APPELLATE CIVIL.

Before Das and Kulwant Sahay, JJ.

KULDIP NARAIN TEWARI

1927. *v.*

Dec., 19. RAM LAL MANDAL.*

Bengal Tenancy Act, 1885 (*Bengal Act VIII of* 1885), *section* 167—*rent decree, execution of—order for attachment and proclamation not simultaneous—sale, whether is a rent sale—section* 167, *notice under, issued by Collector—onus to prove bar of limitation, on whom lies.*

Provided the holder of a rent decree takes every step necessary to be taken under the Bengal Tenancy Act, 1885, to execute the decree as a rent decree, the mere fact that the court fails to issue simultaneously the order for attachment and the sale proclamation cannot make the decree any less a decree for rent.

Dhunmun Singh v. *Lachmilal* (1), followed.

Once a notice under section 167, Bengal Tenancy Act, 1885, has been issued by the Collector, the incumbrance must be deemed to have been annulled; and the onus of establishing that the notice was not served within the period of limitation is on the person questioning the validity of such notice.

Nandkishore Chaudhury v. *Sir Rameshwar Singh Bahadur* (2), followed.

Appeal by defendants, 2nd party.

This appeal arose out of a suit instituted by the respondents for recovery of possession of certain lands specified in the plaint. The suit was resisted by the defendants second party who were the appellants in the High Court on the ground that they, as landlords,

*Appeal from Appellate Decree no. 572 of 1924, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Bhagalpur, dated the 6th March, 1924, affirming a decision of Babu Amarnath Chatterji, Subordinate Judge of Bhagalpur, dated the 10th September, 1919.

(1) (1920) 57 Ind. Cas. 492. (2) (1924) 78 Ind. Cas. 476.

had purchased the disputed lands in execution of a rent decree obtained by them as against the tenants, the defendants first party, and that the plaintiffs as the usufructuary mortgagees had no title to put forward as against them.

It appeared that two rent suits, properly framed as such under the provisions of section 148A, were instituted by the landlords in respect of two holdings as against the defendants first party sometime prior to the 11th December, 1915. While these rent suits were actually pending the defendants first party, on the 11th December, 1915, gave a usufructuary mortgage of the holdings in question which were the subject-matter of the rent suit to the plaintiff. On the 6th January, 1916, the landlords recovered rent decrees as against the defendants first party. They proceeded to execute their decrees and on the 26th March, 1917, and on the 27th March, 1917, they purchased these holdings in question. They actually recovered possession of the holdings on the 15th December, 1917. The plaintiffs were in possession of the holdings under the usufructuary mortgage of the 11th December, 1915. They were, however, dispossessed by the landlords and they then instituted the suit out of which the present appeal arose for recovery of possession of those lands. One other fact has to be noticed. On the 14th June, 1918, the landlords applied to the Collector under the provisions of section 167 of the Bengal Tenancy Act for service of notice upon the plaintiffs to annul their encumbrances and the defendants contended that having regard to all these circumstances the plaintiffs had no title to put forward as against them in this action. They also claimed that there was an abandonment of the holdings in question by the tenants as a result of the execution of the usufructuary mortgage in favour of the plaintiffs.

The trial Court held that there was no abandonment as contended by the defendants second party and that the decree obtained by them as against the defendants first party was not executed as a rent decree and

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that the sale held in pursuance of the decree was not a rent sale. In that view the trial Court gave the plaintiffs a decree substantially as claimed by them. The lower appellate Court found that the sale was a rent sale, but that Court did not go into the other question, namely, whether the encumbrance had been annulled by the defendants second party in accordance with law. That Court also found that there was abandonment as insisted on by the defendants second party. The plaintiff appealed to the High Court. The High Court decided the issue as to abandonment in favour of the plaintiffs and then proceeded to say as follows :—

"The learned District Judge having decided the case in favour of the defendants upon the point which I have just mentioned," namely, the point as to abandonment, "did not proceed to consider the question of fact raised by issue no. 12, namely, whether the encumbrance had been duly annulled. It was the defendants' case that the provisions of section 167 of the Act had been complied with. Whether they had or had not depended upon questions of fact. These facts were not considered by the learned District Judge. It will be necessary therefore before this case can be finally disposed of that a finding should be arrived at upon that question. The result will be that the decree of the learned District Judge dismissing the suit will be set aside and the case will be remanded to him to try that part of issue no. 12, upon the facts, which relates to the question of whether the encumbrance had been duly annulled or not. There may have been other issues which were material to the decision of the case which were not considered by the learned District Judge but they have not been brought to our attention. If there are any such issues then the parties will be entitled to raise them before the learned District Judge on remand."

Thus it will be seen that the question as to whether the sale was a rent sale was not raised before the High Court by the plaintiffs. They accepted the decision of the lower appellate Court on this question and in remanding the case the High Court asked the Court below specifically to try that part of issue no. 12, upon the facts, which related to the question of whether the encumbrance had been duly annulled or not. The question as to whether the sale was a rent sale or not had, therefore, been finally determined by the lower appellate Court in the decision from which there was an appeal to the High Court, which appeal was finally disposed of on the 15th August, 1923.

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When the case went back to the District Judge on appeal the latter went into the question as to whether the sale was a rent sale or not. Having considered that question he came to the conclusion that it was not a rent sale. He proceeded to consider the other question which he was specifically asked to try and he found in favour of the plaintiffs. Having regard to those findings he dismissed the appeal, which had the effect of confirming the decision of the trial Court which was in favour of the plaintiffs. From the decision of the District Judge dated the 6th March, 1924, the present appeal was presented to the High Court.

Sir Sultan Ahmad (with him *J. Prasad* and *S. Dayal*), for the appellants.

S. M. Mullick and *S. N. Dutt*, for the respondents.

DAS, J. (after stating the facts set out above, proceeded as follows): The first question is whether we ought to go into the question whether the sale was a rent sale or not. I have no doubt that the learned District Judge, having regard to the scope of the remand order, had no power to consider the question. But I do not desire to rest my decision on a point so technical as this; for I am satisfied that the decision of the learned District Judge on this point is erroneous. The suits were framed as rent suits under the provisions of section 148A of the Bengal Tenancy Act. It is not disputed before us that the decrees obtained by the landlords were rent decrees. Now, what reason is there for holding that the sales were not rent sales within the meaning of that term as used in the Bengal Tenancy Act? The learned District Judge gives two reasons:—First he says that the orders for attachment and sale of the holding were not issued simultaneously as required by section 163 of the Bengal Tenancy Act. There is nothing to show that the decree-holder did not apply

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for simultaneous issue of the order for attachment and sale of the holdings in question, and I am satisfied that this is not a ground for holding that the sale was not a rent sale. I may refer to a decision of this Court in *Dhunmun Singh* v. *Lachmilal* (1). It was held in that case that provided the holder of a rent decree takes every step necessary to be taken under the Bengal Tenancy Act to execute the decree as a rent decree, the mere fact that the Court failed to issue simultaneously the order for attachment and the proclamation cannot make the decree any the less a decree for rent. The second ground taken by the learned District Judge is equally untenable. He says that in the sale proclamation although the khata number of the holdings has been correctly given, various plot numbers are omitted from the holding and that the area is almost one acre less than the area of the holding. But the khata number of the holding having been given it would follow in my opinion that the decree-holder wanted to sell all the holdings comprised within that khata number; and it is worthy of note that the plaintiffs in this case did not dispute that the entire holdings were sold in this case. In any case therefore the decision of the learned District Judge on this point cannot be supported. I hold that the sales were rent sales and that the holdings in question passed to the landlord-purchasers and not merely the right, title and interest of the judgment-debtors.

I now come to the second point. Sir Sultan Ahmad appearing on behalf of the defendants second party, the appellants in this Court, contends that the question whether the incumbrances were annulled by the landlords under section 167 of the Bengal Tenancy Act is irrelevant, for in any case the holdings being non-transferable holdings, the plaintiffs cannot succeed in a suit for possession as against the landlords who have purchased the holdings in question in execution of their rent decrees. He refers us to a recent decision

(1) (1920) 87 Ind. Cas. 492.

of this Court in *Badhu Pathak* v. *Sibram Singh* (1), decided by this Court on the 14th November, 1927. It is, however, not necessary for us to decide this point, as we are satisfied that the plaintiffs' suit must fail, since they have not established in this case that the incumbrances were not annulled in accordance with law. Now, in dealing with this point the learned District Judge has proceeded as if the onus were on the landlords to establish that the incumbrances were annulled by them in accordance with law. It is conceded that the application for annulment of the incumbrances in question was not made within one year of the date of sale; but it appears on reference to the petition filed before the Collector under section 167 that it was the case of the landlords that they had no information about the incumbrances in question until a period within one year of the date of the application. But the notice was in fact served upon the plaintiffs and to quote the language of section 167 of the Act

"the incumbrance shall be deemed to be annulled from the date on which it was so served."

The question now arises whether in this suit it is for the landlords to establish that they had no information about the incumbrance until a period within one year of the date of the application or whether it is for the plaintiffs to establish that the landlords had the information of the incumbrance beyond one year of the date of their application. On this question the decisions of this Court are perfectly clear. It was held by this Court in *Nandkishore Chaudhury* v. *Sir Rameswar Singh Bahadur* (2), that the onus is upon the person questioning the validity of the notice to establish that the notice under section 167 was not served in accordance with law. It is sufficient for my purpose to quote the headnote of the case. It runs as follows:—

"Under section 167 of the Bengal Tenancy Act once the Collector has issued notice of annulment the incumbrance must be deemed to

(1) S. A. 142 of 1925. (2) (1924) 78 Ind. Cas. 476.

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have been annulled. This does not, however, mean that the validity of the notice and the consequent annulment of the incumbrance cannot afterwards be called in question. The effect of the section is to cast the burden of proof upon the person questioning the validity of the notice."

I entirely agree with this decision and I hold that it was for the plaintiffs to establish that the notice was not served upon them within the period of limitation. The learned Judge did not decide this case on this footing and the question arises whether we should remand the case again to the District Judge to decide this point upon the evidence on the record, or whether we should decide it in this Court. We have power under the present Code to determine a question of fact of this nature in order to save a remand and we have gone into the evidence in order to find out whether the plaintiffs have established their case upon this point. Mr. Sushil Madhab Mullick relies upon the allegation made by the plaintiffs in the 6th paragraph of the plaint and he contends that since the allegations in that paragraph are not disputed in the written statement it should be held that the landlords defendants second party had notice of the incumbrance as early as the 25th November, 1916. The 6th paragraph of the plaint runs as follows:—

"That when the plaintiffs got information about the suit and the decree stated above in the month of November, 1916, they in order to maintain their right had asked the defendants first party to pay the decretal money. But the defendants, first party, were not inclined either to pay the decretal money or to pay the same by becoming petitioners themselves after taking money from the plaintiffs. Then a petition was filed on 25th November 1916 for depositing the decretal money on behalf of the plaintiff no. 7. At that time also neither the defendants first party nor second party made any mention about the execution of decree, on the other hand, they raised objection to the deposit of money; consequently the petition for depositing money was rejected by the said Court."

It is worthy of note that it is nowhere suggested that that petition was filed on behalf of the plaintiffs on the allegation that they were the usufructuary mortgagees and as such were entitled to make the deposit in question. Now, the 6th paragraph of the plaint is

dealt with in the 14th paragraph of the written statement. The opening line of the paragraph is as follows:—

"That the plaintiffs' allegation contained in paragraph 6 of this plaint is wrong."

The defendants then proceed to say as follows:—

"It is not true that the plaintiffs got the information of sale in the month of Jeth 1324. The plaintiffs had been aware of the decree and sale before that and filed petition to set aside the sale which was rejected properly and justly. So that the order of rejection was upheld in the second appeal filed in the Hon'ble High Court and these defendants have obtained possession duly through the court. The plaintiffs' allegation of the loot and the carrying away of the crop stored up by the purchaser is quite wrong."

It is obvious to my mind in the first place that no such case as is now sought to be made out was raised in the 6th paragraph of the plaint and secondly, that if such a case was raised, it was disputed in the 14th paragraph of the written statement. We have in this case the evidence of Ramlal Mandal, plaintiff no. 1. He distinctly states in his evidence that that deposit was made by them but in the names of the tenants. Now, if this be so, clearly no case has been made out in the 6th paragraph of the plaint to the effect that the defendants second party had knowledge of the incumbrance beyond one year of the date of the notice. There is no other ground set out in the plaint for the purpose of affecting the defendants second party with notice of the incumbrance. We have, however, been asked to consider the evidence of Ramlal Mandal. In his examination in chief he tries to make out a case of estoppel as against the landlords. He says as follows:—

"Before this document also (that is to say before the execution of the usufructuary mortgage in question) I went to Baijnath Tewari and enquired of his dues. He mentioned the amount due to him. I don't remember the amount but this is down in the bond. Baijnath Babu did not refer to the existence of the decree in dispute in which the disputed property has been sold. Had I known that there were other dues of the zamindar I would not have advanced the loan."

Now, with reference to this evidence it is sufficient to say that the learned Subordinate Judge who heard

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the evidence disbelieved Ram Lal Mandal on this point. The witness, however, proceeds to say as follows:—

"Baijnath Babu came to know of this sudbharna bond two or four days after the execution of the document. I went to him and saw him after the registration of the document. I offered the amount payable to him under both the documents but he did not take them. He began putting me off. Then I got the money deposited in court by the tenants."

It is unnecessary to refer to his cross-examination on this point, because I am satisfied that it is impossible for any Court to act upon this evidence since he does not mention this in the plaint as a ground for affecting the defendants second party with notice of incumbrance. It is also necessary to remember that the learned Subordinate Judge disbelieved him on a very material point in the evidence and for myself I am unable to rely upon his evidence on this point. It follows from this that there is no evidence on the side of the plaintiffs to establish that the notice under section 167 was served upon them beyond the period of limitation. The learned District Judge, however, says that there is no evidence on the side of the defendants. Sir Sultan Ahmad has referred us to the evidence of Kartick Chaudhury, defendants' witness no. 5, who says definitely in his evidence that his malik came to know of the incumbrance when the notice was received in the cases for setting aside the sale. I do not, however, consider that this evidence is sufficient, for the evidence would be at best hearsay and the malik should have been called to give evidence on this point. The result is that there is no evidence on either side on this point and this being so, it is impossible to say that the plaintiffs have discharged the onus which is upon them so far this point is concerned.

I would allow this appeal, set aside the judgments and decree passed by the Courts below and dismiss the plaintiffs' suit with costs in all the Courts.

KULWANT SAHAY, J.—I agree

Appeal allowed.