

APPELLATE CIVIL.

Before Sanderson C. J. and Mookerjee J.

BHUSHAN CHANDRA GHOSE

v.

SRIKANTA BANERJEE*.

1916

March 16.

Landlord and Tenant—Adverse possession—Title—Under-tenant—Purchase of tenancy by auction-purchaser—Incumbrance—Notice of annulment proceedings—Bengal Tenancy Act (VIII of 1885) ss. 161, 167.

When a person has, by adverse possession against a sub-tenant, acquired a statutory title to a portion of the lands comprised in the sub-tenancy, he has an interest in the sub-tenancy, so that when on a sale of the superior tenancy for arrears of rent, the purchaser seeks to annul the sub-tenancy as an "incumbrance," such person stands in the position of an "incumbrancer", and is entitled to notice under section 167 of the Bengal Tenancy Act.

SECOND APPEAL by Bhushan Chandra Ghose and Jatindra Mohan Ghose, the defendants Nos. 1 and 2.

One Baikunta Nath Mukherji and others were co-sharer *mokararidars* of a certain *jama* in the name of Amir Ali Chowdhury situate within the *mal* lands of the village Kalyanpur and appertaining to the *taluk* of Tara Prasanna Changdar. On the 27th August, 1886, the *mokararidars* created a *dur-mokarari* tenure in favour of one Ganga Narain Pal in respect of their entire *jama* and realised from him the entire rent for the same. Some time prior to 1889, the *dur-mokararidar* settled $2\frac{1}{2}$ bighas out of the lands comprised in the *jama* with one Goberdhan Sheikh and received rent from him for the portion settled. Goberdhan

* Appeal from Appellate Decree, No. 2459 of 1914, against the decree of Jadab Chandra Bhattacharjee, Subordinate Judge of Burdwan, dated May 16, 1914, confirming the decree of Narendra Nath Ghose, Munsif of that place, dated March 31, 1913.

Sheikh, thereafter, attorned to Bhushan Chandra Ghose and Jatindra Mohan Ghose in respect of the $2\frac{1}{2}$ bighas and paid rent to them instead. In 1889, Ganga Narain Pal brought a suit against Goberdhan Sheikh, Bhushan Chandra Ghose and Jatindra Mohan Ghose for recovery of possession of the $2\frac{1}{2}$ bighas; but this suit was dismissed and Goberdhan remained, thereafter, in adverse possession and continued to pay rent to the landlord he had attorned to. In 1902, Tara Prasanna Changdar instituted a suit against the *mokararidars* for arrears of rent in respect of their tenure and obtained a decree. In execution of this decree the entire *jama* including the $2\frac{1}{2}$ bighas was sold and on the 22nd January, 1903, one Srikanta Banerjee purchased the *mokarari* tenure and became the owner thereof. The auction-purchaser then took proceedings under section 167 of the Bengal Tenancy Act to annul the incumbrance on the entire property and gave notice to the *dur-mokararidar* for that purpose. Bhushan Chandra Ghose, Jatindra Mohan Ghose and the representatives of Goberdhan Sheikh having failed to vacate possession of the $2\frac{1}{2}$ bighas held by them, Srikanta Banerjee filed a suit against them praying, *inter alia*, for a declaration of title to the said portion of the lands and for *ichas* possession of the same. Both the Courts below decreed the suit. The defendants Nos. 1 and 2, thereupon, appealed to the High Court, making the representatives of Goberdhan Sheikh party respondents.

Babu Bipin Behary Ghose (with him *Babu Mohini Mohan Chatterjee*), for the appellants. The interest of the appellants in the land in dispute was created by the *dur-mokararidar* and by the lapse of time they acquired a valid title to the land as against their grantor. This interest was in the nature of an

1916

BHUSHAN
CHANDRA
GHOSE
c.
SRIKANTA
BANERJEE.

1916

BHUSHAN
CHANDRA
GHOSE
v.
SRIKANTA
BANERJEE.

incumbrance, as defined by section 161 of the Bengal Tenancy Act, entitling the incumbrancer to notice in the proceedings for the purpose of annulling the incumbrance under section 167 of the Act. The appellants, thus being incumbrancers, were entitled to a separate notice in the annulment proceedings. The notice, which was served on the *dur-mokararidar*, was, therefore, insufficient so far as the appellants were concerned, and did not operate in affecting their interest in any way. *Gocool Bagdi v. Debendra Nath Sen* (1), followed in *Arsadulla v. Mansubali* (2), was referred to.

Babu Mahendra Nath Roy, (with him *Babu Kalidas Sarkar*), for the respondent Srikanta Banerjee. If the *dur-mokararidar* chose to allow a third party to take possession adversely to him of a portion of his under-tenancy, his action would not affect the right of the *mokararidars*, who could say that they were not bound to recognise the interest of the 3rd party and might proceed to eject them. An incumbrancer, for the purposes of section 167 of the Bengal Tenancy Act, was the owner of an incumbrance as defined in section 161. The defendants, who derived their title to the land in dispute by adverse title against the *dur-mokararidar*, were not the under-tenants of the *mokararidars*, nor did they become so by virtue of their adverse possession, and had no right to be treated as such. Not being under-tenants of the *mokararidars*, their interest in the land in dispute was not in the nature of an incumbrance entitling them to a separate notice in the annulment proceedings. Separate notices would be necessary only in the case of different under-tenants holding under the *mokararidar*. The notice on the *dur-mokararidar*, was, therefore, sufficient to entitle the

(1) (1911) 14 C. L. J. 136.

(2) (1912) 16 C. L. J. 539.

plaintiff, who purchased the *mokarari* right, to enter into possession of the entire property including the interest of the defendants. Inasmuch as the adverse possession began during the existence of the *dur-mokarari* tenure, whatever right the defendants had acquired from the *dur-mokararidar* would not be an under-tenancy within the meaning of section 161 as creating an incumbrance. *Womesh Chunder Goopto v. Raj Narain Ray* (1), *Krishna Gobind Dhur v. Hari Churn Dhur* (2), *Sheo Sohye Roy v. Luchmeshur Singh* (3), *Sharat Sundari Dabia v. Bhobo Pershad Khan Chowdhuri* (4), *Gunga Kumar Mitter v. Asutosh Gossami* (5) and *Thamman Pande v. The Maharaja of Vizianagram* (6) were relied on. *Gocool Bagdi v. Debendra Nath Sen* (7), referred to by the appellants, was distinguishable.

Babu Mohini Mohan Chatterjee, in reply.

SANDERSON C. J. This is an appeal from the judgment of the Subordinate Judge of Burdwan, in which he gave judgment for the plaintiff: and the defendants Nos 1 and 2, whom I may call the Ghose defendants, have appealed.

Now, it appears that in 1886, the Mukherjis who held under one Amir Ali entered into an agreement with an individual whom I shall call Pal, by which a subordinate tenure was created, and it appears that this tenure was of the character of a permanent under-tenure. It was in respect of 60 bighas, but apparently, prior to 1889 a man called Goberdhan had got into occupation of $2\frac{1}{2}$ bighas, part of the 60 bighas, and he was paying rent to the first and second defendants.

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| (1) (1868) 10 W. R. 15. | (4) (1886) I. L. R. 13 Calc. 101. |
| (2) (1882) I. L. R. 9 Calc. 337. | (5) (1896) I. L. R. 23 Calc. 863. |
| (3) (1884) I. L. R. 10 Calc. 577. | (6) (1907) I. L. R. 29 All. 593 |
| (7) (1911) 14 C. L. J. 136. | |

1916
 BEUSHAN
 CHANDRA
 GHOSE
 v.
 SRIKANTA
 BANERJEE

1916

BHUSHAN
CHANDRA
GHOSE

v.

SRIKANTA
BANERJEE.SANDERSON
C. J.

the Ghoses, and in 1889 Pal brought an action against Goberdhan and the first two defendants, the Ghoses, for the purpose of recovering possession of the $2\frac{1}{2}$ bighas. He failed in that action, and from that time Goberdhan or some other occupant has been in possession of the $2\frac{1}{2}$ bighas, and Goberdhan or the other occupant has been paying rent to the Ghoses down to the institution of the present suit.

Now, a suit for rent was brought by the landlord against the Mukherjis in 1902, and a decree was obtained in that suit. The plaintiff purchased the land in pursuance of that decree, and in order to obtain possession of the land free from incumbrances, he gave notice or caused notice to be given to Pal or his representatives, I am not sure whether he was still alive, for the purpose of putting an end to the incumbrance which was created under the agreement of tenancy between the Mukherjis and Pal. But the Ghoses say in this case that they too were the holders of an incumbrance within the meaning of section 167 of the Bengal Tenancy Act, and, therefore, they were entitled to notice: and, that is the question in this case, namely, whether the Ghoses were in the position of holders of such an incumbrance as entitled them to notice under section 167. I am of opinion that they were.

It appears that the tenancy was of the nature, as I have already said, of a permanent tenure which was capable of assignment either in whole or in part, and, therefore, if Pal had assigned his interest in the tenure in respect of the $2\frac{1}{2}$ bighas to the Ghoses, in my judgment, the Ghoses would clearly have been in the position of incumbrancers to whom notice would have had to be given under section 167, if the plaintiff desired to get possession of the land free from incumbrances. There was no actual conveyance in this case, but it

has been held, and there is no dispute about it, that at all events ever since 1889 the Ghoses have been in possession of this $2\frac{1}{2}$ bighas by means of their tenants who were in fact occupying the $2\frac{1}{2}$ bighas and paying rent to the Ghoses: and, therefore, as against Pal, they have by reason of their possession as against him, obtained title, just as effective a title as if Pal had in fact conveyed his interest in the $2\frac{1}{2}$ bighas to the Ghoses, and for that reason I am of opinion that the Ghoses were holders of an incumbrance and consequently it was necessary for the plaintiff, if he desired to get possession of the property free from incumbrances, to give notice not only to Pal, which in fact he did, but also to the Ghoses which in fact he did not.

The result, therefore, is that the judgment of the Subordinate Judge was wrong, because he held that it was not necessary for the plaintiff to give notice to the Ghoses, whereas, in my judgment, he was entitled to such notice.

The appeal is, therefore, allowed and the suit dismissed with costs in all the Courts.

We do not intend to decide anything by this judgment, which would prevent the plaintiff from recovering rent from the Ghoses in a proper proceeding. We do not think we can deal with that matter in this case.

MOOKERJEE J. I agree that the decree of the Subordinate Judge cannot be supported. The facts material for the determination of the question of law raised before us, lie in a narrow compass and may be briefly recited. Under one Changdar as *talukdar*, the Mukherjis hold a *mokarari* tenure. In 1886, the Mukherjis created a permanent under-tenure in favour of Pal. In 1889, the Ghoses took possession of $2\frac{1}{2}$

1916
 BHUSHAN
 CHANDRA
 GHOSE
 v.
 SRIKANTA
 BANERJEE.
 ———
 SANDERSON
 C. J.

1916
 ———
 BHUSHAN
 CHANDRA
 GHOSE
 v.
 SRIKANTA
 BANERJEE.
 ———
 MOOKERJEE
 J.

bighas of land included in the tenancy of Pal under the Mukherjis. This adverse possession of the Ghoses against Pal continued for the statutory period; and in 1901, by operation of section 28 of the Indian Limitation Act, the Ghoses acquired a good title to this 2½ bighas of land as against Pal. In 1902, Changdar brought a suit for arrears of rent against the Mukherjis and obtained a decree. At the sale held in execution of that decree on the 22nd January, 1903, the plaintiff purchased the *mokarari* tenancy of the Mukherjis under Changdar. He then took proceedings under section 167 of the Bengal Tenancy Act to annul the incumbrance on the property, that is, the tenancy created in 1886 by the Mukherjis in favour of Pal. The plaintiff, it is conceded, served a notice under section 167 on Pal, and the question in controversy is, whether the notice so served affects the Ghoses.

On behalf of the plaintiff, respondent, it has been argued that he completely fulfilled the requirements of section 167 when he served notice upon Pal and that he was under no obligation to take notice of the right, if any, which by operation of law might have been acquired by the Ghoses against Pal. In support of this view, reliance has been placed on the decisions in *Womesh Chunder Goopto v. Raj Narain Roy* (1), *Krishna Gobind Dhur v. Hari Churn Dhur* (2), *Sheo Sohye Roy v. Luchmeshur Singh* (3), *Sharat Sundari Dabia v. Bhobo Pershad Khan Chowdhuri* (4), *Gunga Kumar Mitter v. Asutosh Gossami* (5), *Thamman Pande v. The Maharaja of Vizianagram* (6), which formulate the doctrine that adverse possession against a tenant is ordinarily not operative as adverse possession against the landlord during the

(1) (1868) 10 W. R. 15.

(2) (1892) I. L. R. 9 Calc. 367.

(3) (1884) I. L. R. 10 Calc. 577.

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(6) (1907) I. L. R. 29 All. 593.

continuance of the lease. This proposition is obviously of no avail to the respondent. The question in controversy is, not whether the possession of the Ghoses was adverse to the Mukherjis, but whether the Ghoses have acquired by operation of law the status of incumbrancers within the meaning of section 167 of the Bengal Tenancy Act. The appellants contend that this question should be answered in the affirmative, because they are persons in whom the incumbrance, that is, the sub-tenancy created by the Mukherjis in favour of Pal in 1886, has, as to a portion thereof, become vested. In fact, after the lapse of the statutory period, the position of the Ghoses became that of grantees of 2½ bighas from Pal. Consequently, the notice served on Pal alone is inoperative so far as the Ghoses are concerned, and has not in any way affected the interest acquired by them in the sub-tenancy.

It may be pointed out that the transfer of a share of a permanent tenure or under-tenure or of a *raiyati* holding at a fixed rate of rent, is valid under sections 11, 17 and 18 of the Bengal Tenancy Act, although, under section 88, the transferee of the share is not entitled to claim a sub-division of the tenure or holding as against the landlord. The Ghoses, here, do not claim a sub-division of the tenancy as against the plaintiff; all that they assert is that they have acquired an interest in the tenancy created by the Mukherjis in favour of Pal, that they have thus become "incumbrancers," and that they are consequently entitled to notice under section 167. This contention is clearly well founded on principle and must prevail.

Reference has been made, in the course of the argument, to the decisions in *Gocool Bagdi v. Debendra Nath Sen* (1) and *Arsadulla v. Mansubali* (2), which recognise the principle that the term "incumbrance"

1916

 BHUSHAN
CHANDRA
GHOSE
v.

 SRIKANTA
BANERJEE.

 MOOKERJEE
J.

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1916

—
BHUSHAN
CHANDRA
GHOSE

v.

SRIKANTA
BANERJEE.

—
MOOKERJEE
J.

used in sections 159 and 161 of the Bengal Tenancy Act includes a statutory title acquired by a trespasser by adverse possession of the land of a defaulting tenant. This doctrine has no application to the circumstances of the present case, because the Ghoses claim title and possession, not against the Mukherjis, but against Pal. The true view is that when a person has, by adverse possession against a sub-tenant, acquired a statutory title to a portion of the lands comprised in the sub-tenancy, he has an interest in the sub-tenancy, so that when on a sale of the superior tenancy for arrears of rent, the purchaser seeks to annul the sub-tenancy as an "incumbrance", such person stands in the position of an "incumbrancer" and is entitled to notice under section 167. In my opinion, this appeal must be allowed and the suit dismissed with costs in all the Courts.

O. M.

Appeal allowed.