

APPELLATE CIVIL.

Before Adami and Macpherson, JJ.

HARGOBIND DAS

v.

RAMCHANDRA JHA.*

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August, 12.

Bengal Tenancy Act, 1885, (Bengal Act VIII of 1885), sections 161(a) and 167—non-transferable occupancy holding, mortgage of, whether is an incumbrance—auction-purchaser, whether bound to annul the mortgage—section 167, scope of—landlord purchaser, position of, whether different from that of tenant purchaser—mortgagee, whether entitled to redeem auction purchaser.

An usufructuary mortgage of a non-transferable occupancy holding is an incumbrance within the meaning of section 161(a), Bengal Tenancy Act, 1885. A purchaser of the holding at a rent sale must annul such incumbrance within one year, as required by section 167 of the Act, or he loses all right to annul it. *Chaudhry Mahadeo Prasad v. Sheikh Azmat* (1), followed.

Lala Murlidhar v. Surat Lal Chowdhary, (2), *Jognarain Singh v. Badri Das* (3), *Sital Chandra Majhi v. Parbati Charan Chakrabarti* (4), and *Bidhumakhi Dasi v. Bhaba Sundari Dasi* (5), distinguished.

The position of a landlord purchasing a holding at a rent sale is different from that of an ordinary purchaser, who in fact steps into the shoes of the original tenant and becomes a tenant of the landlord. A tenant-purchaser of a non-transferable occupancy holding cannot, on the ground of non-transferability, eject a mortgagee whose incumbrance has not been annulled under section 167.

A purchaser at a rent sale who has not, under section 167, annulled a mortgage of the holding is, however, entitled to

* Appeal from Appellate Decree no. 333 of 1924, from a decision of Ashutosh Chattarji, Esq., District Judge of Darbhanga, dated the 5th July, 1923, affirming the decision of Babu Satyaranjan Prasad Sinha, Munsif of Darbhanga, dated the 24th March, 1923.

(1) (1920) 1 Pat. L. T. 108.

(3) (1912) 16 Cal. L. J. 156.

(2) (1922) 3 Pat. L. T. 362.

(4) (1922) 35 Cal. L. J. 1.

(5) (1919-20) 24 Cal. W. N. 961.

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S. M. Meherunnessa v. Sham Sundar Bhuiya (3), not followed.

A. B. Chiodetti v. Quadress (4) and *Surat Lal Chowdhury v. Lala Murhidhar* (5) distinguished.

Appeal by the plaintiffs.

This appeal arose out of a suit for a declaration that the sale of the properties in suit was brought about by fraud and without the knowledge and information of the plaintiffs who claimed, as mortgagees, the right of redemption as against the purchaser at an auction sale in execution of a rent decree.

Defendant no. 3 held under defendant no. 2 a holding of 6 bighas odd and he mortgaged to the plaintiffs 4 bighas odd with possession. The arrangement was that the mortgagor was to pay the rent to the landlord. The mortgagor, defendant no. 3, however, defaulted in paying the rent to the landlord with the result that the latter obtained two rent decrees against him, and, in execution of those decrees, the holdings were sold and were purchased at the auction sale by defendant no. 1. The plaintiffs, as mortgagees, were in possession but defendant no. 1 sought to obtain possession under his purchase and the result was that the present suit was brought.

The purchaser, defendant no. 1, did not take any steps to annul the incumbrance of the mortgage, and, therefore, the plaintiffs contended that they were entitled, as second mortgagees, to redeem the purchase by paying to defendant no. 1 the purchase money.

Though there was no allegation in the pleadings that the holding was transferable or non-transferable,

(1) (1919-20) 24 Cal. W. N. 961. (3) (1901-02) 6 Cal. W. N. 834.

(2) (1922) 35 Cal. L. J. 1. (4) (1916) 1 Pat. L. J. 161.

(5) (1919) 4 Pat. L. J. 362.

the learned Munsif held that in the absence of any evidence as to transferability without the consent of the landlord, the holding must be considered to be a non-transferable holding, since unless there is proof of a custom of transferability it will be taken that a holding is not transferable without the consent of the landlord. Finding then that the holding was not transferable, the learned Munsif held that the mortgage of the plaintiffs was not binding or valid against the landlord, and therefore the mortgage was invalid, and the plaintiff could not claim to redeem under it. He also found that the plaintiffs had failed to show that the sales in execution of the rent decrees had been brought about by fraud or surreptitiously. He therefore dismissed the plaintiffs' suit.

Before the learned District Judge in appeal the only question argued was that the Munsif was wrong in holding that the mortgage of the plaintiffs was not an incumbrance and was of no validity since the holding was a non-transferable holding. The learned District Judge thought that the question depended upon a finding whether the plaintiffs' mortgage was an incumbrance which it would be necessary for the purchaser to annul. He considered the cases of *Surat Lal Chowdhury v. Lala Murlidhar* (1) and *Lala Murlidhar v. Surat Lal Chowdhury* (2) and, coming to the finding that it was settled that the mortgagee can under the circumstances fall back upon his mortgage as a shield, considered the question whether the mortgage can be relied upon as a shield against the claim of the auction-purchaser in a rent sale. He noticed that in *Ch. Mahadeo Prasad v. Sheikh Azmat* (3) it was found that the interest of the plaintiffs in the present case would be an incumbrance which the auction purchaser would have to avoid under section 167 of the Bengal Tenancy Act. But he followed the decision of Ross, J., in *Lala Murlidhar v. Surat Lal Chowdhury* (2) to the effect that the

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(1) (1919) 4 Pat. L. J. 362.

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mortgage of a non-transferable occupancy holding cannot effectively create a lien in limitation of the interest of the original tenant. He then considered the position where a tenant mortgages the entire holding with possession and then the landlord himself purchases the holding at a rent sale but fails to give notice under section 167: and he said

"If the interest of the mortgagee be held to be an incumbrance he will be entitled to redeem the landlord by paying the decretal amount and will thereby be entitled to get possession. But the old tenant having already ceased to have any connection with the holding the landlord can at once treat the holding as abandoned and sue the mortgagee for khas possession without paying up his mortgage"; and he remarked that the result would be that the mortgagee would not only lose the land but also lose the money paid to the landlord for redemption of the mortgage. He then said: "The fact that in the present case the auction purchaser is not the landlord can make no difference as he by his auction purchase stands in the shoes of the landlord and also because the landlord himself also is a party to this suit."

L. K. Jha, for the appellants.

R. K. Jha, for the respondents.

ADAMI, J. (after stating the facts set out above, proceeded as follows): In my opinion the decision of the lower Courts is wrong. The lower Courts have held that, because the holding was a non-transferable one or was presumed to be such, the mortgage of a portion of the holding could not be held to be an incumbrance, as a mortgage of a non-transferable holding is invalid, and, since the mortgage of the non-transferable holding was invalid there could be no incumbrance which the auction purchaser at the rent sale would be bound to annul under section 167 of the Bengal Tenancy Act. My views on the questions raised in this second appeal have been given in the judgment in the case of *Ch. Mahadeo Prasad v. Sheikh Azmat* (1). There it was held that a usufructuary mortgagee of a non-transferable occupancy holding has an incumbrance under section 161(a) of the Bengal Tenancy Act which is an interest voidable on sale under section 170(3). It was

(1) (1920) 1 Pat. L. T. 108.

shown there, too, that there is nothing to show that section 161(a) of the Bengal Tenancy Act relates to transferable holdings only, and that the cases of a mortgagee and a purchaser are clearly distinguishable for a sale is not in limitation of, but is a destruction of, the interest of the tenant. The decisions of the lower Courts and the cases on which they have relied turn on the point that a holding being non-transferable, there can be no incumbrance. But taking it for granted that the general rule is that an occupancy holding is non-transferable and it is only in exceptional cases where a custom is proved, that the holding will be held to be transferable, it is strange that sections 161 and 167 make no exception in the case of non-transferable holdings, and in fact in those sections there is no mention of a transferable or non-transferable holding at all. Plainly the Legislature intended those sections to apply to all holdings and did not confine them to those that are transferable.

In the case of *Lala Murlidhar v. Surat Lal Chowdhury* (1) Ross, J., remarks—

“ This holding is non-transferable. The mortgage was a transfer and was, therefore, of no effect as against the holding or the person who purchases the holding in a rent execution. Such a mortgage cannot effectively create a lien in limitation of the interest of the original tenant. It would operate not by force of any title to the holding created thereby but by way of estoppel. In my opinion, therefore, the holding stands free of encumbrance and the plaintiff is not entitled to redeem ”.

The facts in that case were distinguishable from the present one inasmuch as the mortgagee had already sued upon his mortgage and obtained a decree before the landlord instituted a suit against the mortgagor for rent, while in the present case the mortgagee has not yet sued upon his mortgage. In that case it would appear that the Court was influenced by the

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fact that the landlord himself purchased the holding in execution of his rent decree and the transfer of a non-transferable holding would not be valid as against the landlord. Here the defendant auction purchaser is not the landlord and it has to be borne in mind that where a landlord purchases in execution of a rent decree, all the conditions applying to an ordinary purchaser apply to him and his position as landlord has to be considered separately. In that case it may have been true that the transfer by mortgage was not valid against the purchaser qua the landlord. The fact of the matter is that it would be valid against the purchaser qua the purchaser, and he would be required to do all that a purchaser is required to do; if he wanted to annul an incumbrance only, as landlord, he would be able to treat the mortgage of the non-transferable holding as not binding upon him.

The learned District Judge has stated in his judgment that the purchaser at the auction sale steps into the landlord's shoes, but I cannot hold that this is a fact. The purchaser becomes a tenant of the landlord and does not step into the landlord's shoes.

In the present case the purchaser defendant is not the landlord, and it would fall upon him, if he wanted to get rid of the incumbrance, to annul the incumbrance as required by section 167 of the Bengal Tenancy Act. The mortgagee, plaintiff, is still in possession, and the landlord, if he likes, can take action to dispossess him if he has not given consent to the transfer, but the tenant purchaser, the defendant, could not so eject him on the ground of non-transferability.

I have not repeated the arguments used by this Court in *Ch. Mahadeo Prasad v. Sheikh Azmat* (1), but I adhere to them, and am of the opinion that the mortgage of the plaintiff was an incumbrance which, under section 167, the purchaser at the rent sale must annul within one year or lose all right to annul the incumbrance.

The appellant has relied on the cases of *Jognarain Singh v. Badri Das* (1) and *Sital Chandra Majhi v. Parbati Charan Chakrabarti* (2), but in those cases the question as to transferability was not raised. Similarly the cases of *Bidhumukhi Dasi v. Bhaba Sundari Dasi* (3) and *Sital Chandra Majhi v. Parbati Charan Chakrabarti* (2) are strongly in favour of the view I have taken, but in those cases, too, the question of transferability was not raised. The fact is that probably in these cases it was taken that sections 167 and 161 relate to non-transferable holdings as well as transferable holdings. In the latter case it was held that a sale for arrears of rent does not ipso facto cancel a mortgage on the holding, being an incumbrance. The procedure provided by section 167 of the Bengal Tenancy Act is the only mode of annulling the incumbrance, and the purchaser must have recourse to the prescribed mode within the specified period, if he desires to annul the incumbrance, and a landlord purchaser in a rent sale is, like any other purchaser, bound to follow the provisions of section 167. A mortgage of a non-transferable holding without the consent of the landlord may make the incumbrance invalid so far as the landlord is concerned but it cannot be said that the mortgage is altogether invalid, for it will be valid against the tenant who created it, and in the same way it will be valid against the person who purchases at a sale in execution of a rent decree obtained against the tenant. The defendant in this case failed to annul the incumbrance within one year and therefore the holding remained subject to the mortgage.

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I must hold, therefore, that in the present case the plaintiff, since the incumbrance has not been annulled, is entitled to remain in possession until the mortgage be redeemed.

(1) (1912) 16 Cal. L. J. 156.

(2) (1922) 35 Cal. L. J. 1.

(3) (1919-20) 24 Cal. W. N. 961.

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The question then arises whether the plaintiff can redeem the mortgage as he has claimed to do in the plaint. I am of opinion that he cannot redeem as against the defendant.

It is argued that rent being a first charge on the holding, the defendant, as purchaser at the rent sale, has a first charge and has priority over the charge of the mortgagee.

In the case of *Surat Lal Chowdhury v. Lala Murlidhar* ⁽¹⁾ Roe and Coutts, J.J., holding that a purchaser under a rent decree is not liable to be ousted by a person who purchases the same property in execution of a mortgage decree, stated

“ It is settled law so far as this Court is concerned, by the decision in *A. B. Chiodetti v. Quadress* ⁽²⁾ by Mr. Justice Mullick, upheld in Letters Patent by Chief Justice Chamier and Mr. Justice Sharfuddin, that in a suit to recover possession he (the mortgagee) could not possibly have succeeded though he might have succeeded in a suit to redeem the mortgage by payment of the amount due under the rent decree. This decision is in accordance with the decision in *Meherunnissa v. Sham Sundar Bhuiya* ⁽³⁾. The purchaser under the mortgage decree could not oust the purchaser under the rent decree even though there had been no notice under section 167. He might be regarded as a second mortgagee ”.

As a matter of fact while Roe and Coutts, JJ. state only that the mortgagee might be regarded as a second mortgagee, in the Letters Patent decision the point was left open and there was no specific statement that as a matter of fact the mortgagee might be regarded as a second mortgagee; and in *A. B. Chiodetti v. Quadress* ⁽²⁾ there was no actual decision that the mortgagee could have a right to redeem as against

(1) (1919) 4 Pat. L. J. 362.

(2) (1916) 1 Pat. L. J. 161.

(3) (1901-02) 6 Cal. W. N. 884.

the auction purchaser. In *Bidhumukhi Dassi v. Bhaba Sundari Dassi* (1) it was held that the purchaser at a rent sale was entitled to redeem the mortgagee purchaser, and that a purchaser at a rent sale who does not annul a subsisting mortgage incumbrance upon the holding, does not acquire priority over the purchaser at a subsequent sale in execution of a decree obtained on a mortgage by reason of the rent being a first charge upon the holding under section 65 of the Bengal Tenancy Act. In that case Chatterjea and Newbould, J.J. stated—

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“ No doubt section 65 of the Bengal Tenancy Act lays down that rent shall be a first charge. But the analogy does not go further than that. In the first place, in ordinary mortgage transactions, a prior mortgagee must make the puisne mortgagees parties to a suit on the mortgage in order that the sale held in execution of the decree might be binding upon them, but the mortgagee of a holding or tenure is not made a party to a suit for rent by the landlord, and he is not bound to do so, although the rent is a first charge; and the mortgagee cannot bring a suit for redemption or otherwise exercise his right of redemption after the rent sale, on the ground that he was not a party to the rent decree and was not bound by the sale ”.

The learned Judges in that case pointed to sections 159, 161 and 167 and proceeded :—

“ So that notwithstanding that section 65 provides that ‘ rent shall be a first charge ’ on a tenure or holding, the purchaser must take steps as laid down in section 167 for annulling the mortgage. If he does not do so within the time specified in section 167, the mortgage remains an incumbrance even though the purchaser at the rent sale may be in the position of a first mortgagee ”.

The defendant was in fact the purchaser of the equity of redemption and it was, therefore, open to him to redeem the mortgage.

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Similarly in the present case I am of opinion that the defendant would be in a position to redeem the mortgage of the plaintiff, and that the reverse position cannot be held by the plaintiff.

In *Sital Chandra Majhi v. Parbati Charan Chakrabarti* (1), Sir Asutosh Mookerjee and Panton, JJ., held that relative rights of the purchaser at a rent sale and the mortgagee should be determined with reference to their position at the time of the rent sale; and if the purchaser at the rent sale has not availed himself of the privilege of annulling the mortgage within his prescribed period he holds the property subject to the mortgage and is entitled to redeem. It is true that in the case of *S. M. Meherunnessa v. Sham Sundar Bhuiya* (2) it was held that where in execution of a decree for arrears of rent a raiyati holding was sold and purchased by the landlord, and the plaintiff, a mortgagee of the raiyati holding, whose mortgage was not annulled, brought a suit to enforce the mortgage, the mortgagee was entitled to enforce the mortgage on payment of the money due under the rent decree and that the mortgagee might be regarded as a second mortgagee. But I am inclined to follow the decisions of the Calcutta High Court which I have mentioned above and cannot agree with this latter decision or follow the reasons given therein.

The result is that the claim in this suit being for redemption by the plaintiff, the plaintiff must fail, for he has not the right of redemption. He is in possession and will be entitled to remain in possession until he is redeemed by the defendant auction purchaser.

I think that each party should pay his own costs in this appeal.

MACPHERSON, J.—I agree to the order proposed.

(1) (1922) 85 Cal. L. J. 1.

(2) (1901-02) 6 Cal. W. N. 884.