APPELLATE CIVIL.

Before Mukerji and Guha JJ.

GOPAL LAL CHANDRA

v.

AMULYAKUMAR SUR.*

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Aug. 12, 13, 14, 26.

Will—Executors—Probate, when takes effect—Vesting of—Collector, functions of—Encumbrance—Notice—Knowledge—Bengal Tenancy Act (VIII of 1885), ss. 148 (h), 167—Indian Succession Act (XXXIX of 1925), s. 187—Hindu Wills Act (XXI of 1870).

The view adopted by the Calcutta High Court in respect of wills after 1870 is that, on the executors obtaining probate, they immediately become vested by force of statute with the whole of the estate, which belonged to the testator at the time of his death : or, in other words, that the vesting takes place on the taking of probate, but relates back to the time of the testator's death and to the estate which then belonged to him.

Administrator-General of Bengal v. *Premlal Mullick* (1), *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (2) and *Kurrutulain Bahadur* v. *Nuzbat-ud-dowla Abbas Hossein Khan* (3) referred to.

Katreddi Ramiah v. *Kadiyala Venkatasubbamma* (4) not followed.

If an executor institutes a suit in anticipation of probate and subsequently obtains probate, the requirements of section 187 of the Succession Act are satisfied for the purposes of a decree to be obtained.

Chandra Kishore Roy v. *Prasanna Kumari Dasi* (5) referred to.

It is well settled that the legal heir of a testator in possession of his general estate can maintain a suit for the benefit of the estate so long as any other claimant does not establish his right to the same under the will.

Basunta Kumar Chuckerbutty v. *Gopal Chunder Das* (6) referred to.

Forbes v. *Maharaj Bahadur Singh* (7) distinguished.

Chhatrapat Singh v. *Gopi Chand Bothra* (8) approved.

Inadequacy of price is hardly a consideration, which comes in when the question is what is the legal consequence that should have followed from the sale. Irregularities and errors, with regard only to the forms used and the statement whether the sale was or was not free from encumbrances, cannot affect the statutory consequences of the sale that was held.

*Appeal from Original Decree, No. 400 of 1928, against the decree of Kiranchandra Mitra, Fourth Subordinate Judge of 24-Parganas, dated June 15, 1928.

(1) (1895) I. L. R. 22 Calc. 788 ; L. R. 22 I. A. 107.
(2) (1897) I. L. R. 25 Calc. 103.
(3) (1905) I. L. R. 33 Calc. 116 ; L. R. 32 I. A. 244.
(4) (1925) I. L. R. 49 Mad. 261.
(5) (1910) I. L. R. 38 Calc. 327 ; L. R. 38 I. A. 7.
(6) (1914) 18 C. W. N. 1136.
(7) (1914) I. L. R. 41 Calc. 926 ; L. R. 41 I. A. 91.
(8) 1899) I. L. R. 26 Calc. 750.

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The decision in *Nritya Gopal Hazra* v. *Golam Rasool* (1) only lays down that the Collector's function, in the matter of revival of a dismissed application, to issue notices under section 167 of the Bengal Tenancy Act, is that of a ministerial officer. There is nothing in the decision suggesting that the Collector may not change his mind or that he may not subsequently do what he had declined to do before. The word "revival" may not be a happy word to use in this connection.

Section 167 speaks of "notice" and not "knowledge" and so requires some intimation of a definite character as regards the nature and the particulars of the encumbrance to serve as a basis, on which the starting point of the period contemplated by the section may rest.

There is no form of notice prescribed by the statute. Knowledge or intimation may sometimes be sufficient to impute notice, if the circumstances are such as may reasonably require the person, who has such knowledge or intimation, to enquire about the particulars.

Yusuf Gazi v. *Asmat Mollah* (2) referred to.

The landlords of a *dar mourasi mokarrari* lease had purchased the property in execution of a decree for arrears of rent against the lessee, whose mortgagee thereupon brought a mortgage suit making the said landlords, parties thereto. The landlords alleged that they had no knowledge or notice of the said encumbrances prior to the sale, as alleged by the mortgagee, that the rent sale was held in execution of a decree for rent in accordance with the provisions of the Bengal Tenancy Act with power to the purchasers to avoid all encumbrances, that they only got notice of the encumbrances when they received notice through court in connection with the mortgage suit and they thereupon annulled the encumbrance by proceeding under section 167 of that Act.

Held that the decree, in execution of which the purchase was made, was a decree for rent contemplated by the Bengal Tenancy Act, and the sale in execution thereof had the effect of a rent sale thereunder.

Held, further, that the mortgagee was entitled only to a money decree against his mortgagor, the lessee ; but to no relief against the landlord purchasers of that property in execution of their rent decree, the mortgage (encumbrance) having been annulled by them according to law, as it was not a registered and notified encumbrance and as no copy of the instrument had been served on the entire body of landlords.

FIRST APPEAL by the plaintiff.

The facts of the case and relevant portions of arguments of counsel appear fully in the judgment.

Brajalal Chakrabarti, *Manmathanath Ray* and *Krishnalal Banerji* for the appellant.

Rupendrakumar Mitra and *Kapilendrakrishna Deb* for the respondent.

Cur. adv. vult.

(1) (1900) I. L. R. 28 Calc. 180. (2) (1912) 17 C. W. N. 440.

MUKERJI AND GUHA JJ. The plaintiff instituted this suit for enforcement of a mortgage bond in his favour, of which the consideration was made up of his dues upon 7 promissory notes and a cash amount of Rs. 8,000 and odd, and upon four subsequent mortgages in his favour on deposit of title deeds. The moneys were taken and the bonds were executed by one Taraknath Banerji, the defendant No. 1 in the suit, who held the mortgaged properties under the defendants Nos. 3 to 6 under a *dar mourasi mokarrari* lease. The latter purchased the properties in execution of a decree for arrears of rent against the defendant No. 1. The plaintiff's case was that the said purchase was made with knowledge and notice of the encumbrances in plaintiff's favour and that in law and equity the purchasers were bound to pay up the plaintiff's dues. He prayed for a preliminary decree for sale with liberty reserved to apply for a personal decree for the balance.

The defendant No. 2 disclaimed all interest in the mortgaged properties. He, as well as the other defendants, namely, Nos. 3 to 6, alleged that they had no knowledge or notice of the encumbrances prior to the sale, that the sale was held in execution of a decree for rent in accordance with the provisions of the Bengal Tenancy Act with power to the purchasers to avoid all encumbrances, that they got notice of the encumbrances, when they received the notices through court in connection with the present suit and they, thereupon, annulled the encumbrances by proceeding under section 167 of the Act.

The Subordinate Judge has made a decree for money in plaintiff's favour against the defendant No. 1 and has dismissed the suit against the defendants Nos. 2 to 6. The plaintiff has appealed.

The first contention of the appellant is that the decree, in execution of which the defendants Nos. 3 to 6 made the purchase, was not a decree for rent

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contemplated by the Bengal Tenancy Act and the sale in execution also had not the effect of a rent sale thereunder.

This contention is pressed on several grounds, which will be noticed presently. But before doing so it will be convenient to state a few facts.

The suit for rent was instituted by five persons, namely, (1) Praphullakumar, (2) Amulyakumar, a minor son of one Shashibhooshan represented by his mother Manmohini, (3) Anathnath, (4) Sarojekumar and (5) Prasannakumar. It was stated in the plaint that the share of Nos. 1 and 2 was 10*as.*, of No. 3—2 *as.* 13 *gds.* 1 *k.* 1 *kr.*, of No. 4—13 *gds.* 1 *k.* 1 *kr.*, and of No. 5—2 *as.* 13 *gds.* 1 *k.* 1 *kr.* The prayer was for recovery of rents and cesses for the years 1324 to 1327 B. S. with damages and interest. It was instituted on the 14th April, 1921. Shashibhooshan had left a will, dated the 10th October, 1918, which was pending probate at the date of the suit. By the will, Praphullakumar, Manmohini and Shashibhooshan's son-in-law, Satish, were appointed executors: the first two being also appointed guardians of the person of the minor, Amulyakumar. Several bequests were made in favour of different persons, the properties, with which this suit is concerned, being bequeathed to Amulyakumar and it being provided that the executors should deliver them to him on his completing the age of twenty-one years. Probate was issued in favour of the two executors, Praphullakumar and Manmohini on the 28th April, 1921. On the 7th September, 1921, the decree was passed in the suit for rent. The plaintiffs in the suit named above, as decree-holders, applied for execution. The sale was held on the 19th November, 1923, they themselves being purchasers. They obtained a sale-certificate in their own names on the 21st December, 1923, and they obtained delivery of possession of the purchased properties on the 10th January, 1924.

It has been argued that, as the properties had vested in the executors under the will, there was no

representation in respect of the 10 *annas* share of Shashibhooshan in the properties, since not the executors but the plaintiffs Nos. 1 and 2, that is to say, Praphulla in his personal capacity and Amulyakumar as represented by his guardian Manmohini, and not Manmohini as executrix, had sued so far as that share is concerned. This contention is pressed on the strength of the decisions of the Judicial Committee in the case of *S. M. K. R. Meyappa Chetty* v. *S. N. Supramanian Chetty* (1). In that case their Lordships observed: "It is quite clear that an executor derives "his title and authority from the will of his testator "and not from any grant of probate. The personal "property of the testator, including all rights of "action, vests in him upon the testator's death, and "the consequence is that he can institute an action in "the character of executor before he proves the will. "He cannot, it is true, obtain a decree before probate, "but this is not because his title depends on probate, "but because the production of the probate is the only "way in which, by the rules of the court, he is "allowed to prove his title." Their Lordships were there relying on the English law on the point and referred to the cases of *Thompson* v. *Reynolds* (2) and *Woolley* v. *Clark* (3). The view adopted by this Court in respect of wills after 1870 is that, on the executors obtaining probate, they immediately become vested by force of statute with the whole of the estate, which belonged to the testator at the time of his death: or, in other words, that the vesting takes place on the taking of probate, but relates back to the time of the testator's death and to the estate which then belonged to him. [See *Administrator-General of Bengal* v. *Premlal Mullick* (4), *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (5) and *Kurrutulain Bahadur* v. *Nuzbat-ud-dowla Abbas Hossein Khan* (6).] It has been pointed out to us

(1) (1916) L. R. 43 I. A. 113.
(2) (1827) 3 C. & P. 123, 172; E. R. 352.
(3) (1822) 5 B. & Ald. 744, 106; E. R. 1363.
(4) (1895) I. L. R. 22 Calc. 788 (796); L. R. 22 I. A. 107 (115).
(5) (1897) I. L. R. 25 Calc. 103, 106.
(6) (1905) I. L. R. 33 Calc. 116; L. R. 32 I. A. 244.

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that a different view has been taken in other courts [*e.g.*, in the case in *Katreddi Ramiah* v. *Kadiyala Venkatasubbamma* (1)], but we should be content to adopt the view which this Court has taken. It is true that, if an executor institutes a suit in anticipation of probate and subsequently obtains probate, the requirements of section 187 of the Succession Act are satisfied for the purposes of a decree to be obtained [*Chandra Kishore Roy* v. *Prasanna Kumari Dasi* (2)]. But at the same time, it is well settled that the legal heir of a testator in possession of his general estate can maintain a suit for the benefit of the estate so long as any other claimant does not establish his right to the same under the will. [See the cases referred to in *Basunta Kumar Chuckerbutty* v. *Gopal Chunder Das* (3)]. The contention of the appellant, therefore, cannot be upheld.

It has next been contended that, even if the suit was properly constituted at the date it was laid, by the grant of the probate, which Praphulla and Manmohini obtained, Shashibhooshan's 10 *annas* share vested in them as executors, and neither at the date of the decree nor at the date of the application for execution the decree-holders had any rights as landlords, and so, on the authority of *Forbes* v. *Maharaj Bahadur Singh* (4), the execution was not one in which the tenure could pass. We have carefully perused this decision and we have come to the conclusion that it is not possible to regard the decree-holders as having parted with or assigned over their interests as landlords in any way, so as to be ex-landlords and not existing landlords within the meaning of the decision. Ameer Ali J., in the case of *Chhatrapat Singh* v. *Gopi Chand Bothra* (5), observed thus:—"From one point "of view the trustee is an assignee, inasmuch as the "property is conveyed to him as has been done in this "case. But to my mind the legislature never

(1) (1925) I. L. R. 49 Mad. 261.
(2) (1910) I. L. R. 38 Calc. 327 ; L. R. 38 I. A. 7.
(3) (1914) 18 C. W. N. 1136.
(4) (1914) I. L. R. 41 Calc. 926 ; L. R. 41 I. A. 91.
(5) (1899) I. L. R. 26 Calc. 751, 757.

"intended to include in the word 'assignee' used in "clause (*h*)" (meaning that clause of section 148 of the Act) "persons in whom a legal estate was vested by "an act of the owner, but had no independent interest "in the property." We entirely agree in this view. This contention also must be overruled.

It has been argued that the sale was held subject to encumbrances and this should be inferred from the fact that the price which the properties fetched was only Rs. 5,000, whereas after purchase it was let out by the purchasers in 1926 for a *selâmi* of Rs. 3.000 and at an annual rent of Rs. 3,000. The price, for which the properties were purchased, seems to have been very low. But inadequacy of the price is hardly a consideration, which comes in when the question is what is the legal consequence that should have followed from the sale. In one copy of the proclamation (Exhibit H) filed on behalf of the defendants the words "sale will be free from incumbrance" appears, while in another copy (Exhibit 14), which is said to be the original, the words "sale will be subject to the "encumbrance" appears, and the forms of these proclamations, that were used, were inapposite, inasmuch as, instead of forms under section 162, clause (*a*), those under clause (*b*) were used. These irregularities and errors cannot, in our opinion, affect the statutory consequences of the sale that was held. Both in Exhibit 14 and in Exhibit H it was distinctly stated at more places than one that the sale was to be held with power to annul encumbrances.

The next question raised is whether the Collector had jurisdiction to issue the notices under section 167 of the Bengal Tenancy Act. The sale, as already stated, took place on the 19th November, 1923. The application for serving the notices under section 167 of the Act was made on the 11th June, 1926. This application was dismissed by the Collector on the 15th June, 1926, on the ground that it had been made beyond one year from the date of the sale. There was then an application for revival of the case on the

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allegation, supported by an affidavit of the *nâib* of the defendants Nos. 2 to 6, that they had notice of the encumbrance only on the 11th May, 1926. On this application, the case was revived and notices were ordered to issue. It has been argued that the Collector's order of revival was without jurisdiction, because what he had to do in this connection was nothing judicial and reliance for this proposition has been placed on the decision in the case of *Nritya Gopal Hazra* v. *Golam Rasool* (1). The decision only lays down that the Collector's function in this matter is that of a ministerial officer. There is nothing in the decision suggesting that the Collector may not change his mind or that he may not subsequently do what he had declined to do before. The word "revival" may not have been a happy word to use in this connection. Our attention has been drawn to the allegation in the petition and the affidavit aforesaid that the defendants Nos. 2 to 6 received notice of the incumbrance on the 11th May, 1926, and that the correct date should be the 29th April, 1926. The error is unfortunate, but we cannot regard it as intentionally made.

Then it has been argued that the defendants Nos. 2 to 6 had notice of the incumbrance far beyond one year from the date of the application made for issuing the notices under section 167 of the Act. Their case was that it was on the 11th May, 1926 (or rather the 29th April, 1926, to be correct), that they got notice of the incumbrance when they received the registered post cards issued by the court informing them of the present suit. The plaintiff's case on the other hand was that on at least four previous occasions they had such notice or knowledge of the encumbrance. The plaintiff has adduced some oral evidence and has also relied upon some circumstances to establish this position. We have examined this evidence with care and we are quite unable to believe it: we are decidedly of opinion that it was untrue in every material respect,

(1) (1900) I. L. R. 28 Calc. 180.

and it is in conflict with what some documentary evidence, that there is on the record, unmistakably proves. The circumstances, on which the appellant relies, are at best dubious and lead to no definite conclusion. It is possible that the wholesale ignorance pleaded on behalf of the defendants is not true, but the possibility is more or less a mere supposition and is not based on any tangible proof. In the circumstances we think it is reasonable to hold that the defendants are entitled to rely on the notices that they received through the court in respect of the suit as giving them first notice of the encumbrance.

An argument has been addressed to us based on the supposition that two of the defendants had much earlier notice of the encumbrance. It was based upon a passage in the judgment of the court below, which is worded thus :—

> It is also very likely that, during the years 1920 to 1924, the plaintiff would tell two out of the five landlords about his mortgage lien, but this will not help the plaintiff's cause in the present case, when it is admitted that no other landlord, except Saroje Sur and Praphulla Sur, was apprised of the mortgage lien. The Bengal Tenancy Act does not encourage this vague talk about a mortgage lien and it has been provided that, in case of registered and notified encumbrances, a copy of the instrument must be served on the entire body of landlords. A purchaser in a rent sale has got the right of annulling all encumbrances excepting the notified and registered encumbrances and the plaintiff cannot claim any benefit for himself unless he brings himself within the class of registered and notified encumbrances.

It has been argued that if Saroje and Praphulla had notice of the encumbrance, the other decree-holders defendants, who were members of the same joint family as they and to whom they or one of them stood in the position of *kartâ*, were affected by that notice. The answer to this contention is that the fact that Saroje and Praphulla had knowledge is only a possibility, as we have already stated, and is not a fact proved in the case. Nextly, the answer is that section 167 speaks of "notice" and not "knowledge" and so requires some intimation of a definite character as regards the nature and the particulars of the encumbrance to serve as a basis, on which the starting point of the period contemplated by the section may rest. It is true that

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there is no form of notice prescribed by the statute. It is also true that it has been held that knowledge or intimation may sometimes be sufficient to impute notice, if the circumstances are such as may reasonably require the person, who has such knowledge or intimation to enquire about the particulars [*Yusuf Gazi* v. *Asmat Mollah* (1)]. But we can find nothing on which it may be held that there was such a duty cast on Praphulla or Saroje in the present case. Nor do we see how knowledge, if any, on their part may be regarded as knowledge of the others on the footing of their being members of one family. There are no materials, on which we can hold that Praphulla and Saroje or either of them acted as *kartâs*, while on the other hand the plaintiff's own evidence is that on one occasion, when he and the mortgagor saw Praphulla and Saroje make entreaties of them for returning the properties to the mortgagor on taking some money, Praphulla and Saroje replied that "they would "consult their co-sharers, if it was possible to give "back the properties after taking some money."

On the findings we have arrived at no other question need be considered. The appeal, in our opinion, ought not to succeed. It is, accordingly, dismissed with costs to the appearing respondents.

Appeal dismissed.

G. S.

(1) (1912) 17 C. W. N. 440.