

(1907) 01 CAL CK 0012

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1917 of 1905

Dwarka Nath Pal and
others

APPELLANT

Vs

Tarini Sankar Roy and
another

RESPONDENT

Date of Decision: Jan. 23, 1907

Final Decision: Dismissed

Judgement

1. The present appeal arises out of a suit brought by the Plaintiffs-Respondents, for a declaration of their title to and for partition of an 8 annas share in a certain holding in which they claimed title by purchase. The Plaintiffs' case was that the Holding in question originally belonged to one Dwarka Nath Pal and his brother, that in execution of a money decree obtained by one Dwarka Nath Saha against Dwarka Nath Pal the whole holding was put up to sale and was purchased on the 9th November 1894 by the decree-holder Dwarka Nath Saha. A claim was put in during those execution proceedings by the daughters of one of the brothers who claimed as such to be entitled to an 8 annas share of the holding. That claim was disallowed and thereupon the claimants brought a regular suit against the purchaser Dwarka Nath Saha to have it declared that by the sale in execution of his decree only an 8 annas share belonging to Dwarka Nath Pal had passed to the purchaser and not the 8 annas share belonging to their father. The claimants appear to have died during the pendency of the suit and the Defendants' mother was substituted as their heir on their deaths. In the suit Dwarka Nath Pal was added as a pro forma, Defendant. It was decided on the 8th July 1896 in favour of the Plaintiffs and it was declared that the sale transferred to the purchaser Dwarka Nath Saha only the 8 annas share of Dwarka Nath Pal. On the 31st December 1898, Dwarka Nath Saha obtained delivery of possession of the 8 annas share and in 1900 he had his name registered as a tenant of the half share in the sherista of the landlord. On the 29th of Magh (1902) Dwarka Nath Saha sold the 8 annas to the Plaintiffs.

2. The Plaintiffs' case was that after the sale had been confirmed and possession had been delivered to their vendor, the vendor and, after the transfer to Plaintiffs, the Plaintiffs had been in possession of the half share of the holding and had been paying rents to the landlord and receiving receipts. On the basis of his title they claimed the relief sought in the suit.

3. The Defendant, Dwarka Nath Pal, in his defence contended that no right passed under the sale to the vendor of the Plaintiffs on the ground that the holding was one in which the tenant had only an occupancy right and it was not transferable by custom, and therefore by the sale the purchaser acquired no right.

4. The Court of first instance held that the jote was an occupancy jote and not transferable and it further held that as the sale had been made without the consent of the landlord, therefore no right was transferred by it to the purchaser Dwarka Nath Saha. The Munsif therefore dismissed the Plaintiffs' suit entirely.

5. On appeal the lower Appellate Court has set aside the judgment and decree of the Court of first instance and has found that the 8 annas share of Dwarka Nath Pal passed to Dwarka Nath Saha under the sale, in the execution proceedings, that the transfer was recognised and consented to by the landlord and therefore that the purchaser acquired a valid title to the share. He also found that after the purchase the Plaintiffs' vendor and afterwards the Plaintiffs had been in possession of the 8 annas share and therefore they were entitled to the reliefs claimed, namely, a decree declaring their title and for a partition of their share.

6. The Defendant has appealed to this Court. The main point which has been taken in support of the appeal is that under the sale in the execution proceedings no right passed to the purchaser as the sale was not held with the previous consent of the landlord, and in support of this contention the case of *Bhiramali Shaikh v. Gopi Kanth I. L. R. 24 Cal. 355 (1897)* has been relied upon.

7. It has also been argued that the Plaintiffs have failed to prove such consent to the sale on the part of the landlord either prior or subsequent to the sale as would be sufficient in law to validate the sale and give the Plaintiffs a good title. It has been pointed out that after the sale and purchase in November 1894, the landlords brought a suit for rents for the succeeding years against the Defendant in 1898 and obtained a decree, and it is contended that this circumstance is sufficient to indicate that the landlords did not up to that time recognise the purchaser at the auction-sale as a tenant of the holding.

8. In reply to this conclusion, the learned vakil for the Respondents has very properly invited our attention to the following facts which in our opinion entirely nullify the strength of the argument. The auction-sale no doubt took place on the 9th November 1894 but after that the claim was preferred by the heirs of one of the brothers of the Defendants and when that claim case failed, a regular suit was instituted. That suit was not decided till the 8th July 1896. The purchaser afterwards

applied for delivery of possession but that was not given until the 31st December 1898. Even after that date the present Defendant did not cease to raise obstacles to the enjoyment by the purchaser of the property. At the time of delivery of possession he put in objection under sec. 318, C. P. C, and then for the first time raised the point that as the holding was an occupancy holding not transferable by custom., therefore no right passed to the auction purchaser. That objection was decided in the Court, of first instance in 1899: but an appeal was preferred by the objector which was not dismissed till the 20th January 1900. An application was made by Dwarka Nath Saha to the landlord to be registered as a tenant in 1900. There can, in our opinion, be no doubt that under these circumstances, the purchaser applied at the earliest possible opportunity to the landlord to be recognised as a tenant and to have effect given to his purchase. We do not think that the ruling already referred to on which the applicants rely can be taken as going so far as to lay down that no sale of a non-transferable occupancy holding in execution of a decree would be valid if the consent of the landlord were not obtained prior to the execution proceedings. It is not denied by the learned vakil for the Appellants that in the case of a voluntary sale it is almost universally the practice to obtain the consent of the landlord to the sale after it has been effected, and the purchaser then obtains recognition as a tenant by payment of a salami. It can hardly be supposed that in the case of a sale in execution of a decree the consent of the landlord can be obtained prior to the sale, as in the first instance it could not then be ascertained who would be the purchaser and it would not then be possible for the landlord to come to any settlement with that purchaser. We think that where a settlement is made by the landlord with the purchaser as soon as can reasonably be expected after the sale and where the landlord afterwards recognises the purchaser and receives rents from him, it is sufficient to render the sale valid in law. In this case we think that the facts disclosed by the evidence sufficiently prove that the consent of the landlord to the sale and his recognition of the purchaser as a tenant were obtained as soon as could reasonably be expected after the objections and obstacles raised on behalf of the judgment-debtor to the purchaser's obtaining possession had been overcome, and we therefore hold that the view which the Subordinate Judge has taken is correct that under the sale the 8 annas share of Dwarka Nath Pal passed to the auction purchaser.

9. The suit by the landlords for the rents up to 1898 was brought against old tenants because they were still in the possession and the auction purchaser had not then obtained possession under his purchase through the Court.

10. It has been suggested on behalf of the Appellants that the Subordinate Judge has come to no finding whether the subsequent sale by the purchase to the Plaintiff was bona fide or not. We think that was a question which hardly requires consideration. The mere fact that the auction purchaser sold the share to the Plaintiffs because after his purchase he could not enjoy the property to his satisfaction in consequence of the obstacles raised by the Defendants would not be

a sufficient reason by itself for holding that the sale was not a bona fide one. The conclusions at which we have arrived are in themselves sufficient to determine the present appeal. A further point, however, has been raised by the Appellant based on the judgment of this Court in the case of *Bhiramali Shaikh v. Gopi Kanth Shaha* I. L. R. 24 Cal. 355 (1897). to which we have already referred. The learned vakil for the Respondents argued that after the present Defendant had failed at the time of the auction-sale in 1895 or in the suit to which he was a party in 1896 to set up the present objection, namely, that no title passed under the auction-sale as the holding was an occupancy holding and not transferable, he was estopped from raising that objection in the present case. For the Appellants it has been urged on the authority of the case to which we referred that the Defendant would not be barred from raising the objection in his defence. We think, however, that this point has been sufficiently dealt with in the case of *Sheikh Murullah v. Sheikh Burullah* 9 C. W. N. 972 (1905). Mr. Justice Mitra in disposing of that case which was similar to the present discussed the case on which the Appellants rely and following the ruling in a later case of *Durga Charan Mondal v. Kali Prosanna Sarker* 3 C. W. N. 586: s. c. I. L. R. 26 Cal. 727 (1899). came to the conclusion that after a judgment-debtor with a full knowledge of the execution proceedings and full opportunity of raising an objection to the effect that the holding was an occupancy holding and non-transferable, had failed to raise that objection at the time of the sale, it was not competent to him to resist the purchaser after the confirmation of the sale, and that as between the purchaser and the judgment-debtor the title to the property vested in the purchaser on the confirmation of the sale. We agree in the view taken by the learned Judge in that case and we think that it fully disposes of the point raised. We therefore hold that the Appellants have failed to make out any good grounds for our disturbing the judgment and decree of the lower Appellate Court and we dismiss the appeal with costs.