(1973) 08 CAL CK 0027

Calcutta High Court

Case No: F.A. No. 232 of 1959

Kanailal Goswami	APPELLANT
Vs	
Mahesh Prasad Mal	RESPONDENT

Date of Decision: Aug. 6, 1973

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 160
- Revenue Sales Act, 1859 - Section 37

Citation: (1975) 1 ILR (Cal) 387

Hon'ble Judges: Sen Gupta, J; A.K. Sinha, J

Bench: Division Bench

Advocate: Bijan Behary Dasgupta and Sailendra Nath Bakshi, for the Appellant;R.K. Banerjee, Naresh Chandra Ganguly and Sib Kumar Mazumdar, for the Respondent

Final Decision: Dismissed

Judgement

A.K. Sinha, J.
This appeal is preferred by the Plaintiffs against a judgment and decree of the trial Court dismissing their suit.

2. The property in dispute is a small plot of land about 5 and a half or 6 cottahs on a portion of which the Respondents have a dwelling house. The Appellants'' case, briefly, is that by a registered conveyance dated November 19, 1943, they purchased the above property along with other properties comprised in several C.S. plots under several khatians belonging to one Ganendra Mohan Bhaduri and Girindra Mohan Bhaduri of Serampore through the Receiver appointed in an insolvency proceeding against them, but this was subject to a condition that so long as debt due to a boarding named ''Rajendralal Free Boarding Trust'' by the Bhaduris was not fully paid off, properties conveyed would remain in possession of the Receiver in a title execution case No. 60 of 1936. The Appellant No. 1 was appointed Receiver who in sale held in a rent execution case against the tenant auction-purchased

properties along with the above properties with right to annual all encumbrances and the sale was confirmed on November 8, 1946. Thereafter, the Appellants served a notice upon the Respondents for annulment of encumbrances as they were found to be in possession of the property through Court. But in spite of receipt of such notice of annulment the Respondents failed to vacate and thus the Appellants were entitled to necessary declaration of their title and to get possession of the properties.

3. The suit was contested by the Respondents and apart from the general denial of material allegations, their specific case was that the sale held in execution case was not a rent sale at all and their interest being that of a permanent tenure and raiyat mukrari could not, in any event, be annulled. The land in dispute was a garden land and their predecessor Sm. Basumati Devi since her purchase of the disputed land on January 6, 1934, constructed a dwelling house thereon. Their interest was not an encumbrance but on the contrary a protected interest under the provisions of law and thus their interest could not be annulled.

4. The learned Court below on consideration of evidence held that the decree in the rent suit put to execution was a rent decree and impugned sale held in such rent execution case had the effect of a rent sale with the result that the Appellants had the right to annul the encumbrances on the defaulting tenure purchased by the Appellant No. 1 as the Receiver. On the question whether the interest of the Respondent was an encumbrance, the learned Court below, though found that the interest of the Respondents was that of a tenure-holder and not of a raiyat with occupancy right or at a fixed rent, took the view that the Respondents had still a protected interest as they had a dwelling house covering 2 cottahs out of 6 coitahs of the disputed land and accordingly, dismissed the suit. That is how in short the Appellants felt aggrieved and preferred the present appeal.

5. The Respondents have filed a cross-objection disputing the correctness of the findings made against them.

6. In the appeal before us three main questions arise for consideration, firstly whether the impugned sale in the rent execution case was a rent sale; secondly, even if it was a rent sale and the tenure of the Respondents was sold in auction and purchased by the Appellant No. 1 as Receiver in the execution case, whether the Appellants in their personal capacity acquired any right to annul encumbrances; thirdly, whether the interest of the Respondents in the disputed property was an encumbrance or a protected interest.

7. On the first question the source of the Appellants'' title to the disputed property as superior landlords as recited in the judgment is not disputed. It is undisputed that the Appellants acquired a portion of the superior touji to the extent of 5 annas 12 gandas share by virtue of their purchase on January 19, 1943, by a registered conveyance (Ex. 1) from a pleader-Receiver, Phani Bhushan Ghosh, appointed in the

insolvency proceeding in respect of the properties of the Bhaduris who were adjudicated insolvents. The correctness of the finding of the Court below about the two successive sales of the interest of the immediate tenants, namely, Kundus, who were recorded as tenure-holders in respect of the disputed lands along with other plots, are also not challenged. So, the admitted position is that the Appellant No. 1 as Receiver in the second sale auction-purchased the disputed lands or the tenure of the Respondents with right to annul all encumbrances. Subsequently, however, the Receiver, Appellant No. 1, was discharged by an order of the Court made on September 21, 1949, in the impugned rent execution case. The plea actually taken in the Court below by the Respondent was that the first sale was not a rent sale as all the co-sharer tenants were not impleaded in the previous rent suit. But the learned Court took the view, we think rightly, that the Kundus, who were four brothers and the recorded tenure-holders, were all made parties in the rent decree and therefore, sale held in execution of that decree and purchased by next tenant Sm. Anima Mondal was a rent sale and her tenure again was sold in the second execution and the second sale of tenure of Anima Mondal in execution of rent decree obtained against her and auction-purchased by the Appellant No. 1 was equally a rent sale. Nevertheless, Mr. Banerjee on behalf of the Respondents has taken up the same plea in a different form. It is contended that since the properties in question vested not in the Receiver Kanailal Goswami but in the Appellant No. 1 and his two brothers in their personal capacity, the decree obtained against Anima Mondal the subsequent tenure-holder could not be a rent decree as there was no relationship of landlord and tenant between the Receiver and the tenure-holder. It is, therefore, argued that the sale held in rent execution of that decree obtained against Anima Mondal and auction-purchased by the Receiver Kanailal Goswami could not be a rent sale and consequently conferred upon the Appellants any right or interest to annul the encumbrances under the relevant provisions of the Bengal Tenancy Act. It is said that the Receiver in the rent execution case was merely appointed as a stopgap arrangement to realise the debts still then due by the Bhaduris to the Rajendralal Free Boarding Trust and therefore, the interest of the landlords, namely the Appellants, could not have vested in him. There may be some substance in the objection now raised, but we think this question cannot be effectively decided as pointed out by Mr. Dasgupta, on behalf of the Appellants, in absence of evidence and proper materials. There is nothing to indicate as to what really were the terms of appointment of the Receiver in the impugned rent execution case. From the documentary evidence including the Sale Certificate (Ex. 5), it is not possible to ascertain the terms of appointment or the power of the Receiver to represent the landlords, namely the Appellants, either in obtaining rent decree or executing such decree particularly when the present Appellants after their purchase were not parties either in the main execution case in which the Receiver was appointed or in the rent suit or the rent execution. We, however, think that in such cases if a Receiver is appointed, the estate of the landlord may pass to and vest in the Receiver : See Bhuneswari v. Ayodhya 15 C.L.J. 339. We cannot, however, allow Mr.

Banerjee to raise this point in the form now put before us and decide this question finally at this stage.

8. Nevertheless, on the next question as to the right of the Appellants to annul the encumbrance, it appears on admitted facts that the Receiver Kanailal Goswami though auction-purchased the disputed tenure did not transfer that tenure to the present Appellants. The question, therefore, is whether in absence of such transfer, right, title and interest by virtue of his auction-purchase vested in the Appellant.

9. We are of opinion that in the facts and circumstances of this case without transfer of the tenure by a registered instrument by the Receiver in favour of the present Appellants, right, title and interest by virtue of the auction-purchase by the Receiver of the tenure could not possibly have passed to the present Appellants. It may be that one of the Appellants was appointed Receiver who auction-purchased the disputed tenure, but that fact by itself could not create or pass title to the Appellants including the Appellant No. 1, the Receiver, in their personal capacity. In this case, the Appellant No. 1 was appointed Receiver in the original execution case for the purpose of realisation and collection of rent. After such appointment of the Receiver, the landlord could not have any right or status to file a suit and obtain a decree for recovery of rent or put the decree into execution for sale of the holding for realisation of the decretal dues. In this case, by virtue of the agreement contained in the conveyance a rent decree could not have been obtained by the landlord, the Appellants for their estate passed to the Receiver. The estate, inclusive of the cause of action in the rent suit vested in the Receiver and thereafter, the Receiver was the only person competent to prosecute the suit and to obtain a decree against the tenants. It follows therefore that if the Receiver, as the decree-holder, auction-purchased the tenure that purchase could not automatically ensure to the benefit or vest in the landlord, unless there was proper assignment with the leave of the Court made by the Receiver in favour of the Appellants. In this case, there is no transfer or assignment of the tenure auction-purchased by the Receiver in favour of the present Appellants. Subsequently, however, the Receiver Kanailal Goswami was discharged by order of the Court dated September 21, 1949, in the rent execution case in which he was appointed. The learned trial Court has taken the view that the properties in consequence of such discharge of the Receiver with all rights vested in the Plaintiff-Appellants on the basis of their purchase. We, however, think that this cannot be the correct position in law. Right, title and interest relating to the Receiver''s purchase of the tenure could not pass to the landlords only as a result of the Receiver''s discharge. The right to get a conveyance or a proper document of transfer from the Receiver may still remain with the landlord and such right may be enforced on a proper application to the executing Court. But this right could not have ripened into a legal right creating title in respect of the disputed tenure in favour of the Appellants in absence of a proper document of title in their favour. That being the position, clearly the Appellants cannot have any right to annul the so-called encumbrance and recover the possession of the

disputed property from the Respondents and the present suit must fail on that account alone.

10. In the above view of the matter, it is sufficient to dispose of the present appeal, but as elaborate arguments have been made by both sides on the question whether the disputed tenure is an encumbrance or a protected interest, we will proceed to examine the correctness of the rival contentions of the parties.

11. The learned Court below has held that the interest of the Respondents was not that of a raiyat with occupancy right or at a fixed rent but that of a tenure-holder and accordingly, the interest was not a protected interest under Clauses (d) and (ff) of Section 160 of the Bengal Tenancy Act. The learned Court below, however, then found as a fact that though there was no existence of a garden, a dwelling house was built some 25 or 26 years ago on 2 cottahs out of the 6 cottahs of the total land which, even if not a permanent building, is nonetheless protected and accordingly, it is held that the interest of the Respondents was a protected interest under Clause (c) of Section 160 of the Bengal Tenancy Act. Mr. Dasgupta, appearing in support of the appeal, made two-fold arguments, firstly, it is said that having regard to the provisions of Section 160(c) of the Bengal Tenancy Act the dwelling house in question ought to be of a permanent character and not merely a temporary structure. In support of his contention he has relied on several decisions of this Court-- Narendra Nath Dutta Vs. Alanga Sundari Dasya, , Latim Sekh and Others Vs. Tripura Sundari Debi and Hem Prova Devi v. Sarat Chandra Basu and Ors. 51 C.W.N. 134. The question, however, is one of construction involving the meaning of the term ''dwelling house'' in Clause (c) of Section 160 of the Bengal Tenancy Act. It is difficult to disagree with the construction put on the nature of ''dwelling house'' required to be a protected interest, rather unformly, as revealed in the above decisions covering a long period, but we think the question whether a dwelling house is a permanent dwelling house must be decided on the facts of each case. It may be that a temporary structure consisting of straw-hut may not be a permanent dwelling house, but this does not necessarily mean that a permanent dwelling house must consist of brick-built structure for, there may be permanent structure without being brick-built structure and this distinction is clear from the provisions itself where "dwelling house, manufactories have been clearly distinguished from other permanent building". So, even if the word ''permanent'' qualifies ''dwelling house'', that may not be a building which would normally mean a brick-built structure. Even buildings though not in the Bengal Tenancy Act have been defined under the Bengal Municipal Act as a
shed, hut or any other such structure whether of masonary, bricks, wood, metal or any other material whatsoever but does not include a hogla or other similar kind of temporary shed erected on ceremonial or festive occasions.

At any rate, applying the plain significance of the word ''building'' it may not necessarily mean a pucca structure, that is, of masonary throughout. It may be

partly brick-built or partly mud-built with a shed of permanent nature and m that event it would be sufficient to constitute ''permanent'' ''dwelling house'' within the meaning of Clause (c) of Section 160 of the Bengal Tenancy Act. Applying that test to the facts and circumstances of the present case, we think on the evidence adduced in this case, it would be perfectly legitimate to conclude that the disputed dwelling house is a permanent dwelling house. For, from the evidence of Mahesh Prasad, the Defendant No. 1, it appears that the house built on 2 cottahs of land has a wall of split bamboos with mud plaster'' 6 or 7 ft. high above the brick wall. This evidence is supported by his witness Rahim, D.W. 3, he says that the house is partly of brick wall and partly of split bamboo wall and in cross-examination his evidence is that he could not exactly say whether walls of one or two rooms were partly of bricks, but the wall is of 10 ft. wide and made of bricks in mortar and this evidence is supported even by the Appellant witness No. 3, Bomkesh Singh, who. as stated that he was seeing the tin-roofed house for the last 14 or 15 years, but before the house was roofed by tin it was roofed by straw and mud. The wall was of split bamboo with earthen plaster, but he has not seen any brick construction. This witness in his cross-examination, however, has stated that he had no occasion to go inside the Defendants'' house but saw the house while going that way and could not deny that there was not at all any brick construction. It is true that the learned Court below did not come to any finding as to whether or not the dwelling house was a permanent one, but on the evidence adduced, we are clearly of the opinion that the disputed dwelling house is a permanent dwelling house and therefore, it would attract the provisions of Clause (c) of Section 160 of the Bengal Tenancy Act.

12. Even so, Mr. Dasgupta, secondly, argues that the dwelling house if a permanent dwelling house would be protected to the extent of the area of land upon which it is built. In other words, it is said that the dwelling house admittedly covers an area of 2 cottahs out of the 6 cottahs of the suit land. The Respondents'' interest, therefore, can be declared to be protected interest only to the extent of the area of 2 cottahs upon which the dwelling house is built and no more. He seeks to support his argument from a long line of decisions of this Court in Najemoddeen Moonshi Vs. Syed Hassan Hyder Chowdry , Wahid Ali and Others Vs. Rabat Ali , Jogendra Narain v. Rai Kiran Chandra 723 C.W.N. 315 and Hem Prova v. Sarat Chandra 51 C.W.N. 134. It appears, excepting the last mentioned decision, which is a case under the Bengal Tenancy Act, all other cases relate to question of annulment of encumbrance and protection provided under the 4th exception of Section 37 of the Revenue Sale Act (XI of 1859). But then on a construction of the relevant provisions which appears to be almost similar to the provisions of Clause (c) of Section 160 of the Bengal Tenancy Act, unanimity in principle is found in these decisions which lay down that the benefit conferred by this provision must be limited only to such portions of land as are covered by buildings, tanks, gardens etc. and cannot be extended to cover those lands included in the leases in which no permanent works have been constructed. It must be noticed, however, that a contrary view has been taken, in a Bench decision

of this Court relied on by Mr. Banerjee on behalf of the Respondents in Kiran Chandra Roy v. Naimuddi Talukdar ILR 30 Cal. 498 where considering the same question Mclean C.J. held--

as there was only one lease covering the whole land in dispute on which there were gardens and tanks, the lease itself would be protected under the 4th exception of Section 37 of the Revenue Sale Act.

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This decision though considered in all earlier decisions of this Court was not followed as in Najemoddeen Moonshi Vs. Syed Hassan Hyder Chowdry , this case was distinguished on facts, but in other cases the principle laid down was not accepted substantially on the view that this decision was never followed. But we do not think in all these subsequent decisions this aspect of the matter as to whether the disputed dwelling house, buildings, gardens etc. was covered by one lease of land, was ever considered. We also think, having regard to the relevant provisions both of the Revenue Sale Law and the Bengal Tenancy Act, what is protected is lease of land whereon there are dwelling house, manufactories, buildings, gardens etc., but not the dwelling house etc. by themselves or merely the land on which such dwelling house etc. are erected or gardens or plantation are made. It is difficult to see, therefore, how bereft of the lease only the land whereon dwelling house etc. have been erected can be protected under Clause (c) of Section 160 of the Bengal Tenancy Act.

13. In our opinion, each case has to be considered on the basis of lease of land on which the disputed dwelling house, gardens or plantation, as the case may be, are erected or made and on consideration of such lease each has to be decided on its own facts. It is difficult to apply such broad principle in each and every case as laid down in the several decisions noticed above. In this view of the matter, we would have been inclined to follow Rai Kiran Chandra''s case Supra and refer the matter to a larger Bench, but for reasons we shall presently show, it is not necessary to decide this question finally on the facts of this case.

14. Firstly, as appears from the judgment of the trial Court, the point that the Respondents are entitled to get the benefit of Clause (c) of Section 160 of the Bengal Tenancy Act only to the extent of the land upon which the actual dwelling house structure is erected was never raised. The question in our opinion is a mixed question of fact and law. In absence of proper pleadings or averment of facts in the plaint, it is neither possible nor desirable to decide such questions, more so, when no issue was framed. It is true that the Court below found that the structures covered 2 cottahs of land, but it was not right to adjudicate on such question on evidence in absence of proper pleading. For, it is well-established that no amount of evidence can be looked into on a plea not taken by the parties in their pleading : AIR 1930 57 (Privy Council) . We, therefore, cannot allow the Appellants to raise this

point at this stage in the present appeal.

15. Secondly, what is protested, even assuming such finding is proper, we think, is ''dwelling house'' and not merely the structure portion of the dwelling house. ''Dwelling house'', as under the Partition Act or Transfer of Property Act, it is true, has not equally been defined under the Bengal Tenancy Act. But the legal connotation of dwelling house seems to be much wider than the actual structure of the dwelling house. Without being exhaustive it would be sufficient to refer to a Bench decision of this Court in Khantamoyee v. Rukmini 48 C.W.N. 759 where considering the question as to what are agricultural lands in the background of the Hindu Women''s Right to Property Act, it has been held that

within the term ''dwelling house'' must be included not only the structure used for residence and its site but also adjacent buildings or outhouses, curtilage, garden, courtyard, orchard which is within what can be regarded as compound of the house and all that is necessary for the convenient use of the house.

Applying, therefore, this test to the facts-of the present case, it leaves us in little doubt that although the structures are standing on only 2 cottahs of land in absence of evidence to the contrary, the remaining portion must be presumed to have been used as courtyard, compound, passages and for all other purposes that are necessary for the convenient use of the house. In fact, it is not possible to conceive of a dwelling house without any courtyard, compound, passage, for without them it would be not only not convenient but rather impossible to use the house. In this case, there is no dispute that the lease in question is of 6 cottahs of land and there is no evidence given by the Appellants to show that the remaining portions of the land are used for purposes other than for the convenient use of the structure for residence of the Respondents. While we say this, we are not unmindful of the several decisions of this Court, noticed earlier, but we do not think that there is anything in those decisions which militate against the view we are taking in this matter. In our opinion, therefore, as the dwelling house covers the entire area of the disputed land, it must be deemed to be a protected interest under Clause (c) of Section 160 of the Bengal Tenancy Act. We therefore, come to the same conclusion as reached by the learned trial Court though on additional reasons.

16. Mr. Banerjee, however, has raised another point which is that there could not be any annulment only in respect of the part of land covered by the parent lease. It is said that the original patta, as appears from Ex. B in this case, was obtained by Purna Chandra Das in respect of more than 2 bighas 17 cottahs 18 chataks of land in one plot included under holding No. 17 of the Tollygunge Municipality by a registered Dar Mourashi Mokrari Patta at a rental of Rs. 2-6-0 per bigha per annum dated Ashar 31, 1303 B.S. and the Respondents were granted a lease out of this jamma in respect of only 6 cottahs of land. It is, therefore, argued that there cannot be in law any piecemeal annulment of the so-called encumbrance. We cannot allow this point to be raised for the first time in this Court. For, there was neither any

pleading nor any issue was framed. Accordingly, we are unable to decide this question in the present appeal.

17. For reasons, however, already given, the appeal is dismissed and the decree of the trial Court is affirmed. We do not make, however, any order as to costs. As Mr. Banerjee did not press any other point, the cross-objection is also dismissed but without costs.

Sen Gupta J.

18. I agree.