MACPHERSON, J.—I agree and I would add a few observations. The many headed objection of the respondents to the substitution of the appellants was in all respects groundless and nothing short of an abuse. Their object was to defer as long as possible execution of a decree on which no interest is payable. A Court should be astute to prevent such mala fide delaying tactics from attaining any measure of success. Then if the respondents, that is, the judgment-debtors and the attaching decree-holders are, as is suggested, in league, it is clearly open to the Court to allow appellants to execute the decree on terms; even terms will be unnecessary if the suggestion that the appellants pay off the decree of the attaching decree-holders is given effect to.

Order set aside.

APPELLATE CIVIL.

Before Das and Allanson, JJ.

HITNARAYAN SINGH

v.

RAMBARAI RAI.*

1928.

April, 20.

Rent Suit—real heir of deceased tenant not impleaded—sale in execution of decree, whether holding passes—Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 167—*Notice, service of—onus probandi.*

Where the defendant, in a suit for the rent of a holding, is not in fact the heir of the deceased tenant, or does not completely represent the holding, the decree obtained in the suit is not a "rent" decree and, consequently, a sale of the holding in execution of the decree does not pass the holding to the auction-purchaser.

*Appeal from Original Decree no. 192 of 1924, from a decision of Babu Tulsi Das Mukherji, Subordinate Judge of Shahabad, dated the 14th August, 1924.

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Obita dicta:

As section 167 of the Bengal Tenancy Act, 1885, confers upon a landlord the right to put an end to an incumbrance without having to pay first, the section must be construed strictly.

Therefore an incumbrance is not annulled unless the notice required by section 167 to be served on the incumbrancer is proved to have been so served in the prescribed manner.

An entry in an order-sheet in a proceeding before the Collector under section 167, that notice has been served, is not binding on a civil court in which the service is in issue.

Radhey Koer v. *Ajodhya Das* (1), *Prafulla Nath Tagore* v. *Shital Khan* (2), *Chhatardhari Lal* v. *Biranchi Lal* (3) and *Krishna Kamini Dasi* v. *Kumar Pratapendra Chandra Pandey* (4), followed.

Nand Kishore Chaudhuri v. *Maharajadhiraja Sir Rameshwar Singh Bahadur* (5) and *Mahboob Momin* v. *Bhagwati Prasad* (6), referred to.

Section 114(*c*) of the Evidence Act, 1872, does not give rise to a presumption that an official act has been done, but that an official act which has been done has been regularly done.

Narendra Lal Khan v. *Jogi Hari* (7), followed.

Appeal by the defendants.

The facts of the case material to this report are stated in the order of Das, J.

Hasan Imam (with him *S. M. Gupta*, *S. N. Bose*, *S. M. Mullick* and *Syed Mehdi Imam*), for the appellants.

Sir Sultan Ahmad (with him *Siveshar Dayal*), for the respondents.

(1) (1908) 7 Cal. L. J. 262.
(2) (1917-18) 22 Cal. W. N. 788.
(3) (1911) 9 Ind. Cas. 248.
(4) (1925) 85 Ind. Cas. 790.
(5) (1924) 78 Ind. Cas. 476.
(6) (1917) 39 Ind. Cas. 943.
(7) (1905) I. L. R. 32 Cal. 1107.

DAS, J.—This was a suit instituted by Rambarai Rai the principal respondent in this Court under the following circumstances.

One Autar Rai had a block of land, 27 bighas 15 kathas in area by survey measurement, in kasht rights. Autar Rai died sometime in 1920. On the 30th September, 1920, Hitnarain Singh, the landlord, (the principal defendant in the action and the appellant before us) instituted a rent suit against Sri Krishna Rai for recovery of rent due in respect of the raiyati lands once in the possession of Autar Rai. On the 20th December, 1920, he recovered a decree. He proceeded to execute his decree in due course of law and on the 13th June, 1921, he purchased those raiyati lands. On the 8th April, 1922, he obtained delivery of possession. Proceedings under section 144 of the Criminal Procedure Code followed; but these were all decided in favour of Hitnarain Singh. The plaintiff claims to be a mortgagee in possession, and he traces his title in the following way.

According to him, Autar Rai made over possession of the disputed lands to one Ganpat under certain usufructuary mortgages executed by Autar Rai in favour of Ganpat. These usufructuary mortgages were executed on the 11th March, 1892, 5th June, 1892, and 18th December, 1905, respectively. According to the plaintiff, Ganpat transferred his right, under the usufructuary mortgages, to Gunendra Prasad on the 9th August, 1911, and Gunendra Prasad sold his interest in those mortgages to the plaintiff on the 26th June, 1922. The plaintiff contends that, as the transferee of the original usufructuary mortgagee he is entitled to be restored to possession of the disputed lands.

It appears that Hitnarain Singh took certain proceedings for the annulment of the incumbrance under the provision of section 167 of the Bengal Tenancy Act. With regard to this, the plaintiff

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contends that the notices were not served in accordance with law and that indeed there is no evidence that they were at all served, and he insists that the proceeding taken under section 167 of the Bengal Tenancy Act did not operate so as to extinguish his title as an usufructuary mortgagee.

But the principal point made by the plaintiff in this case is that the rent suit instituted by Hitnarain Singh against Sri Krishna Rai was instituted against a wrong party inasmuch as Hira Rai and not Sri Krishna Rai was the heir of Autar Rai.

According to the plaintiff the decree obtained by Hitnarain in his suit against Sri Krishna cannot be regarded as a rent decree.

The first question to be determined in this appeal is whether the plaintiff has established a title to entitle him to the relief claimed. It was contended before us by Mr. Hasan Imam that the transactions between Autar Rai and Ganpat were farzi in character and that consideration was not paid in respect of those transactions by Ganpat to Autar Rai and that possession of the subject-matter of those usufructuary mortgages was not made over by Autar to Ganpat.

The decision of the learned Subordinate Judge on this point is far too favourable to the defendant.

* * * *

The learned Subordinate Judge is hypercritical in regard to the evidence which was adduced by the plaintiff in support of his case as to the possession of Ganpat. It is, however, not necessary for me to go into all these matters because it is obvious that the learned Subordinate Judge ignored the most important evidence as to Ganpat's possession. The record-of-rights records Ganpat as in possession of all the disputed lands. Now if that be so, the onus was clearly upon the defendants to show that possession was not obtained by Ganpat. There is no satisfactory evidence in the record of this suit to show that

the entry in the record-of-rights is erroneous. In my opinion, having regard to the entry in the record-of-rights and an entire absence of any evidence on this point on the other side, the learned Subordinate Judge should have held that the possession of Ganpat was established beyond reasonable doubt. I have already pointed out that the learned Subordinate Judge has found as a fact that, so far as Gunendra is concerned, he obtained possession in 1920. But I may point out that, if Ganpat's possession is established, there is no reason to take the view that Gunendra did not obtain possession of the disputed lands on the 9th August, 1911. On a consideration of the evidence in the case, and having regard to the entry in the record-of-rights, I hold that it has been established that Ganpat obtained possession of the disputed lands on the execution of the usufructuary mortgage bonds in his favour and that Gunendra obtained possession thereof on the 26th August, 1920. If this be so, it is impossible to contend that the transactions upon which the plaintiff relies were farzi in character.

The plaintiff's title being established, the question arises whether he is entitled to recover possession of the disputed lands. The defendants contest the position taken up by the plaintiff on the ground that he obtained a rent decree which was operative as against the raiyati lands which were once in the possession of Autar Rai and that he has annulled the incumbrance existing on those lands. Now on this point, the plaintiff's case is that Hira Rai and not Sri Krishna Rai was the heir of Autar Rai. On the other hand the defendant contends that Sri Krishna Rai and his brother Swarath were the heirs of Autar Rai.

Now the evidence on the question of heirship is very meagre; and it, therefore, becomes important to consider the question of onus of proof. As I have said, the plaintiff has established his title in this case. He is therefore entitled to recover possession of the

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disputed lands if nothing else is established. In other words, if no evidence is adduced on behalf of the defendant, the plaintiff, having established his title, would undoubtedly be entitled to a decree for recovery of possession of the disputed lands. It seems to me that the onus is clearly upon the defendant to establish that he obtained a rent decree binding on the holding and that he has extinguished the title of the plaintiff by taking the proper procedure indicated in section 167 of the Bengal Tenancy Act.

It becomes necessary for me, therefore, to consider whether the defendant has obtained a decree binding upon the raiyati lands which were once in the possession of Autar Rai. The case of the defendant is that Sri Krishna and his brother Swarath were the heirs of Autar and that Sri Krishna, upon the death of Autar, took possession of the disputed lands, applied for mutation of his name in the landlord's sharista, was recognised as a raiyat, and was then proceeded against in the rent suit to which I have already referred.

I will first consider the question whether there is any evidence to establish that Sri Krishna is the heir of Autar Rai.

* * * *

There is, in my opinion, not an atom of evidence in support of the defendant's case that Sri Krishna was the heir of Autar Rai.

I will shortly deal with the question whether the plaintiff has established that Hira Rai is the heir of Autar Rai. The learned Subordinate Judge has found on this point in favour of the plaintiff; but Mr. Hasan Imam contends before us that the decision of the learned Subordinate Judge on this point is erroneous. It must be conceded that the oral evidence adduced on behalf of the plaintiff on this point stands on no better footing than that adduced on behalf of

the defendant. In other words there is no oral evidence of which we need take notice in support of the plaintiff's case that Hira Rai is the heir of Autar Rai. But there is one document which certainly constitutes very strong evidence in support of the plaintiff's case. That is a will which was undoubtedly executed by Autar Rai. This will was executed by Autar Rai on the 17th August, 1907. The plaintiff himself was an attesting witness to this will and his evidence completely proves the due execution of the will by Autar Rai. It is a registered document and no suspicion as to its genuineness can possibly arise. In this will Autar Rai says as follows:—

"I have only two nephews, one named Hira Rai and the other named Ram Khelawan Rai and both the nephews attend upon me and obey my orders and I also hope that after my death both the nephews will fully perform the Saradh and other ceremonies."

Now there is a clear assertion by Autar Rai that he had only two nephews Hira Rai and Ram Khelawan Rai. It may be mentioned that Ram Khelawan as a matter of fact predeceased Autar Rai. There is, in my opinion, no reason to doubt the accuracy of the statement made by Autar Rai in his will. It is quite true that Hira Rai cannot claim a title by virtue of this will as probate of this will was not taken, but the statement of Autar Rai in his will is good evidence under section 32 of the Evidence Act.

Now, in the whole record of this case, this is the only piece of admissible evidence on the question of heirship, and I can see no reason at all for discrediting the statement of Autar Rai in the will. In my opinion the plaintiff has established, on the terms of the will of Autar Rai dated the 27th August, 1907, that Hira Rai was the nephew of Autar Rai and that, as there is no evidence to the effect that there is any nearer heir of Autar Rai, we must hold that the plaintiff has established that Hira Rai was the heir of Autar Rai. If this be so, then it is obvious that the decree which was obtained by Hitnarain Singh

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as against Sri Krishna Rai cannot be regarded as a rent decree so as to have any effect upon the title of the plaintiff. It is quite true that Hitnarain Singh has purchased the disputed lands in execution of a decree obtained against one who in no sense represented Autar Rai in that litigation, but, to quote the expression used by the plaintiff in the plaint, all that has been purchased by Hitnarain Singh is a "bag of wind." In any case the decree was not a rent decree and the sale pursuant to that decree did not operate to convey the holdings in question to Hitnarain Singh. That being so, the plaintiff is clearly entitled to succeed in this action.

I should mention that, even if we were to accept the case of the defendant that Sri Krishna was one of the heirs of Autar Rai, we must still hold that the decree obtained by the landlord cannot be regarded as a rent decree. It is the defendant's own case that Swarath and Sri Krishna were two brothers, and therefore co-heirs of Autar Rai. Swarath was not a party to the rent suit. It follows that the holdings in question were not completely represented in that suit, and that, therefore, the decree obtained by the landlord must be regarded as a money decree and not as a rent decree. It is the case of the defendant that Sri Krishna obtained possession of the holdings, applied for registration of his name, and was recognised by the landlord as the sole tenant. But such recognition could not extinguish the title of Swarath. Apart from anything else, however, the defendant's case on this point is manifestly false. The record-of-right shows that both Ganpat and Gunendra obtained possession of the raiyati lands in the lifetime of Autar Rai, and it would be absurd to hold that Sri Krishna got possession of these lands on the death of Autar Rai. There is no documentary evidence in support of the defendant's case that Sri Krishna applied for registration of his name in the landlord's office or that his name was registered in accordance with that application. The defendant no

doubt says that he lost all these documents as the result of the flood which overtook Arrah; but I have no doubt whatever that he is taking advantage of that flood to support a false case as to the absence of material documents.

In the view which I take, it is not necessary for me to consider the further point whether the incumbrance was annulled by Hitnarain in accordance with law; but as this case may travel across the seas, it is just as well that I should say what I think of this point. Section 167 of the Bengal Tenancy Act provides as follows:—

"A purchaser having power to annul an incumbrance.....may, within one year from the date of the sale or the date on which he first has notice of the incumbrance, whichever is later, present to the Collector an application in writing requesting him to serve on the incumbrancer a notice declaring that the incumbrance is annulled."

(2) "Every such application must be accompanied by such fee for the service of the notice as the Board of Revenue may fix in this behalf."

(3) "When an application for service of a notice is made to the Collector in manner prescribed by this section, he shall cause the notice to be served in compliance therewith, and the incumbrance shall be deemed to be annulled from the date on which it is so served."

Now it is quite clear that a very strict construction must be placed upon the provision of section 167 of the Bengal Tenancy Act because it confers upon the landlord the right to put an end to an incumbrance without having to pay for it. It is, therefore, essential, in my opinion, for the landlord to establish that the proper procedure indicated in the section was adopted.

Sir Sultan Ahmad appearing on behalf of the plaintiff contends that there is no evidence in the record that notice under section 167 of the Bengal Tenancy Act, paragraph (3) was in fact served upon the incumbrancer, and he argues that the only evidence in support of the defendant's case that notice was served upon the incumbrancer is the order-sheet in "The section 167 Case no. 14 of 1921-22." The order-sheet records an order to this effect:

"Notice served. No objection filed. Case disposed of."

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It is contended on behalf of Hitnarain Singh that the order-sheet (Ex. C—4) constitutes good evidence that notice was in fact served upon the incumbrancer. But it has been laid down in a number of cases in the Calcutta High Court that "the entries in the order-sheet are not prima facie evidence against the incumbrancer that the notice was served," and that it is obligatory on the purchaser to show that the notice under section 167 has been served in the manner prescribed—see *Radhey Koer* v. *Ajodhya Das* (1), *Prafulla Nath Tagore* v. *Shital Khan* (2), *Chhatardhari Lal* v. *Biranchi Lal* (3) and *Krishna Kamini Dasi* v. *Kumar Pratapendra Chandra Pandey* (4).

Mr. Hasan Imam contends that the decisions of the Calcutta High Court are not correct because the order-sheet itself raises a presumption that the notice in question was served and that every presumption must be made by us as to the regularity of official acts, and section 114, clause (*e*) of the Evidence Act was relied upon. But the meaning of section 114 of the Evidence Act is that if an official act is proved to have been done it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of it is essential to the plaintiff's case [see *Narendra Lal Khan* v. *Jogi Hari* (5)]. It seems to me that a Civil Court dealing with this matter must be satisfied that the notices under section 167 of the Bengal Tenancy Act were in fact served upon the incumbrancer. The order-sheet in this case merely records the opinion of the Collector that the notices were served; but the opinion of the Collector is in no way binding upon the Civil Court; and the Civil Court has a right to determine for itself the question whether the notices were in fact served or not. Mr. Hasan Imam relies upon two decisions of

(1) (1908) 7 Cal. L. J. 262.
(2) (1917-18) 22 Cal. W. N. 788.
(3) (1911) 9 Ind. Cas. 248.
(4) (1925) 85 Ind. Cas. 790.
(5) (1905) I. L. R. 32 Cal. 1107.

this Court, the case of *Nand Kishore Chaudhuri* v. *Maharajadhiraja Sir Rameshwar Singh Bahadur* (1) and *Mahboob Momin* v. *Bhagwati Prasad* (2). In my opinion in none of those cases were the learned Judges considering the point which the Calcutta High Court discussed in the cases to which I have referred. The only point in *Nand Kishore* v. *Maharaja Sir Rameshwar Singh* (1) was whether the notices had been served within the period of limitation prescribed in section 167. No doubt in dealing with that point the late Chief Justice of this Court said as follows:—

> "Under the section once the Collector has issued the notice the incumbrance must be deemed to have been annulled."

Stopping here for a moment I may point out that this is not a correct reproduction of section 167 of the Bengal Tenancy Act. Section 167 lays down that the incumbrance shall be deemed to be annulled, not from the date when the Collector issues the notice, but from the date on which it is served upon the incumbrancer. The late Chief Justice proceeds to say as follows:—

> "This does not mean that the validity of the notice and the consequent annulment of the incumbrance cannot afterwards be called in question. I consider, however, that the effect of the section is to cast the burden of proof upon the person questioning the validity of the notice. It was, therefore, incumbent upon the plaintiff to prove that the landlord had in fact notice of the incumbrance more than 12 months before he made the application to the Collector."

The point which I have to consider in this case was not before their Lordships; and it is therefore not necessary for me to say anything more than this, that if the learned Judges intended to differ from the long

(1) (1924) 78 Ind. Cas. 476. (2) (1917) 39 Ind. Cas. 943.

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series of cases decided in the Calcutta High Court without referring to those cases, then, with all respect, I differ from their Lordships.

The other case upon which Mr. Hasan Imam relies is the case of *Ramprotap Marwari* v. *Jhoomak Jha*(1). The only point involved in that case was whether an application presented to the Deputy Collector was an application contemplated by section 167 of the Bengal Tenancy Act. No other point was involved in the case, and I decline to consider as binding upon me any obiter dictum that may have been expressed in the course of the decision of their Lordships in dealing with that case. In my opinion the decisions of the Calcutta High Court on this point are correct and I respectfully agree with those decisions. In my opinion therefore, there is no evidence at all that the incumbrances have been annulled under section 167 of the Bengal Tenancy Act; and, even if it were established in this case that the decree obtained by the landlord was a rent decree, the plaintiff would still be entitled to recover possession of the disputed lands.

I agree with the conclusion at which the learned Subordinate Judge has arrived and dismiss this appeal with costs.

ALLANSON, J.—I agree.

PRIVY COUNCIL.

J. C. 1928.

April, 24.

ASHUTOSH DEO AND ANOTHER

v.

BANSIDHAR SHROFF.*

Ghatwali Tenure—Ghatwals in Birbhum—Inalienability—Execution of Decree— Commutation of Police Charges—Ben. Reg. XXIX of 1814—*Act V of* 1859—*Santal Parganas Rural Police Regulation (Reg. IV of* 1910).

*Present: Viscount Sumner, Lord Shaw, Lord Blanesburgh, Lord Atkin, and Sir Lancelot Sanderson.

(1) (1917) 38 Ind. Cas. 948.