

APPELLATE CIVIL.

Before Mookerjee and Newbould JJ.

SALIMULLAH

v.

RAHENUDDI.*

1915

March 31.

Sale—Execution of rent-decree—Encumbrances—Bengal Tenancy Act (VIII of 1885), ss. 159, 163 to 167—Decree for arrears of rent—Sale under the Bengal Tenancy Act, effect of—Purchase by landlord.

Where a tenure is sold under the provisions of the Bengal Tenancy Act in execution of a decree for arrears of rent, and the procedure prescribed in the Act has been observed, the result therein described follows, namely, the purchaser becomes entitled to annul all encumbrances other than registered and notified encumbrances; the consequence of the sale does not depend upon the amount of the bid offered by the successful purchaser; it is independent of the value of the bid. Section 165 of the Act was enacted solely for the benefit of the decree-holder; if the bid is not sufficient to satisfy his decree and costs, it entitles him to have the property sold with power to annul all encumbrances; but it is not obligatory upon him to adopt this extreme measure, and he is not in peril if he decides not to pursue this special remedy.

Banbihari Kapur v. Khetra Pal Singh Roy (1) not followed.

SECOND APPEAL (No. 2539 of 1912) by Nawab Sir Salimullah Bahadur and others, the plaintiffs.

The plaintiffs were the superior landlords of a *nim osat* taluk, and obtained a decree for arrears of rent on the 7th April 1909 against the talukdars; and on the 5th August 1909, they applied to execute the decree in accordance with the provisions of the Bengal Tenancy

* Appeal from Appellate Decree, No. 2539 of 1912, against the decree of Ramesh Chandra Sen, Subordinate Judge of Backergunge, dated July 20, 1912, reversing the decree of Raman Chandra Banerjee, Munsif of Patuakhali, dated Feb. 28, 1912.

1915
 SALIMULLAH
 v.
 RAHENUDDI.

Act. The sale was held under sub-section (1) of s. 164 of the Act on 23rd September 1909 when the decree-holders themselves purchased the tenure, but, although symbolical delivery was made to them, they could not obtain actual possession of the tenure owing to the resistance of the defendants, who set up under tenures in the property sold. The plaintiffs, thereupon, took proceedings under s. 167 of the Act, and the requisite notices for the annulment of the alleged encumbrances were duly served.

On the 18th April 1911, the plaintiffs commenced this action in ejectment against the defendants. The Court of first instance decreed the suit, but this decision upon appeal was reversed by the lower Appellate Court on the ground that although the sale was held under the Bengal Tenancy Act, it operated only as a sale under the provisions of the Code of Civil Procedure, and the decree-holders had therefore acquired nothing beyond the right, title and interest of the judgment-debtors.

This decision was based on the ground that as the sum realised on the sale was not sufficient to liquidate the amount of decree and costs, the sale could not be deemed to have been held under s. 164 of the Bengal Tenancy Act, but under the provisions of the Civil Procedure Code. In support of his view, the Subordinate Judge referred to the case of *Banbihari Kapur v. Khetra Pal Roy Choudhury* (1).

Against this decision the plaintiffs appealed to the High Court.

Babu Surendra Nath Guha, for the appellants.

Babu Gunada Charan Sen, for the respondents.

MOOKERJEE AND NEWBOULD JJ. This is an appeal by the plaintiffs in a suit for declaration of title to

(1) (1911) I. L. R. 38 Calc. 923.

land and for recovery of possession thereof. The plaintiffs are the superior landlords of a *nim osat* taluk. The talukdars defaulted to pay rent, with the result that they were sued and a rent decree was obtained against them on the 7th April 1909. On the 5th August 1909, the plaintiffs applied to execute the decree in accordance with the provisions of the Bengal Tenancy Act; five days later, an order was made for the simultaneous issue of the writ of attachment and the sale proclamation under sub-section (1) of section 163. The sale was held under sub-section (1) of section 164 on the 23rd September, when the decree-holders themselves purchased the defaulting tenure. The sale was confirmed in due course and symbolical delivery was made to the purchasers. They could not, however, obtain actual possession of the land, as they were resisted by the defendants who set up undertenures in the property sold. The plaintiffs, thereupon, took proceedings under section 167 of the Bengal Tenancy Act and the requisite notices for the annulment of the alleged encumbrances were duly served. On the 18th April 1911, the plaintiffs commenced this action to eject the defendants. The Court of first instance found that the decree was for arrears of rent, that it had been executed in accordance with the provisions of the Bengal Tenancy Act, that at the sale held under sub-section (1) of section 164, the purchasers had acquired the tenure with power to annul the encumbrances thereon, other than registered and notified encumbrances, and that steps had been taken in conformity with section 167 to annul the encumbrances set up by the defendants. In this view, the Court decreed the suit. Upon appeal, the Subordinate Judge has reversed that decision on the ground that the sale, though held under the Bengal Tenancy Act, operated only as a sale under the provisions of the Code of Civil

1915

SALIMULLAH
v.
RAHENCDDI.

1915
 SALIMULLAH
 v.
 RAHENUDDI.

Procedure, and that the decree-holders auction-purchasers had acquired nothing beyond the right, title and interest of their judgment-debtors. This decision is based on the ground that as the sum realised at the sale, was not sufficient to liquidate the amount of the decree and costs, the sale must be deemed to have been held, not under sub-section (1) of section 164, but under the provisions of the Code of Civil Procedure. The Subordinate Judge, in this view, has dismissed the suit. On the present appeal, it has been argued on behalf of the plaintiffs that the view taken by the Subordinate Judge as to the effect of the sale held on the 23rd September 1909, is erroneous and that the purchasers at that sale acquired the defaulting tenure with power to annul all encumbrances other than registered and notified encumbrances. This view has been controverted by the respondents, on the authority of the decision in *Banbihari Kupur v. Khetrapal Singh Roy* (1). It has been, indeed, broadly argued on their behalf that a sale in execution of a decree for arrears of rent operates as a sale under sub-section (1) of section 164, only if the sum realised at the sale is sufficient to liquidate the amount of the decree and costs. We feel no doubt that this contention is erroneous and is not supported by the provisions of the Bengal Tenancy Act.

Section 159 formulates the fundamental principle that where a tenure or holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined as protected interests, but with power to annul the interests defined as encumbrances. Section 163 provides that when the decree-holder makes the application for execution mentioned in section 162, the Court, if it admits the application and orders

(1) (1911) I. L. R. 38 Calc. 923.

execution of the decree as applied for, shall issue simultaneously the order of attachment and the proclamation required by rules 66 and 70 of Order XXI of the Civil Procedure Code. Sub-section (2) of section 163 lays down that the proclamation shall announce that the tenure or holding will first be put up to auction, subject to the registered and notified encumbrances, and will be sold subject to those encumbrances, if the sum bid is sufficient to liquidate the amount of the decree and costs, and that, otherwise, it will, if the decree-holder so desires, be sold on a subsequent date of which due notice will be given, with power to annul all encumbrances. Subsection (1) of section 164 provides that when a tenure has been advertised for sale under section 163, it shall be put up to auction, subject to registered and notified encumbrances; and if the bidding reaches a sum sufficient to liquidate the amount of the decree and costs including the costs of sale, the tenure shall be sold subject to such encumbrances. The respondents argue that if the bid does not reach a sum sufficient to liquidate the amount of the decree and costs, the sale, if concluded, operates only as a sale under the provisions of the Code of Civil Procedure, with the consequence that the purchaser acquires merely the right, title and interest of the judgment-debtor. We are clearly of opinion that this contention is not wellfounded. If we were to accept the contention of the respondents, we would have to read into sub-section (1) words which are not to be found there. The intention of the Legislature, as can be gathered from sections 163, 164 and 165, is to entitle the decree-holder, if he so desires, to proceed under section 165 in the event of the sale on the first notification not realising a sum sufficient to liquidate the amount of the decree and costs. It is not obligatory

1915
 SALINULLAH
 v.
 RAHENUDDI.

1915
 SALIMULLAH
 v.
 RAHENUDDI.

upon him, however, in this contingency, to avail himself of the provisions of section 165; he may nevertheless be content with the sale under section 164; and if the sale is held under that section, the result described therein follows, namely, the purchaser becomes entitled to annul all encumbrances other than registered and notified encumbrances, provided he follows the procedure prescribed in section 167. The consequence of the sale does not depend upon the amount of the bid offered by the successful purchaser; it is independent of the value of the bid. It is obvious that section 165 was enacted solely for the benefit of the decree-holder; if the bid is not sufficient to satisfy his decree and costs, it entitles him to have the property sold, with power to annul *all* encumbrances; but it is not obligatory on him to adopt this extreme measure, and he is not in peril if he decides not to pursue this special remedy.

We have been pressed, however, to adopt the contrary view on the strength of some observations in the case of *Banbihari Kapur v. Khetrapal Sing Roy* (1) which support the contention of the respondents. With all respect for the learned Judges who decided that case, we are unable to accept their view as a correct exposition of the law on the subject. But we do not think it necessary to refer the matter for decision to a Full Bench, because the observations mentioned were not necessary for the purpose of the decision of that case. It further appears that in that case the sale certificate stated that the purchaser had acquired merely the right, title and interest of the judgment-debtor, while in the case before us, the sale certificate shows on the face of it, that the purchaser acquired the defaulting tenure itself which had been

(1) (1911) I. L. R. 38 Calc. 923.

brought to sale. In our opinion, the view taken by the Subordinate Judge cannot possibly be supported.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of appeal below.

W. M. C.

Appeal allowed.

1915
SALIMULLAH
v.
RAHENUDDI.

APPELLATE CIVIL.

Before Mookerjee and Roe JJ.

HARINATH CHOWDHURY

v.

HARADAS ACHARJYA CHOWDHURY.*

1915
May 21.

Deposit in Court—Money paid under compulsion of Law—Want of bona fides—Action for recovery of money—Civil Procedure Code (Act V of 1908), O. XXI, r. 46 cl. (1)—Attachment of debt due to a stranger on the allegation that the garnishee's creditor was benamidar of the judgment-debtor—Deposit by garnishee, conditional, on enquiry—Withdrawal of the money from Court by the attaching creditor without notice to the garnishee—Court's power of enquiry.

Where debt due to a stranger was attached on the allegation that he was benamidar of the judgment-debtor and the attaching creditor withdrew the money by leave of the Court without notice to the garnishee, in a suit by the latter for the recovery of the money deposited, it being found that there was no benami transaction as alleged :

Held, that the rule that money paid under compulsion of a legal process was irrecoverable can only be pleaded where the party who has got the benefit of his opponent's payments, acts *bona fide*.

Marriott v. Hampton (1) distinguished.

Ward & Co. v. Wallis (2) followed.

* Appeal from Appellate Decree. No. 3656 of 1913, against the decree of Annada Kumar Sen, Subordinate Judge of Mymensingh, dated Aug. 11, 1913, confirming the decree of Lutfar Rahaman Munsif of Mymensingh, dated July 17, 1912.

(1) (1797) 7 T. R. 269.

(2) [1900] 1 Q. B. 675.