of priority of title between the two contesting claimants, the first point for determination is, whether the rent payable to

the zemindars by the puntidar, in respect of which a decree had already been obtained, was a first charge upon the tenure. Sec. 65 of the Bengal

Tenancy Act provides that where a tenant is a permanent tenure-holder, he shall not be liable to ejectment for arrears of rent, but his tenure shall

be liable to sale in execution of a decree for the rent thereof and the rent shall be a first charge thereon. Reliance, however, has been placed upon

sec. 195, cl. (e), of the Bengal Tenancy Act to support the argument that sec. 65 has no application to putni tenures. Sec. 195, cl. (e), provides

that nothing in the Act shall affect any enactment relating to putni tenures in so far as it relates to those tenures. To exclude the operation of sec. 65

in the case of a putni tenure which is a permanent tenure, it must be shown consequently that sec. 65 affects some provision of the Putni

Regulation. Our attention, however, has not been drawn to any such provision, except sec. 17 to which we shall presently refer. On the other

hand, there are indications in the Putni Regulation to show that the rent payable by the putnidar to the zemindars is a first charge upon the tenure.

Sec. 11 provides that any taluk or saleable tenure that may be disposed of at a public sale, under the Rules of the Regulation, for arrears of rent

due on account of it, is sold free of all encumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or

assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by a stipulation to that effect in the written

engagements under which the said taluk may have been held. The section further provides that no transfer by sale, gift or otherwise, no mortgage

or other limited assignments shall be permitted to bar the indefeasible right of the zemindars to hold the tenure of his creation answerable?, in the

state in which he created it, for the rent, which is in fact his reserved property in the tenure, except the transfer or assignment should have been

made with a condition to that effect under express authority obtained from such zemindar. A similar provision finds a place in sec. 15 which states

that the purchaser acquires the entire rights and privileges attached to the tenure of the late talukdar in the state in which it was originally derived by

him from the zemindar. The status of the purchaser thus described in the Regulation can be supported only on the theory that the rent payable by

the putnidar to the zemindar is a first charge upon the property. We must hold consequently that not only is there nothing in the Putni Regulation

contrary to the principle which underlies sec. 65 of the Bengal Tenancy Act, but that the Putni Regulation does in essence recognise that principle.

We start then with the position that the rent payable by the putnidar to his zemindar for which a decree had already been obtained is a first charge

upon the tenure.

4. The next question for determination is, Whether the rent which the remindars now seek to realise from the surplus sale-proceeds constitutes a

charge upon the putni taluk. Our attention has, in this connection, been drawn to sec. 17 of the Putni Regulation, which lays down rules for the

disposal of the proceeds of a sale held under the Regulation. It is first provided that one per cent shall be deducted and carried to the account of

the Government. It is next provided that the balance due to the zemindar either for the year immediately expired or for the current year, as the case

may be, and also the expenses of sale are to be made good. The reason why the zemindar is restricted to the realization of the arrears for the year

immediately expired or for the current year as the ease may be, is found in sec. 8 of the Regulation, which provides that the zemindar is entitled to

have recourse to a summary sale in the beginning of the year for the realization of arrears due for the year immediately expired or in the middle of

the year for the realization of the arrears of the current year. Sec. 17 next states explicitly that the former balance, that is, the balance due for a

period earlier than the year immediately expired, or the current year, as the case may be, is not to be included in the demands to be satisfied from

the sale-proceeds. The reason for this exclusion is stated in the second paragraph of the third clause of sec. 17 in the following terms : such

antecedent balance, if the zemindar shall have omitted to avail himself of the process within his reach for having them satisfied at the time, will have

become, in fact, mere personal debts of the individual talukdar and must be recovered in the same way as other debts by a regular suit in Court.

With reference to this statement of the reason for the exclusion of the former balances from the process of summary realisation, it has been argued

that the Legislature intended that the antecedent balances should, after the Regulation sale, be relegated to the position of mere personal debts and

should be capable of realization only in the same way as other debts by a regular suit in the Courts, in other words, that the Legislature intended

that such balances should not be deemed a charge upon the property or the sale-proceeds which represent the property after the sale has taken

place. On this assumption it has been argued that there is a conflict between sec. 65 of the Bengal Tenancy ''Act and the second paragraph of the

third clause of sec. 17 of the Putni Regulation, and that consequently in view of sec. 195 (e) of the Bengal Tenancy Act, antecedent balances

cannot be treated as constituting a charge either upon the property or upon the surplus sale-proceeds; in other words, that the effect of the

Regulation sale is to destroy the charge which the zemindar previously had upon the property in respect of all arrears of rent. We are not

impressed by the soundness of this argument. But we observe there is a divergence of judicial opinion upon this question. In the case of Peary

Mohan Mukerjee v. Sreeram Chandra Bose 6 C.W.N, 794(1902). the opinion was expressed that there is no conflict between sec. 65 of the

Bengal Tenancy Act and sec. 17 of the Putni Regulation. The contrary position, however, was adopted in the case of Jagannath v. Mohiuddin

Mirza ILR 87 Cal. 747 (1910). In the view we propose to take, it is not necessary for us to pronounce a final opinion upon this matter. But we

may state that our present inclination is in favour of the view that sec. 65 does not contradict sec. 17 of the Putni Regulation. The Legislature

appears merely to have intended by sec. 17 to lay down that the zemindar cannot by the summary method, on his own ex parte statement, realize

what is called the ""former balances,"" and must sue in the ordinary course to establish his claim and to realize the arrears; no intelligible reason has

been suggested why the zemindar should not have a charge for the realization of those balances, in addition to the personal remedy which he

possesses under sec. 17. It is plain, however, that sec. 17 of the Regulation, even if it were construed in the way suggested by the Respondents

and were treated as contradictory to sec. 65, would have no possible application to the circumstances of the present case. The second paragraph

of the third clause of sec. 17 contemplates a case in which a regular suit has to be brought for the recovery of the antecedent balances as the

personal debt of the putnidar. In the case before us, the zemindar did obtain a rent-decree against the putnidar on the 19th January 1906. The

putni sale took place on the 15th May 1907. We are not prepared to accede to the contention of the Respondents that the effect of the putni sale

was to destroy the character of the decree previously obtained as a rent-decree. That argument could prevail, only if we were to ignore the clear

language of the second paragraph of the third clause of sec. 17. The zemindar could not, after he had obtained a decree on the 19th January 1906,

proceed, in terms of sec.17, to institute a fresh regular suit for recovery of the antecedent balance as a personal debt of the putnidar. The second

paragraph of the third clause of sec. 17 has clearly no application to the circumstances of the present case, and the rights of the parties must be

determined independently thereof, upon fairly elementary principles.

5. Let us now consider the relative situation of the two contestants. Before the 15th May 1907, the mortgagees held their decree obtained on the

3rd November 1906 and the zemindars held their rent-decree made on the 19th January 1906. If the zemindars had executed their decree for rent,

which was a first charge on the tenure, and brought it to sale, the purchaser would have taken the property with powers to annul the mortgage

encumbrances, though it had been already transformed, into a judgment debt [Jog Narain Singh v. Badri Das 16 is. L.J. 156 (1911).]. The

question consequently arises, was this relative situation altered as the result of the sale under Regulation VIII of 1819 Three alternative answers are

possible, one of which must be accepted; first, that the parties retained their relative position, notwithstanding the sale under the Regulation;

secondly, that as on the sale under the Regulation, it had become impossible for both the decree-holders to realise their decrees by sale of the

tenure, which could not be followed in the hands of the purchaser, both of them were relegated to the position of money-decree holders; or,

thirdly, that the Regulation sale placed the zemindar in the position of a money-decree holder, but did not affect the position of the mortgage

decree-holder. The third alternative has been, as might be expected, most strenuously pressed upon us by the Respondents. It has been contended

that under sec. 73 of the Transfer of Property Act, where mortgaged property is sold through failure to pay arrears of revenue or rent due in

respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment there out of the arrears, for the amount remaining

due on the mortgage, unless the sale has been occasioned by some default on his part : Gosto Behary v. Shibnath ILR 20 Cal. 241 (1892).. There

is nothing to indicate in this case that the sale under the Regulation was occasioned by any default on the part of the mortgagees. Consequently, it

may be assumed that the mortgagees had a charge on the surplus sale-proceeds notwithstanding the fact that the mortgage debt had been

transformed into a judgment debt, because, as was pointed out in the cases of Surjiram Marwari v. Berhamdeo prosad 2 C.L.J. 202 at p. 215

(1905), Lowry v. Williams (1895) 1 I.R. 274., Economic v. Usborne [1902] 1 A.C. 147. and In re Jennings'' Estate 15 L. R. Ir. 277 (1885), the

security subsists till the mortgage-decree has been satisfied. We may take it then that the mortgagee decree-holder has a lien upon the surplus sale-

proceeds. But what is the position of the zemindars who hold the rent-decree? It has been tenaciously argued on behalf of the Respondents that

even if it be assumed that the rent payable to the zemindars, for which a decree had already been obtained, is a first charge upon the tenure under

sec. 65, that charge can be enforced only in the manner prescribed by the Bengal Tenancy Act; and in support of this view, reliance has been

placed upon a passage from the judgment of Mr. Justice Banerjee in the case of Sasi Bhusan v. Gagan Chandra ILR 22 Cal. 364 at p. 374

(1894).. It may be conceded that if the landlord seeks to enforce his rent charge, the only method by which he can enforce that charge is by way

of execution of a decree for rent, with the resultant consequences set out in the Bengal Tenancy Act. But that is not the contingency which has

happened in this case. The landlords have obtained a decree for rent. They are unable to execute that decree in the manner specified in the Bengal

Tenancy Act because, as was pointed out in the cases of Musstt. Luteefun v. Mea Jan 6 W.R. 112 (1866). and Pran Gour v. Hemanta Kumari

ILR 12 Cal. 597(1886), the tenure which has been lawfully sold for its own arrears, cannot be again put up to sale for the arrears due on account

of a previous period. The landlords, consequently, are not in a position to execute their decree against the tenure which has passed into the hands

of a person entitled to hold the same free, not only from incumbrances but also from the rent charge under a decree for arrears of any antecedent

period. But it has been argued that if the landlords are in this position, the difficulty is entirely of their own creation, and that they might have

escaped from this situation if they had, year after year, taken recourse to summary proceedings under the Regulation. We are of opinion, however,

that it was open to the landlords, as was pointed out by their Lordships of the Judicial Committee in the case of Brindaban Ch. Sircar v. Brindaban

Ch. Dey L.R. 1 IndAp 178 : s.C 13 B.L.R. 409 (1874)., to seek their remedy by way of a suit in the Civil Court without repeated recourse to the

summary procedure laid down in the Regulation. The decree which the landlords have obtained is a decree of a peculiar character. It is in one

sense a money-decree inasmuch as the landlords are not restricted to their remedy by sale of the defaulting tenure; they are also entitled to proceed

personally against the judgment-debtors. But, notwithstanding this circumstance, the Legislature has provided that if the decree is executed as a

rent-decree, the property will pass into the hands of the purchaser free from all encumbrances imposed thereon by any act of the defaulter. The

question, consequently, arises, have the landlords lost this advantage; has the decree obtained by them been deprived of its fundamental character

by reason of the circumstance that it can no longer be executed by a sale of the tenure? We are clearly of opinion that this question should be

answered in the negative. In a case of this description, we must look to the substantial rights of the parties and not merely to forms of procedure,

The landlords, under sec. 65 of the Bengal Tenancy Act, are in this position of advantage, namely, that the rent for which a decree has been made,

is a first charge on the tenure, and thereby takes precedence over all other charges though they be prior in point of time. The landlords have, in

essence, been awarded a decree which, though in form a decree for money, possesses a peculiar quality, namely, the sale thereunder passes the

tenure to the purchaser who acquires it with liberty to annul all encumbrances. If the sale had taken place, not in execution of their decree, but in

some other proceedings, there is no intelligible reason assigned why the landlords should, in respect of the sale-proceeds which essentially

represent the tenure, be placed in a worse position than what they would have unquestionably occupied if the sale had been held at their instance in

execution of their decree. The parties may well be deemed to occupy the same relative situation as they would have occupied if the sale had taken

place at the instance of either of them in execution of their respective decrees. There is thus no room for controversy that the landlords were

entitled in the first place to appropriate a sufficient portion of the sale-proceeds before; the mortgagees could proceed to realize their dues. This

conclusion is not only bated on sound legal principles, but also accords with rules of justice, equity and good conscience.

6. In the view we take, it becomes unnecessary for us to discuss another question which was argued before us at some length, namely, whether this

suit is barred by limitation. Reliance was placed on behalf of the Appellants on the fifth paragraph of sec. 17 of the Putni Regulation and it was

argued that the suit should have been brought within two months from the date of the sale. This position was supported by reference to the case of

Surnomoye Dassya v. The Land Mortgage Bank of India (15). As the suit fails on the merits, it is needless to decide the question of limitation. But

we may add that we are not satisfied with the expression of opinion in the case cited. We are rather inclined to adopt the view that the limitation of

two months applies to a suit for compensation, as stated in sec. 17, and that this suit instituted by the mortgagees for declaration of their right to

appropriate the surplus sale-proceeds in satisfaction of their decree is not a suit of that description. The result is that this appeal is allowed, the

decrees of the Courts below discharged and the suit dismissed with costs in all the Courts.