(1871) 04 CAL CK 0010

Calcutta High Court

Case No: Special Appeal No. 1820 of 1870

Bamandas Mukhapadhya		APPELLANT
	Vs	
Shibdas Bandapadhya		RESPONDENT

Date of Decision: April 13, 1871

Judgement

Norman, Offg. C.J.

1. The appellants first attempted to argue that the tenure in question consisted of land in a town; that, under Act X of 1859, the Collector had no jurisdiction to entertain a suit for the rent of such land; and that therefore the sale of the tenure, under the decree of the Collector"s Court against Bankubehari for rent, could not affect the rights of the appellant. But as the suit was a suit for the rent of land and nothing more, we think the argument quite untenable. They next argued that, by the sale of a portion of the tenure to Bipinbehari in January 1865, the tenure had been divided, and that the rights of the purchasers at that sale could not be affected by any sale of the tenure in a suit for rent against Bankubehari alone.

2. I think it convenient to consider in the first place what is the effect of a sale by a tenant of a portion of his tenure. The relation between landlord and tenant is that of parties to a contract. The contract is entire and single. Except so far as he may be empowered by a provision in the contract, or by some special law or custom, one party to such a contract cannot withdraw from it and introduce a stranger as a party. There are many instances in which tenures are transferable, either by express provision to that effect in the contract, or by the custom of the district, which the Court would treat as incorporated as an implied condition in contracts for the letting of land. But a zamindar is not bound to recognise the sale of a tenure which is not transferable, or to accept the purchaser as a tenant. A zamindar is not bound to allow a sub-division of a tenure. There is no provision in any of the Acts relating to this subject which compels a zamindar to accept as his tenants the alienees of portions of the tenure. The rule that a zamindar is entitled to his rent as an entire demand upon a liability which cannot be sub-divided or distributed, without his

consent, is clearly recognized in section 27 of Act X of 1859. If therefore a piece of land constituting a portion of a tenure be sold either by the tenant or in execution of the decree of a Civil Court against the tenant, in the absence of any consent by the zamindar, the only mode in which effect can be given to the alienation is to treat the purchaser as holding a rent-free tenure subordinate to that of the original tenant. The position of a purchaser under such circumstances was considered by Mr. Justice Phear in Srinath Chuckerbutty v. Srimanto Lashkar [(1)]. By section 16 of Act VIII of 1865 (B.C.), the purchaser of a tenure sold for arrears of rent under that Act acquires it free from all encumbrances which have accrued thereon by any act of the holder of the under-tenure. A rent-free holding within a tenure is clearly an encumbrance upon it. I think it clear that the purchaser of a tenure under Act VIII of 1865 (B.C.), can therefore avoid the rent-free holding of the purchaser of a portion of the tenure.

3. But then comes the question, suppose he avoids the rent-free under-tenure, what are his rights as regards the owner of a brick-built house erected on land comprised in the holding? and what are the rights of the occupier of such house?

4. I think that a house cannot be considered as "an encumbrance" on the tenure within the meaning of that word in section 16 of Act VIII of 1865 (B.C.). If the land had been sold for arrears of Government revenue, the owner of a house built on the land might have been entitled as against the auction-purchaser to reside in or enjoy the house, paying an equitable ground rent for the site to such purchaser: and that whether the house were built by a person holding under a lease granted by the former proprietor,--Act I of 1845, sections 3, 26, and 27, Act XI of 1859, sections 3, 7,--or even by the ex-proprietor himself. See Ramcoomar Sen v. Mohes Chunder Sen S.D.A. for 1860, 637. It is not easy to see why the purchaser of a tenure at a sale for arrears of rent should be treated as having a right greater than that of a purchaser at a sale for arrears of Government revenue. It was decided by a Full Bench of this Court in Thakoor Chunder Paramanick v. Ramdhun Bhuttacharjee Case No. 108 of 1865; 12th September 1866, after long and careful consideration, that, in this country where a person in possession of land, under a title which he believes to be good, builds a house on that land, he has a right either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it be allowed to remain for the benefit of the owner of the soil--Beni Madhab Banerjee v. Jai Krishna Mookerjee 7 B.L.R., 152 and Durgaprasad Misser v. Brindaban Sookal 7 B.L.R., 159.

5. Therefore, apart from any particular relation between the parties, the ownership and right of possession in the soil does not necessarily carry with it a right to the possession of buildings erected thereon.

6. Let us now see what are the respective rights of landlord and tenant where buildings are erected by a tenant during the tenancy.

7. I think there is no doubt but that a zamindar might object to the erection of brick-houses on land let for purposes of cultivation; and if he resorted to a Court of Justice might obtain an order restraining his ryot from doing anything which would substantially alter the character of the tenure. In the North-West Provinces it has been held See Agra H.C. Rep., F.B. Rul., 1867, 119, 125 that a tenant, having a right of occupancy, planting trees on his holding without his landlord"s permission, or even digging a kutcha well, commits such a breach of the contract of tenancy as warrants the landlord in suing to eject him. But if the landlord, instead of objecting to the erection of a brick-house on the holding, were to remain passive, and allow a house to be built, knowing, as he necessarily would in a case such as that now before us, that the security for the rent would be enormously increased by the erection of the building, it appears to me that he could not afterwards be heard to say that the tenant had done any wrong in erecting the house on the tenure. If in such a case the tenancy should be determined, the position of the parties would appear to be this:--The landlord would be the owner of the soil, the tenant of the house. I think it would be contrary to the principles of equity and good conscience to allow the landlord to insist on the needless destruction of a valuable building, or to allow him to claim to remove it, without making to the owner full compensation for its value. I may refer on this point to the Roman Civil Law, Institutes, Book 2, title 1, section 30, and Digest 7, Book 41, Chapter 1, section 7, & 12. By that law, if the person who built was honestly in possession of the land, and the owner of the soil claimed the building, but refused to pay the price of the materials and the wages of the workmen, the claim of the owner might be rejected. I am disposed to think that the purchaser of a tenure, at a sale for arrears of rent, only takes such rights as the landlord himself could have exercised if he had re-entered and resumed possession of the property; and if that be so, if the landlord in the present case could not have insisted on the demolition of the house, so neither could the purchaser of the tenure. His only right would be either to purchase the house, by reimbursing to the owner the full amount of its cost, or to take a fair rent from him for the land on which the house stands.

8. But suppose, in the absence of any distinct finding, that the landlord acquiesced in the building of the house; the defendant must be taken to be merely in the position of a person who has built a house on land of which he was in possession by a lawful title.

9. According to the case decided by the Full Bench to which I have already referred, the purchaser of the tenure had the option of taking over the building, or allowing the removal of the materials remaining with the owner of the land, in those cases in which the building is not taken down by the builder, during the continuance of any estate he may possess. I think that an option to insist on the destruction of a brick-house, and the removal of the materials, is one which should and must be exercised promptly, or not at all. Nandakumar, the original purchaser, who bought on the 31st of July 1866, never did exercise that right. He seems to have acquiesced in the continuance of the building on the ground, and to have sought to make use of his supposed legal right, for the purpose of extorting an excessive price or rent for the use of the site of the house from the

defendant. This, I think, he could not do. Nandakumar sold to the plaintiff, who brought the present suit, on the 21st of July 1869. Without expressing a final opinion whether, in the present case, Nandakumar, immediately on acquiring the tenure, could have called on Bipinbehari or Rambax to remove the materials of the house, and give him actual possession, I think, if it ever existed, such right is now lost, and that the plaintiff''s only right is to get a fair rent for the land. I think that the judgment of the Court below should be reversed, and the suit dismissed with costs in all the Courts.

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

The 17th December 1868.

Srinath Chuckerbutty (one of the Defendants) v. Srimanto Lashkar and Others (Plaintiffs).*

Baboos Chandra Madhab Ghose and Ramesh Chandra Mitter for the appellant.

Baboo Purna Chandra Shome for the respondents.

The judgment of the Court was delivered by

Phear, J.--We think that the decision of the lower Appellate Court is wrong. There is nothing in the facts found by that Court which goes at all to show that the decree obtained by the zamindar against Balak Ram was not a valid decree, a decree made in an actual suit. It therefore follows that any process for execution of this decree issued against the property of Balak Ram would be a good foundation for the sale by the Court of that property as against any one who claimed through or under Balak Ram. It appears also, from the judgment of the lower Appellate Court, that the tenure which has been sold in execution of the decree was certainly at one time, in its entirety, the property of Balak Ram; and even if the contention of the plaintiffs is correct, a portion of it still remains Balak Ram''s property.

Further, the plaintiffs'' claim at the utmost makes them shareholders with Balak Ram, and, therefore, primarily liable with him to the zamindar for the rent of the tenure, unless the zamindar has come to a separate agreement with them for the payment of their share. If they were shareholders with Balak Ram, and liable with him for the payment of the rent, it might be that the zamindar''s suit ought to have failed for want of making them defendants with Balak Ram; but that of itself does not vitiate the decree as it stands. It seems to us that the evidence to which the lower Appellate Court refers, as showing that the zamindar recognized the assignment by Balak Ram to the plaintiffs, really does not amount to evidence of their having, with the sanction of the zamindar, a separate holding. It may be that he was well aware that they were in some respect or other holding under Balak Ram or through him; but this would be matter of no consequence to him. He was not bound to recognize it. His taking the rent of the whole tenure, or a part of it, from their

hands, would not of itself amount to such a recognition of their separate holding as is contemplated in section 16, Act VIII of 1865 (B.C.)

We think, then, that the matter stands thus:--That there is a good decree against Balak Ram; that the tenure which has been seized and sold in execution of the decree is properly treated as being liable to be sold in execution of the zamindar''s decree against Balak Ram; that there is no evidence of such recognition of the plaintiffs'' interests in the tenure by virtue of an assignment or sale from Balak Ram as binds the zamindar, or creates a valid encumbrance under the provisions of section 16, Act VIII of 1865 (B.C.). In other words, that there is no evidence of the plaintiffs either being tenants themselves of the zamindar by reason of his recognition of their holding, or of their being encumbrances upon Balak Ram''s holding under such circumstances as would serve to protect their encumbrances by reason of the provisions of the section we have just mentioned. Consequently, the lower Appellate Court ought not to have declared that they had made out the right which they claim as against the defendant (auction-purchaser) from the zamindar. We accordingly decree this appeal, reverse the decree of the lower Appellate Court, and dismiss the plaintiffs'' suit. The special appellant must have his costs in all the Courts.

*Special Appeal, No. 2406 of 1868, from a decree of the Subordinate Judge of 24-Pergunnahs, dated the 16th June 1868, affirming a decree of the Moonsiff of that district, dated the 31st October 1867.