

*Privy Council Appeal No. 59 of 1941*

*Patna Appeal No. 27 of 1940*

**Ishwari Prasad Singh and others** - - - - *Appellants*

v.

**Hon'ble Maharajdhiraj Sir Kameshwar Singh Bahadur,  
K.C.I.E. of Darbhanga and others** - - - *Respondents*

FROM

**THE HIGH COURT OF JUDICATURE AT PATNA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY, 1943.

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*Present at the Hearing:*

LORD ATKIN  
LORD RUSSELL OF KILLOWEN  
LORD PORTER  
SIR GEORGE RANKIN  
SIR MADHAVAN NAIR

[*Delivered by SIR GEORGE RANKIN*]

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The plaintiffs appeal from a decree of the High Court at Patna dated 11th April, 1940, dismissing their suit. Respondents 2 to 11, or their predecessors, held a permanent mukarrari interest in certain villages in the district of Gaya as tenure-holders under the Maharajadhiraja of Darbhanga, herein called "the landlord." By an instrument dated 21st June, 1915, this interest was mortgaged by them to the plaintiffs, who obtained a preliminary mortgage decree for Rs.1,76,808 on 2nd August, 1932, and a final decree for sale on 15th February, 1934. The plaintiffs purchased the interest of the tenure-holders at the mortgage sale held on 15th January, 1935, and were put in formal possession on 7th November, 1935. The order confirming the sale is not before their Lordships, nor is its date mentioned in the order for delivery of possession, but it is said in the landlord's memorandum of appeal to the High Court to have been made at some date after 25th September, 1935. When the sale had been confirmed, the property passed with effect from 15th January, 1935, under section 65 of the Code.

Meanwhile in September, 1934, the landlord began proceedings under the Bihar and Orissa Public Demands Recovery Act, 1914, against the tenure-holders to recover arrears of rent and cesses for the years 1339 to 1341 Fasli. These proceedings came to be numbered Certificate Case No. 1009 of 1934-35. On 1st November, 1934, the certificate was filed by the Certificate Officer and notices thereof under section 7 of the Act were by 27th November, 1934, served on all the persons named therein as debtors except one who had died and whose heirs were not served until the 9th January, 1935. It would appear that in February and March the certificate was formally amended so as to substitute the names of the heirs for that of the deceased, and fresh notices were served on all the parties. In May, 1935, objection was taken to the certificate on the ground that it had included two distinct tenures as one tenure. This objection was rejected by the Certificate Officer and the Collector, but the matter was pending before the Commissioner when on 26th September, 1935, it was compromised. It was agreed by all the parties to the Certificate that there were two tenures; that of the sums paid on account, Rs.948 should be credited to the first and Rs.1,250 to the second; that the total

amount remaining due on the first was Rs.1,284, and this being now paid, the first was wholly discharged from the debt and was no longer to be included in the certificate proceedings. The other tenure was to be put up for sale for Rs.7,699. All objections regarding service of notice were waived by the Certificate Debtors interested in this tenure. Thereupon the Certificate Officer at first thought that a fresh Certificate Case should be begun; but he altered this opinion on further reflection, and on 27th November, 1935, directed the issue of a notification of sale, fixing 6th January, 1936, as the date of sale.

This brought the plaintiffs on the scene. On the 7th December, 1935, they filed a petition objecting to any sale being held on the ground that the interest of the tenure-holders had now become vested in the plaintiffs by the mortgage sale of 15th January, 1935. They alleged that the compromise above referred to was fraudulent and collusive, and put forward technical arguments to the effect that the sale would not be a rent sale so as to pass the tenure, but would only take effect upon the right, title and interest of the Certificate Debtors—an interest which no longer subsisted. This result was said to follow from the fact of the plaintiffs' purchase; also because only a part of the tenure mentioned in the Certificate was being sold, and because one or more of the original Certificate Debtors had died before the original certificate was filed. These objections were answered in a "report" made by the manager of the Darbhanga estate, who contended that the plaintiffs, having purchased the tenure, were bound to pay the arrears of rent thereon, which were a first charge on the tenure. The Certificate Officer on 14th December, 1935, dismissed the objection petition, but on the 18th December the plaintiffs presented another petition asking for a review of the order of the 14th, insisting that service of the notice of the certificate was made on some of the Certificate Debtors after 15th January, 1935, the date of the mortgage sale; and that the compromise had split up the tenure; hence that the certificate could not operate as a rent decree. This petition has not been included in the record before the Board, but is mentioned in the order sheet of the certificate proceedings. In the plaint it is called a "petition to review." On the 18th December the Certificate Officer recorded an order on this petition: "Let the decree-holder satisfy me on the points raised by the applicants, because these points should be determined at the very outset." He appointed the 4th January, 1936, to go into the matter, and on that date adjourned it till the 6th January for want of time.

Meanwhile the present suit had been filed in the Court of the Subordinate Judge at Gaya on 2nd January, 1936, and a temporary injunction obtained *ex parte* on 3rd January restraining the first respondent from proceeding with the sale. This was continued until the trial, after hearing both sides on 24th January, 1936. At the trial a decree was passed dated 28th April, 1937, granting an injunction in the following terms: "Defendant No. 1 is hereby directed not to get the properties in suit sold in the Certificate Case No. 1009 of 1934-35." This was the only relief granted or direction given by the decree, save for certain directions as to costs. The learned Subordinate Judge held that the compromise of 26th September, 1935, was not fraudulent, and that the sale proceedings thereafter were restricted to the lands of one tenure only. He found that there was nothing in the objection that all the tenure holders had not been made parties to the certificate or served with notice of it. But he held that by November, 1935, and long before 6th January, 1936, the date fixed for the sale by the Certificate Officer's order of 27th November, 1935, the landlord had knowledge of the plaintiffs' purchase; that the relationship of landlord and tenant no longer subsisted between the Certificate Holder and Certificate Debtors; and that a sale under such a certificate would not be a rent sale and would not pass the tenure, but only the right title and interest of the Certificate Debtors, which was nothing. He considered that as the compromise of September, 1935, had made changes in the claim and in the lands, fresh notices under section 7 of the Act should have been issued to comply with section 11 of the Act of 1914, and that the certificate proceedings should have been begun afresh.

On appeal to the High Court, Wort and Dhavie JJ., on 11th April, 1940, set aside this decree and dismissed the suit. They held that notices of the certificate had been served by the 9th January, 1935, under section 7 of the Act, and that the charge declared by section 8 took effect on that date upon the tenure and subsisted throughout. As the purchase of the plaintiffs at the mortgage sale did not take place till 15th January, 1935, the High Court held that the sale, if held, would have the effect of a rent sale. Wort J., with whose judgment Dhavie J. agreed, dealt with certain other aspects of the matter, but the decision was based upon section 8 of the Act.

It will be convenient to set out certain sections of the Act (Bihar and Orissa Public Demands Recovery Act, 1914):

" 7. When a certificate has been filed in the office of a Certificate-Officer under section 4 or section 6, he shall cause to be served upon the certificate-debtor, in the prescribed manner, a notice in the prescribed form and a copy of the certificate.

" 8. From and after the service of notice of any certificate under section 7 upon a certificate-debtor,—

(a) any private transfer or delivery of any of his immovable property situated in the district, or, in the case of a Revenue-paying Estate, borne on the revenue-roll of the district in which the certificate is filed, or of any interest in any such property, shall be void against any claim enforceable in execution of the certificate; and

(b) the amount due from time to time in respect of the certificate shall be a charge upon such property, to which every other charge created subsequently to the service of the said notice shall be postponed.

" 11. Subject to the law of limitation, the Certificate-Officer may at any time amend a certificate by the addition, omission or substitution of the name of any certificate-holder or certificate-debtor, or by the alteration of the amount claimed therein;

" Provided that when any such amendment is made a fresh notice and copy shall be issued as provided in section 7.

" 24. Where the Certificate-Officer is satisfied that the property was, at the said date (*sc. the date of service of notice of the certificate*), in the possession of the certificate-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Certificate-Officer shall disallow the claim.

" 25. Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a Civil Court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order shall be conclusive.

" 26.—(1) Where property is sold in execution of a certificate there shall vest in the purchaser merely the right, title and interest of the certificate-debtor at the time of the sale, even though the property itself be specified.

" (3) Notwithstanding anything contained in sub-section (1), in areas in which Chapter XIV of the Bengal Tenancy Act, 1885, or Chapter XVI of the Orissa Tenancy Act, 1913, is in force, where a tenure or holding is sold in execution of a certificate for arrears of rent due in respect thereof, the tenure or holding shall, subject to the provisions of section 22 and section 26 of the said Acts, respectively, pass to the purchaser, subject to the interests defined in the said Chapters as 'protected interests,' but with power to annul the interests defined in the said Chapters as 'incumbrances' . . . .

Also sections 65 and 158B of the Bihar Tenancy Act, 1885:

65. Where a tenant is a permanent tenure holder . . . . he shall not be liable to ejection for arrears of rent, but his tenure . . . . shall be liable to sale in execution of a decree for the rent of the tenure . . . . and the rent shall be a first charge on the tenure. . . .

158B.—(1) Where a tenure is sold in execution of . . . . (c) a certificate for arrears of rent signed under the Bihar and Orissa Public Demands Recovery Act, 1914, the tenure . . . . shall . . . . pass to the purchaser . . . . if such certificate was signed on the requisition of or in favour of a sole landlord. . . .

Their Lordships are not of opinion that the *ratio decidendi* of the High Court in the present case can be sustained. Section 8 of the Act of 1914 is not directed to the particular case of a claim for arrears of rent, but is a general provision intended to apply to any case in which a public demand is being enforced. It applies to a public demand which is not secured upon any property, and it affects all the debtor's immovable property in the district. Its effect is not that the debt shall be recoverable out of property which is not the property of the debtor, e.g., at the expense of another person entitled to the interest of a mortgagee in the debtor's land, but merely to prevent recovery of the debt out of the debtor's land being defeated by any private transfer or delivery made or by any charge created after notice of the certificate has been given to the debtor. The charge conferred by clause (b) of section 8 cannot of its own force take precedence of a previous mortgage, or interfere with the remedy of the mortgagee, or impair the title acquired by the auction purchaser at a mortgage sale even if the sale be held after service of the notice under section 7 of the Act. On the contrary, under section 26, sub-section 1, a sale under the certificate vests in the purchaser only the right, title and interest of the Certificate Debtor at the time of sale. Section 8 is no answer to the appellants. The case which they have to meet arises out of a very different charge—that declared by section 65 of the Tenancy Act and ordinarily enforceable by the procedure and on the terms indicated in Chapter XIV of that statute. It depends upon the effect to be given to the provision in sub-section (3) of section 26 of the Act of 1914 that in certain circumstances under this certificate procedure the tenure or holding shall pass to the purchaser. This sub-section must be read with section 24, which makes the date of service of the notice of the certificate the crucial date for the purpose of disposing of a claim or objection preferred under section 21.

The plaintiffs objection petition of 6th December, 1935, was in their Lordships' view a matter to be decided by the Certificate Officer under sections 21 to 25 of the Act. At first, and apparently by some misunderstanding, he had rejected it without calling for a reply from them, but the plaintiffs had filed a petition for review of that order, and on 18th December, 1935, he had recorded an order requiring the landlord to satisfy him on the matter, saying "these points should be determined at the very outset." He had adjourned the matter till 4th January, 1936, yet on 2nd January the plaint is issued and on 3rd January his hands are tied by an *ex parte* injunction. This is continued until it was dissolved by the High Court's decree of 11th April, 1940, the certificate proceedings being thus held up for more than four years in order to prevent the Certificate Officer from determining the matter as his duty was. The learned Subordinate Judge when the right of the civil court to interfere with the certificate proceedings was challenged, relied upon the terms of sections 21 to 25 of the Act. These sections repeat provisions of the Civil Procedure Code (Order XXI. ss. 58-63), which do not have effect under ch. XIV. of the Tenancy Act (cf. s. 170). After the 18th December, 1935, the objection petition was still before the Certificate Officer for his final decision; but, if his previous order be taken as his decision, then it becomes important to observe that the terms of section 25 of the Act of 1914, like those of Order XXI r. 63 of the Code, are intended to enable the execution proceedings to continue notwithstanding the claim or objection which has been dismissed. Subject to the result of the suit, the order is to be conclusive. That on a claim being rejected the execution proceedings should be held up—it may be as in this case for years—till the suit can be decided is contrary to the main purpose of the procedure laid down by the Act and by the Code. As a general practice it would be intolerable and in the particular case before the learned Subordinate Judge such a course had almost nothing in its favour. The plaintiffs had purchased the tenure and the only question was whether a certificate against the original tenure holders was available to the landlord having regard to the date of service of notice and the date of the plaintiffs' purchase. If it was not available, the sale when held would not affect the plaintiffs' interest. Before their Lordships it was not contended that the purchaser of a tenure had a right

to hold it free from the landlord's claim for arrears of rent existing at the date of the purchase. The landlord by section 65 of the Tenancy Act has a first charge for the rent; and though it is very important to recognise that he must take the appropriate steps to get the benefit of such a charge, and that for this purpose a mortgagee and a purchaser are in different positions (cf. *Bidhumuki Dasi v. Bhaba Sundari Dasi* [1920], 24 C.W.N., 951, *Jogendra Chandra Das v. Debendra Nath Ghosh* [1934], 39, C.W.N., 428), the irregularity and inconvenience of staying the landlord's proceedings in the present case are none the less manifest.

Their Lordships are of opinion that the suit was premature, the plaintiffs' claim being under consideration by the Certificate Officer at their instance when they filed their plaint. They think it clear that the temporary and permanent injunctions were improperly granted. It seems doubtful whether after so long an interval the certificate proceedings can usefully be revived, but their Lordships think it right to say that if they are revived as against the tenure the Certificate Officer should begin afresh or else by amending the certificate so that it may correspond to the present facts as regards lands, parties and otherwise. The consequences to the landlord may be unfortunate, but they flow from the fact that his tackle was not in order originally.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

But they direct that if the appellants within two months from the receipt by the High Court at Patna of the Order in Council to be made on this appeal shall pay into the trial Court the sum of Rs. 7699.5.1 (if not already paid) mentioned in the compromise petition of 26th September, 1935, without interest, so as to be available for withdrawal by the first respondent on the terms that the appellants' interest in the tenures mentioned in the certificate proceedings in the plaint mentioned shall be held free from all claim by the first respondent in respect of the arrears of rent covered by the said proceedings, then the order of the High Court as to costs shall be discharged and each party left to bear its own costs incurred in the Courts in India. If the appellants do not make payment into Court as aforesaid the directions of the High Court as to costs shall stand. The appellants will pay the first respondent's costs of this appeal.

In the Privy Council

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ISHWARI PRASAD SINGH AND OTHERS

v.

HON'BLE MAHARAJDHIRAJ  
SIR KAMESHWAR SINGH BAHADUR,  
K.C.I.E. OF DARBHANGA AND OTHERS

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DELIVERED BY SIR GEORGE RANKIN

Printed by His Majesty's Stationery Office Press,  
Drury Lane, W.C.2.

1943