

FULL BENCH.

*Before Chatterjea, Cuming, B. B. Ghose, Pantam
and Page JJ.*

JHARU MANDAL

v.

KHETRA MOHAN BERA

1926

May 14.

Occupancy Holding, non-transferable—Purchaser's (unrecognised) interest void not voidable—Deposit, no right of—Bengal Tenancy Act (VIII of 1885) s. 170 (3), 158B, 159, 161, 167 and 171.

Per Curiam. A purchaser of a non-transferable occupancy holding, who has not been recognised by the landlord, has not an interest in the holding which is voidable on the sale, and so is not entitled to make a deposit under section 170 (3), Bengal Tenancy Act.

Per PAGE J. The expression "voidable on the sale" indicates the subsistence of some interest which may be avoided after the sale. But where an interest is extinguished on a sale nothing remains afterwards which can be avoided; the purchaser can neither make the holding transferable by affirmance, nor avoid the transfer by disclaimer.

Tarak Das Pal Choudhury v. Harish Chandra Banerjee (1), and *Ahamadulla Chowdhury v. Prayag Sahu* (2) overruled.

CIVIL Rule obtained under section 115 of the Code of Civil Procedure by Jharu Mandal, applicant, petitioner.

In the above matter CUMING and MUKERJI JJ. made the following reference to a Full Bench:—

CUMING J. The facts of the case out of which this rule has arisen are briefly these.

The petitioner purchased a certain holding in 1907 in execution of a mortgage decree against the recorded tenants, opposite party 2 and 3, and obtained possession. The property was directed to be sold in execution of a decree for rent in execution case No. 136 of 1924. On this the

* Full Bench Reference No. 1 of 1925, in Civil Revision case No. 429 of 1925.

(1) (1912) 17 C. W. N. 163.

(2) (1914) 20 C. W. N. 39.

1926
 ———
 JHARS
 MANDAL
 v
 KHETRA
 MOHAN
 BERA.

petitioner applied to deposit the decretal amount under section 170, Bengal Tenancy Act. The learned Munsif held that he was not a person having an interest voidable on the sale, and hence was not entitled to make the deposit. The petitioner moved this Court and has obtained this rule. Speaking for myself I should hold that the learned Munsif is right.

Admitting for the sake of argument that the petitioner has an interest in the holding, that interest is not voidable but passes with the sale.

When a holding is sold in execution of an arrear of rent what passes to the purchaser is the holding subject to the provisions of section 22 and subject to the interests defined in section 159, which are described as protected interests, but with the power to annul the interests defined as encumbrances. Section 160 defines a protected interest and section 161 defines what are not protected interests but are interests which are described as encumbrances. These interests or encumbrances are voidable, and it is obvious that section 170 (3) would apply to such an unprotected interest. *If therefore the interest that the petitioner holds falls within neither of these sections, it is an interest that passes with the sale and so is not a voidable interest.*

Clearly a purchase of the whole holding at a sale in execution of a decree does not fall within either section 160 or section 161. An encumbrance implies a limitation of the right of the tenant, and not a total extinction [*Tomizuddin Khan v. Khoda Nawaz Khan* (1)]. I should thus have no hesitation in holding that a *purchaser of a non-transferable occupancy holding without the landlord's consent had no interest in the holding voidable by the sale which would entitle him to make a deposit under section 170(3).*

Unfortunately the question is not *res integra*. It has been the subject of numerous decisions of this Court and these decisions are not uniform.

I propose to deal with first of all the decisions which take the contrary view.

The first of these is the case of *Tarak Das Pal Choudhury v. Harish Chandra Banerjee* (2).

In that case it was held that the purchaser of a holding, who has not been recognised as a tenant by the landlord, has an interest in the holding which is voidable on a sale held in execution of a decree for rent against the registered tenant. It was held in that case that, as the purchaser had been in possession claiming for more than 12 years to be tenant to the knowledge of the landlord, he had such an interest as is contemplated by section 170 (3) and that such an interest was voidable by the sale.

(1) (1909) 11 C. L. J. 16.

(2) (1912) 17 C. W. N. 163.

With the greatest respect to the learned Judge I am unable to understand what the interest could be unless it were the limited interest of a tenant.

The learned Judge then held, though for reasons that are not very clear, that this was an interest voidable by the sale.

The next case to be considered is the case of *Ahamadulla Choudhury v. Prayag Sahu* (1). This again was the purchase of a holding. In this case no question arose of the purchasers being in possession for more than 12 years. In this case the Full Bench case of *Dayamayi v. Ananda Mohan Roy Choudhury* (2) was considered. The learned Judge held that the effect of the sale was to give the auction purchaser the right to oust the transferee, and that it had been held in *Tarak Das Pal Choudhury v. Harish Chandra Banerjee* (3) that that fact makes the interest of the purchaser one that is voidable on the sale.

As against this decision we have been referred to the case of *Barada Prasad Ray Chowdhury v. Faijudli Haldar* (4). In that case the purchaser of a part of a holding who had not been recognised by the landlord applied to make the deposit. In their judgment the learned Judges remarked that there had been some conflict of decisions in this Court on the point. They referred to the cases I have already mentioned and also to two unreported cases I shall presently deal with, *Kumar Narendra Mitter v. Abdul Molla* (5) and *Mahomed Ismail v. Satya Chandra Sarkar* (6).

The learned Judges did not distinguish these cases from the first two cases referred to, but held that, as the contrary view had been taken in a number of later cases, they did not think it necessary to refer the matter to the Full Bench. They held that the transferee of a whole or a part of a non-transferable occupancy holding not recognised by the landlord was not entitled to make a deposit under section 170 (3) because the interest of such a transferee passed by the sale and was not voidable on the sale.

In the Appeal from Appellate Order No. 244 of 1921 and Civil Revision Case No. 591 of 1921, *Mahomed Ismail v. Satya Chandra Sarkar* (6) and in Civil Rule No. 37 of 1923, *Kumar Narendra Nath Mitter v. Abdul Molla* (5) the same view was taken.

There is clearly, therefore, a conflict of decisions in the Court and for this reason a reference to a Full Bench is necessary.

The point on which the decision of the Full Bench is required is whether a purchaser of the whole or portion of a non-transferable

1926
 JHARU
 MANDAL
 P.
 KHETRA
 MOHAN
 BURA.

(1) (1914) 20 C. W. N. 39.

(2) (1914) I. L. R. 42 Calc. 172 ;

18 C. W. N. 971.

(3) (1912) 17 C. W. N. 163.

(4) (1924) 28 C. W. N. 845.

(5) Unreported.

(6) Unreported.

1926

JHARE
MANDAL
c.
KHETRA
MOHAN
BERA.

occupancy holding, who has not been recognised by the landlord has an interest in the holding, which is voidable on the sale, and so entitled to make a deposit under section 170 (3), Bengal Tenancy Act.

Under rule 1, Chapter VII, High Court Rules, the case is referred for decision to a Full Bench.

MUKERJI J. I agree.

Babu Sitaram Banerjee and *Babu Brijoy Proshad Singh Roy*, for the petitioner. This is a Rule calling upon the landlord to show cause why the interest of a purchaser of a non-transferable occupancy holding should not be considered as one which is voidable on the auction sale of that holding, so that he can make a deposit under section 170(3) of the Bengal Tenancy Act. Twice deposits had already been made in this case by the petitioner, and auction sales stayed on that ground, but this money has not been withdrawn by the landlord according to the finding that has now come. Reads referring judgment of Mr. Justice Cuming.

[PAGE J. What interest has the transferee of a non-transferable occupancy holding?]

It is difficult to say. One of my submissions will be that on claiming to make a deposit the transferee is not claiming any right against the landlord.

[GHOSE J. He may have an interest affected by the sale, though not voidable on the sale. You must give a legal meaning to the word voidable.]

The auction purchaser must first bring a suit against the transferee to evict him as a trespasser.

[GHOSE J. The only question before us is whether such an interest is voidable.]

Reads section 159. Therefore the purchaser gets every interest except a protected interest.

[CHATTERJEA J. But read section 158B to which the limitations in section 159 refer.]

Whether an interest is an encumbrance or not need not be decided in this reference. The definition is not exhaustive.

Reads section 170 (3). This section contemplates a sale anterior to that in sections 158B or 159, this being a power conferred on persons to stay sales.

[GHOSE J. You want to read the word "voidable" in the same way as "person affected by the sale"].

That is so. It is very difficult to define that interest. It may be purely metaphysical.

[GHOSE J. It comes to this that, if the landlord withdraws the money from court or takes it he is recognising the transferee, although he has really refused to recognise him. Sub. cl. (4) applies only to East Bengal, the Legislature of which Province had this in mind when providing that this will not amount to recognition.]

Whether it would amount to recognition or not is doubtful as the law stands, but it should not be taken as amounting to recognition. Under the Code of Civil Procedure that right is conceded to the transferee.

[PAGE J. What do you say is the meaning of the word voidable?]

The auction purchaser has got to evict him.

[PAGE J. That may be evidence of avoidance if the sale is voidable. If it is void, it will be void by operation of law, but if it is voidable something has to be done first.]

He has to bring a suit here.

[GHOSE J. Before he can bring a suit he has to avoid it first.]

That is so.

[PAGE J. What has the purchaser to do to avoid it?]

Nothing.

1926

JHARU
MANDAL
".
KHETRA
MOHAN
BERA.

[PAGE J. Then it is not a voidable interest.

The transferee is in the shoes of the transferor and the interest of both is wiped out.]

[CHATTERJEA J. The word "voidable" has in some cases been taken to mean injuriously affected by the sale. So we will have to examine the earlier cases.]

Four of your Lordships, all except Mr. Justice Page, have previously decided the matter against my contention.

[PAGE J. On the sale this interest is avoided.

Is there anything left to be done after sale to avoid this interest?]

No, but we must not confuse landlord and auction purchaser, who may not be the landlord.

[PAGE J. This interest is not voidable on the sale, but is avoided at the sale, because the purchaser is impotent regarding it.]

That is so. All that I can say is he has to have recourse to law as has been said by the Patna High Court.

[CHATTERJEA J. But that is only to eject him. You had better apply yourself to those three cases.]

[PAGE J. I think the confusion has not arisen over the difficulty of distinguishing between what is void and what is voidable on sale.

On the contrary the confusion appears to have^d arisen in reading "interest voidable on sale" as "affected by sale".]

I now proceed to read Mr. Justice Mullick's dissenting remarks in *Mahadeo Lal v. Langat Singh* (1) as a part of my argument.

This is an interest recognised by the law, and you can't treat him as a trespasser.

[PAGE J. The auction purchaser in the case of such an interest has to do nothing in order to avoid it.]

Reads section 171 of the Bengal Tenancy Act. Reads the judgment in *Radhika Nath Sarkar v. Rakhal Raj Gayen* (1). The other cases proceed upon the assumption that "the interest voidable on the sale" is the same as "affected by the sale" Refers to *Jugal Mohini Dasi v. Srinath Chatterjee* (2) a case under section 170 (3), Bengal Tenancy Act.

[GHOSE J.—Your argument is whether the landlord withdraws the money or not or takes it under protest, his position is the same.]

Yes.

[GHOSE J. How can you make it obligatory on the landlord not to challenge the transaction on future occasions?]

Refers to *Sahdeo Singh v. Kuldip Singh* (3), a judgment of D. Chatterjee and Walmsley JJ., holding that such a person can make a deposit under section 170(3). *Dayamayi's case* (4) has made no change in the existing law except that a transferee is protected. Reads *Ahamadulla Chowdhury v. Prayag Sahu* (5). Mr. Justice N. R. Chatterjee's decision was in a case under Order XXI, rule 89 of the Code of Civil Procedure.

[GHOSE J. The difficulty arises if you say that an interest voidable by the sale is an interest passing on the sale.]

[PAGE J. It is not really correct to say "interest passes on the sale", for at the sale the interest ceases and the tenure passes.]

(1) (1909) 13 C. W. N. 1175.

(2) (1910) 12 C. L. J. 609, 610, 611.

(3) (1914) 18 C. W. N. (notes), c c xix.

(4) (1914) L. L. R. 42 Cal. 172; 18 C. W. N. 971.

(5) (1914) 20 C. W. N. 39, 40.

1926

JHARU
MANDAL
%
KHETRA
MOHAN
BERA.

There may be confusion as to both.

These are all the cases that seem to support my contention. I shall now take the cases against me, and Mr. Justice Ghose's observations in *Barada Prasad Roy Chowdhury v. Foijuddi Halidar* (1) really are *obiter dicta*.

My first submission is that there is no reason why a narrow interpretation should be given to the term "interest voidable upon sale" as meaning an encumbrance when a separate word has been used. My second submission is that these cases lay down that a right by adverse possession is an encumbrance. *Isan Chandra Bakshi v. Safatulla Sikdar* (2), and *Gocool Bagdi v. Debendra Nath Sen* (3). A mortgage has been held to be an incumbrance. *Abdul Rahman Chowdhuri v. Ahmadar Rahman* (4). A right that is a mere delimitation of a tenant's right is placed therefore higher than his transferee's right.

[GHOSE J. That may be a lapse of the Legislature.]

It has been held in the Patna case that if a transferee can deposit under section 170 (3) you will give him the right of being recognised by the landlord, and the landlords' rent will be secured. Whatever your Lordships' decision may be, I ask that this case should be remanded, to see if it be found that the transferee has been in possession for 12 years.

Dr. S. C. Basak and Babu Bhupendra Narain Bera for Opposite Party. Reads *Mahanti Lal Sahu v. Harkissen Jha* (5).

[GHOSE J. You may have cited that case before a Divisional Bench but not before a Full Bench, for we

(1) (1924) 23 C. W. N. 845.

(2) (1921) 26 C. W. N. 703.

(3) (1911) 14 C. L. J. 136.

(4) (1915) I. L. R. 43 Calc. 558 :
19 C. W. N. 1217.

(5) (1914) 19 C. W. N. (notes),
clxxvi.

are not bound by the number of decisions but by the strength of the reasoning.]

[PAGE J. Why do you not go to broad general principles?]

I shall do so, and say that the cases against me have been wrongly decided.

The word "voidable" is a very well known word and shows that the interest continues till something is done by the purchaser.

[GHOSE J. That it is valid until rescinded.]

Exactly so. When the holding passes at the sale there can be no other co-ordinate interest left subsisting. The purchaser of a non-transferable occupancy holding has not any interest that would still be subsisting after the auction sale of his holding. So far as liens, etc., are concerned, these interests are reserved by the statute itself. *Cf.* sections 159, 158-B. So far as the tenure is concerned, there is no question of voidability. I submit therefore that in the case of *Mahadeo Lal v. Langat Singh* (1), the Patna High Court Special Bench took the right view, that the word interest refers to incumbrance mentioned in section 159. If the interest does not subsist there is nothing to avoid.

[CHATTERJEA J. How do you meet those three cases against you?]

Regarding *Radhika Nath Sarkar v. Rakhal Raj Gayen* (2) the word "voidable" there was taken to mean "injuriously affected." That case was not rightly decided, for it was held that a person's interest may be affected by the sale although it had ceased to exist at the time of sale.

[PAGE J. There the interest was such as would be extinguished upon the sale.]

1926
 JHABU
 MANDAL
 v.
 KHETRA
 MOHAN
 BERA.

(1) (1917) 2 Pat. L. J. 457.

(2) (1909) 13 C. W. N. 1175.

1926

JHABU
MANDAL
v.
KHETRA
MOHAN
BERA.

CHATTERJEA
J.

The rights given in section 171 are really similar to the rights given to a party in a salvage claim.

[GHOSE J. The question in JENKINS C. J.'s decision was "was he a volunteer" ?]

And so their Lordships held he had a lien: *Jugal Mohini Dasi v. Srinath Chatterjee* (1).

[PAGE J. The meaning of the words is that it passes the tenure free of the interest. The interest therefore is extinguished.]

The conclusion of their Lordships does not follow from the premises. The interest is gone and there is no question of avoiding it. Regarding *Jotindra Mohun Tagore v. Durgu Dabe* (2); this shows the distinction between "void" and "voidable". Sir Lawrence Jenkins, C. J. refused to follow it as being really an *obiter dictum*. Regarding *Jugal Mohini Dasi v. Srinath Chatterjee* (1), it is directly in point being under section 170 (3), and is based upon the fallacious argument that though the interest is gone it is still voidable.

Regarding adverse possession for 12 years, it was not argued in the lower Court:

Babu Sitaram Bannerjee, in reply, had nothing more to add.

CHATTERJEA J. The question referred to the Full Bench is whether a purchaser of the whole or a portion of a non-transferable occupancy holding who has not been recognised by the landlord has an interest in the holding which is voidable on the sale, and so is entitled to make a deposit under section 170 (3) of the Bengal Tenancy Act.

Section 158-B of the Bengal Tenancy Act provides that where a tenure or holding is sold in execution of

(1) (1910) 12 C. L. J. 609.

(2) (1905) 10 C. W. N. 430, 438.

a decree for arrears of rent (under the provisions of Chapter XIV of the Act) the tenure or holding shall (subject to the provisions of section 22) pass to the purchaser. Section 159 lays down that such purchaser shall take subject to certain interests defined as "protected interests", and with power to annul the interests defined in Chapter XIV as "encumbrances". That being so the holding itself passes to the purchaser subject only to the "protected interests", and with power to avoid encumbrances.

In the present case the petitioner is the unregistered transferee of the holding from opposite parties Nos. 2 and 3, who are recorded as tenants of the holding in the office of the landlord, the opposite party No. 1. The opposite parties Nos. 2 and 3, the original tenants, represent (so far as the landlord is concerned) the ownership of the holding. A sale held in execution of a rent decree under the provisions of Chapter XIV of the Act would pass to the purchaser the holding itself free of any interest of the unregistered transferee. That being so, the question arises whether the interest of the petitioner can be said to be an "interest which is voidable on the sale". Now, if the interest is extinguished by the sale and ceases to exist, can it be said that the interest is voidable on the sale? There is no doubt that the petitioner had acquired (except against the landlord) an interest in the holding. But if such interest did not subsist after the sale, it is difficult to see how any question can arise of avoiding such interest.

Apart from the authorities on the point, it appears to me that the words "interest voidable on the sale" refer to interests coming within the description of "encumbrances", which unless steps are taken to avoid them, subsist after the sale, and the interest of a transferee of the holding itself from the tenant is not

1926

JHARK
MANDAL
E.
KHETRA
MOHAN
BERA.

CHATTERJEE
J.

1926

JHARU
MANDAL
v.
KHETRA
MOHAN
BERA.

CHATTERJEA
J.

such an interest. Section 161 of the Act defines "encumbrances", and section 167 lays down how such encumbrances can be annulled by a purchaser having power to annul the same. In the case of *Abdul Rahman Chowdhuri v. Ahmada Rahman* (1) it was held that the interest of an unregistered purchaser of a portion of a patni tenure is not an encumbrance within the meaning of section 161 of the Act, and, so far as the present question is concerned, there is no difference between a patni tenure and a holding. And if a portion of a tenure or holding is not an incumbrance, the entire tenure or holding cannot be an incumbrance. Apart from the decided cases, therefore, it appears that the interest of an unregistered transferee, is not an interest "voidable on the sale".

It has, however, been held in some cases that it is an interest voidable on the sale. In *Rudhika Nath Sarkar v. Rakhal Raj Gayen* (2) (a case under section 171 of the Bengal Tenancy Act) the question was whether an unrecorded purchaser of a share in a darpatni tenure had an interest in the tenure which was voidable upon a sale in execution of a decree for rent obtained by the patnidar against the recorded tenants of the darpatni and, as such, could apply under section 171 of the Bengal Tenancy Act. The learned Judges observed as follows: "There can be no question that the predecessor-in-interest of the present appellants was a person who had an interest in the tenure, there can be no question also that the interest was such as would be voidable upon the sale because the patnidar was entitled in execution of the decree obtained against the recorded tenants of the darpatni to sell the entire tenure." The reason.

(1) (1915) I. L. R. 43 Cal. 558. (2) (1909) 13 C. W. N. 1175.

therefore, why the learned Judges held that the interest would be voidable on the sale was that the entire tenure would be sold in execution of the rent decree obtained against the recorded tenants. That shows that the learned Judges were of opinion that an interest which would be injuriously affected by the sale is an interest voidable on the sale. But as already pointed out, the expression "voidable on the sale" indicates the subsistence of some interest which has to be avoided after the sale. The case of *Jugal Mohini Dasi v. Srinath Chatterjee* (1) was a case under section 170, clause (3) of the Bengal Tenancy Act. But it proceeds upon the same reasoning. These were followed in the case of *Tarak Das Pal Choudhury v. Harish Chandra Banerjee* (2), where it was held that "a purchaser of a holding, who has not been recognised as a tenant by the landlords, has an interest in the holding which is voidable on a sale held in execution of a decree for rent against a registered tenant within the meaning of clause (3) of section 170 of the Bengal Tenancy Act". The learned Judges pointed out that the expression used by the Legislature is "interest voidable on the sale", and not "encumbrance voidable on the sale" under the provision of the Chapter XIV of the Bengal Tenancy Act. The language used by the Legislature is comprehensive and should not be narrowly construed in view of the obvious object of this provision. The case of *Ahamadulla Chowdhury v. Prayag Sahu* (3) merely followed the above case.

The whole question turns upon the meaning to be attached to the expression "voidable on the sale", whether it means an interest injuriously affected by

1926
 JHARI
 MANDAL
 P.
 KHETRA
 MOHAN
 BERA
 CHATTERJEE
 J.

(1) (1910) 12 C. L. J. 609

(2) (1912) 17 C. W. N. 163.

(3) (1914) 20 C. W. N. 39.

1926

JHARU
MANDAL
v.
KHETRA
MOHAN
BERA.

CHATTERJEE
J.

the sale, or an interest which subsists and which has to be avoided after the sale. The opinions of the learned Judges who decided the above cases are entitled to the highest respect, but it seems to me that the distinction pointed out above was not kept in view in those cases.

It is contended by the learned vakil for the petitioner that some steps have to be taken by the purchaser at a sale if the unregistered transferee does not give up possession of the holding, and, therefore, it is a case of avoiding the interest on the sale. But if that contention is well founded, it may be applied with equal force to the case of a trespasser, who certainly has no interest voidable on the sale.

There are a large number of decisions of our Court and a decision of the Special Bench of the Patna High Court [*Mahadeo Lal v. Langat Singh* (1)] supporting the view I have taken. They are all noted in Sen's Bengal Tenancy Act, 5th edition, at pages 797-798. It is unnecessary to discuss them.

For these reasons, I think that the question referred to the Full Bench must be answered in the negative. The result, therefore, is that the Rule is discharged with costs.

CUMING J. I agree. I have already stated my reasons in the Letter of Reference, and I do not think that I should take up the time of the Court by reiterating them.

B.-B. GHOSE J. I agree. My view was already expressed in the case of *Barada Prasad Roy Chowdhury v. Foijuddi Haldar* (2), and the discussion that I have heard to-day confirms me in my opinion. The only thing that I may add is that where an interest is extinguished on a sale, nothing remains

(1) (1917) 2 Pat. L. J. 457.

(2) (1924) 28 C. W. N. 845.

afterwards which need be avoided. The interest, therefore, of the petitioner cannot be called an "interest voidable on the sale".

PANTON J. I agree in the judgment delivered by my learned brother Mr. Justice Chatterjea.

PAGE J. I agree. The words "interest voidable on the sale" in section 170 (3) of the Bengal Tenancy Act connote that such interest may or may not be avoided by the auction purchaser at his election. But whether the interest in question will cease on the sale or subsist thereafter is a matter over which the purchaser has no control. He can neither make the holding transferable by affirmance nor avoid the transfer by disclaimer. It seems to me, therefore, that it is not quite correct to say that the petitioner's interest would pass on the sale. What really would happen is that under the sale the title to the holding would pass to the purchaser free from such interest which would be extinguished on the sale taking place.

Rules discharged.

G. S.

1926
 JHARU
 MANDEL
 P.
 KHETRA
 MOHAN
 BERA.