APPELLATE CIVIL.

Before Dawson Miller, C. J. and Adami, J.

BADLU PATHAK

v.

SIBRAM SINGH.*

1927.

Nov., 14.

Bengal Tenancy Act, 1885 (Beng. Act VIII of 1885) sections 158B and 167—non-transferable occupancy holding, landlord purchaser of, whether bound to annul incumbrance—section 167, scope of—co-sharer landlord, whether can waive notice under section 158B—waiver, effect of.

A mortgagee of a non-transferable occupancy holding, who has obtained a decree on the mortgage and purchased the property in execution, cannot claim possession from the landlord who has purchased the holding in execution of a decree for rent, or from the raiyat settled on the land by the landlord.

A landlord purchaser of a non-transferable occupancy holding in execution of his decree for rent can, qua landlord, ignore the mortgage of the holding without formally annulling the incumbrance under section 167, Bengal Tenancy Act, 1885.

Surat Lal Chowdhery v. *Lala Murlidhar* (1), followed.

A co-sharer landlord can waive his right to notice under section 158B, Bengal Tenancy Act, 1885, in which case the failure to serve notice does not render the sale an ordinary sale under a money decree.

Rajani Kanta Ghose v. *Sheikh Rahaman Gazi* (2), followed.

Raghunath Das v. *Sundar Das Khetri* (3), referred to.

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*Second Appeal no. 142 of 1925, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Bhagalpur, dated the 15th November, 1924, reversing a decision of Babu Krishna Sahay, Subordinate Judge of Bhagalpur, dated the 22nd December 1923.

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

(2) (1922-23) 27 Cal. W. N. 765.

(3) (1915) I. L. R. 42 Cal. 72, P. C.; 41 I. A. 251.

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Appeal by the plaintiffs.

This was an appeal on behalf of the plaintiffs from a decision of the District Judge of Bhagalpur, reversing the decree of the Subordinate Judge and dismissing the plaintiff's suit.

The suit was instituted on the 28th March, 1923, claiming a declaration of their title to and delivery of possession of a holding in mauza Bosbhiti. In the year 1899 Musharu Gope and Roudi Gope executed a mortgage of their kaimi jote lands in mauza Bosbhiti in favour of Tofa Lal Pathak whose interest since his death had devolved on the plaintiffs. In March, 1912, Tofa Lal Pathak brought a suit against the Gopes to enforce the mortgage and on the 9th October, in the same year, obtained a decree which was made absolute on the 3rd June, 1913. On the 27th October, 1914, the holding was sold in execution of the mortgage decree and purchased by the mortgagee. On the 3rd August, 1915, the sale was set aside in proceedings under Order XXI, rule 90, of the Code of Civil Procedure at the instance of the mortgagors. A fresh application for execution was filed and on the 19th July, 1919, the holding was again sold in execution of the mortgage decree and it was again purchased by the plaintiffs, the representatives in interest of Tofa Lal. On the 26th February, 1920, the plaintiffs obtained delivery of possession from the Court. At that time Shibram Singh and others, the defendants first party, were in possession of the holding having been inducted on the land as tenants by the proprietors in circumstances hereinafter mentioned. These defendants who may be referred to as the Singh defendants were however ousted by the plaintiffs in pursuance of the delivery of possession awarded them by the Court as purchasers in the execution proceedings in their mortgage suit. The Singh defendants then instituted proceedings under Order XXI, rule 100, of the Code of Civil Procdeure against the plaintiffs, in which they were successful, and on the 16th May, 1921, the plaintiffs were dispossessed.

The plaintiffs accordingly brought the present suit to recover possession of the holding impleading, in addition to the Singh defendants, the proprietors of the village as second party defendants, Gonar Gope and another, the representatives of the original mortgagors, as third party defendants, and Chatku Pathak and others, members of the plaintiffs' family who had separated from them after partition, as fourth party defendants.

Kumar Rajendra Narain Singh and Babu Tejendra Narain Singh, who were represented by the second party defendants, were the maliks of the village in which the holding was situated, the former having a 9-annas share and the latter a 7-annas share in the proprietary interest and they made separate collections of rents from the tenants. In September, 1911, and on the same day, each of the proprietors brought a separate suit for his proportion of the rent against the Gopes who were then in occupation of the holding as tenants. These suits were framed under section 148A of the Bengal Tenancy Act and each of the landlords obtained a decree for rent against the tenants, the 9-annas landlord on the 4th December, 1911, and the 7-annas landlord on the 27th January, 1912. The 7-annas landlord in execution of his decree put up the holding for sale and himself purchased it on the 5th April, 1914. A similar sale took place in execution of the decree obtained by the 9-annas landlord who also purchased the property on the 6th May, 1915. Neither of the landlords obtained immediate possession but on the 15th February, 1917, possession was delivered to the 7-annas proprietor who then held the land as a joint proprietor under the provisions of section 22, sub-section (2), of the Bengal Tenancy Act paying rent to his co-proprietor the 9-annas share holder. On the 5th February, 1919, the 7-annas proprietor settled the holding with the Singh defendants who entered into possession as raiyats under section 22 of the Bengal Tenancy Act. Subsequently in February, 1920, as already stated, the

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Singhs were dispossessed by the plaintiffs but again recovered possession in the proceedings under Order XXI, rule 100, above referred to. It was found as a fact that the holding in question was a non-transferable occupancy holding, and the main question for determination in this appeal was whether the mortgagees of the original occupancy tenants could recover possession of the holding against those holding under the landlords and without the consent of the latter.

Various issues were raised at the trial, three of which only were material to the appeal:—

(1) Whether, the suit is barred by section 11 of the Code of Civil Procedure on the ground that the lands now claimed were found in the previous proceedings under Order XXI, rule 90, not to be identical with the mortgage property and that this decision operates as res judicata and bars the plaintiffs' claim.

(2) Whether the decree in the rent suit obtained by the 7-annas proprietor was a rent decree under section 148A of the Bengla Tenancy Act, or merely a money decree, and, if a rent decree, whether the sale in pursuance thereof passed more than the right, title and interest of the judgment-debtors by reason of the fact that notice of the sale was not served upon the co-sharer proprietor as provided in section 158B of the Bengal Tenancy Act, and,

(3) whether, having regard to the fact that the landlord purchaser did not take steps under section 167 of the Bengal Tenancy Act to annul incumbrances, the mortgage charge upon the property must be regarded as still subsisting and conferring on the plaintiffs a right of possession.

Certain proved or admitted facts in the case were: First, the holding in question was a non-transferable holding and the original occupancy holders, the Gopes, could confer no title upon the plaintiffs as raiyats without the consent of the landlord. Secondly, the landlords had never consented to accept the plaintiffs as tenants of the holding and, thirdly, the plaintiffs were claiming possession as raiyats.

Both the Courts below found that the lands in suit were identical with the lands mortgaged to the plaintiffs but whereas the trial Court considered that the proceedings between the plaintiffs and the Gopes

under Order XXI, rule 90, in which it was found otherwise, did not act as res judicata against the plaintiffs in the present suit, the District Judge on appeal took a different view. The trial Court was of opinion that the decree obtained in the rent suit by the 7-annas proprietor was not properly framed under section 148A of the Bengal Tenancy Act and, further, held that as no proceedings had been taken under section 167 of that Act to annul the incumbrance the plaintiffs' lien remained and took priority over the rights of the landlord. The District Judge on appeal referred to the plaint in the rent suit and found that it complied with the requirements of section 148A and that the decree obtained in that suit was a rent decree. He further found that, although no notice was served under section 158B on the co-sharer landlord, the latter had acquiesced in the sale and must be taken to have waived his right to such notice. In support of this proposition he relied on the case of *Rajani Kanta Ghose* v. *Sheikh Rahman Gazi* (1). He further held that although no proceedings had been taken under section 167 of the Bengal Tenancy Act to annul the plaintiffs' incumbrance no annulment was necessary in the case of a non-transferable occupancy holding. For this proposition he relied upon *Surat Lal Chowdhry* v. *Lala Murlidhar* (2).

Hasan Imam and *L. K. Jha*, for the appellants.

L. P. Pugh, *Naresh Chandra Sinha*, *N. C. Ghosh* and *N. C. Roy*, for the respondents.

DAWSON MILLER, C. J., (after stating the facts set out above, proceeded as follows:)—In argument before us it was no longer denied on behalf of the appellants that the decree obtained by the 7-annas proprietor was a rent decree. In fact the form of the plaint in that suit makes it quite clear that it complied with the provisions of the Statute. But it was contended that the sale in execution thereof conferred upon the landlord purchaser no more than the right,

(1) (1922-23) 27 Cal. W. N. 765. (2) (1919) 4 P. L. J. 362.

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title and interest of the judgment-debtor because no notice was served upon the co-sharer landlord as required by section 158B, sub-section (2) of the Act. It was also contended on behalf of the appellants that the failure to take proper proceedings to annul the incumbrance gave priority to that incumbrance over the rights of the landlord even assuming that he purchased under a rent decree. On the question of res judicata it was contended that the point was not substantially in issue in the previous proceedings in 1915, that these proceedings were not between the same parties or their representatives and that as no objection was taken at the sale to the plaintiffs in 1917 objection could not be taken now on the principle laid down in the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) and that until the sale was set aside it could not be questioned.

It is unnecessary, in my opinion, to determine the question of res judicata as even if we should decide this in favour of the appellants we think they must fail upon other points in the case. Nor indeed could we finally determine this question without having before us more detailed information as to the proceedings under Order XXI, rule 90, than we have at present.

With regard to the second point I have already stated that it is conceded that the decree was a rent decree. Nor do I consider that in the circumstances the failure to serve notice under section 158B involved the consequence that the purchaser at such a sale was in the position of an ordinary purchaser under a money decree. The obligation to serve notice upon the co-sharer landlord is enacted to protect his interest. In such a case the person upon whom it is required to serve notice may, at his option, waive the necessity for such notice. It is found by the District Judge in this case that he did waive the right to such notice and recognised the purchase of the 7-annas landlord, accepting from him his share of the rent. The

(1) (1881) I. L. R. 8 Cal. 51 P. C.; 8 I. A. 123.

question was considered in the case of *Rajani Kanta Ghose* v. *Sheikh Rahman Gazi* (1), where it was held that a co-sharer landlord might waive his right to notice under the section in question notwithstanding the decision of the Judicial Committee in *Raghunath Das* v. *Sundar Das Khetri* (2). In my opinion the case of *Rajani Kanta Ghose* v. *Sheikh Rahman Gazi* (1), was rightly decided.

It remains to consider the third point, namely, the effect of the failure to annul the mortgage incumbrance under the provisions of section 167 of the Bengal Tenancy Act. Admittedly the provisions of that section were not complied with but, although the notice required under the section is framed in language which applies generally to purchasers at sales in execution of rent decrees, and incumbrances can only be annulled in the manner prescribed in the section, different considerations arise in a case like the present where the landlord is himself the purchaser and the incumbrancer is the mortgagee of a non-transferable occupancy holding. The section must be given effect to in the light of the other sections and of the right of the landlord to refuse to recognise a tenant not of his own choosing. Regarded merely as a purchaser he would be barred by the existing incumbrances unless they were annulled. But regarded as a landlord he has the right to refuse to recognise a transferee of the original occupier as his tenant. The plaintiffs are none the less transferees though they acquired under a mortgage lien granted by the original tenants. By section 65 the rent forms a first charge on the holding and takes priority over the mortgage lien. A landlord holding a decree for rent can sell the property and purchase it himself. If he is a co-sharer proprietor, as in this case, he acquires the peculiar interest conferred by sub-section (*2*) of section 22 and may hold the land

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on paying to his co-proprietors their share of rent, and may transfer his rights so acquired to a third person who thereupon becomes a raiyat. What then is to happen if the holding is subject to a mortgage granted by the defaulting tenant. Can the mortgagee who has obtained a decree on his mortgage and purchased the property in execution claim possession from the landlord or the raiyat settled on the land by the landlord? Clearly not without the landlord's consent. He has no right to hold the land as a raiyat against the will of the landlord and his incumbrance, although never formally annulled and although still subsisting for what it is worth, is a barren right against the landlord when he seeks to enforce it by taking possession of the property. It is therefore of no consequence that the landlord did not seek to annul the mortgage, for the mortgagee could not step into the shoes of the original tenants and acquire a raiyati interest against the landlord's will. To hold otherwise would be, in effect, to allow the tenant of a non-transferable holding to transfer in a roundabout way to a stranger, without the landlord's consent, by executing a mortgage in favour of the stranger and allowing the holding to be sold in execution of a mortgage decree. Such a sale can give him no right against the landlord without the latter's consent or entitle him to oust the landlord or the tenant claiming under him. It must be remembered that the plaintiffs in this case are claiming actual possession as purchasers of the holding. They are not seeking to redeem the landlord by payment of the rent charge under section 73 of the Transfer of Property Act, or to share in the surplus proceeds of the rent sale as second mortgagees. Such remedies may have been open to them in proceedings properly framed for that purpose. But the present suit is not one of such a nature. Even had proceedings been taken under section 73, I apprehend that when the plaintiffs came to take possession they would still have been in a difficulty unless the landlord consented to accept them as tenants. The view just

expressed is in accordance with the decision of this Court in *Surat Lal Chowdhery* v. *Lala Murlidhar* (1). The truth would appear to be that the transferee of a non-transferable occupancy holding, whether he takes by kabala from the original tenant or whether he acquires the property by purchase under a mortgage decree, has a very precarious right, for he cannot force himself upon the landlord as a tenant without the latter's consent.

For these reasons I think that this appeal must be dismissed with costs.

ADAMI, J.—I agree.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

SURAJ BALLI SINGH

v.

TILAKDHARI SINGH.*

1927.

Nov., 17.

Hindu law—widow, interest acquired by, by adverse possession, whether forms her stridhan—test to be applied.

An interest acquired in a property by a Hindu widow by adverse possession is her stridhan and is not an accretion to her husband's estate unless it is shown that she took adverse possession of the property as representing her husband's estate.

Jagmohan Singh v. *Prayag Narayan* (2), followed.

Musammat Lajwanti v. *Safa Chand* (3), explained.

*Appeal from Appellate Decree no. 952 of 1924, from a decision of Babu Kamla Prasad, Subordinate Judge, 1st Court, of Muzaffarpur, dated the 15th April, 1924, confirming the decision of Babu Jadunath Sahay, Munsif, 2nd Court, of Muzaffarpur, dated the 31st July, 1923.

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

(2) (1925) 6 Pat. L. T. 206.

(3) (1925) 6 Pat. L. T. 1, P. C.; 51 I. A. 171.