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assert that such a person has no title to the property, but the fact remains that the property continues to be the property of the judgment-debtor and I do not see why another execution creditor who purchases it in execution of the decree should be debarred from proving that as between himself and the previous purchaser his title ought to prevail. In my opinion it was open to the appellant to show in the present suit that the sale held at Alipur was a nullity and that he was entitled to proceed against the disputed house in execution of his decree.

I would, therefore, allow this appeal, set aside the judgment and decree of the Court below and restore the decree of the trial Court. There will be no order as to costs so far as this Court and the lower appellate Court are concerned, but the appellant will be entitled to the costs awarded to him by the trial Court.

MANOHAR LALL, J.—I agree.

S.A.K.

Appeal allowed.

FULL BENCH.

Before Fazl Ali, Agarwala and Varma, JJ.

MAHADEV MAHARAJ

v.

JAGDEV SINGH.*

Bihar Tenancy Act, 1885 (Act VIII of 1885), sections 65 and 167—mortgagee of a part of holding, rights of.

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March, 21,
22.
May, 11.

* Appeal from Appellate Decree no. 967 of 1936, from a decision of Babu Manindra Nath Mitra, Subordinate Judge of Monghyr, dated the 13th of February, 1936, affirming a decision of Maulavi Muhammad Shamsuddin, Munsif of Monghyr, dated the 13th of May, 1935.

against purchaser in execution of rent decree—mortgage not annulled—purchaser, whether has priority over mortgagee—mutual rights of redemption, whether exist.

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A purchaser (not being a landlord) of a holding in execution of a decree for rent has a charge for the amount of the decree for rent as against the holder of a mortgage of a part of the holding executed before the purchase, and is entitled to the same rights as the purchaser of a holding in execution of a decree passed on a prior mortgage.

A. B. Cheoditti v. Quadress(1), *Surat Lal Chowdhery v. Lala Murlidhar*(2), *S. M. Meherunnesa v. Sham Sundar Bhuiya*(3), *Bibi Taibatannessa Chowdhurani v. Pravabati Dasi*(4) and *Gopi Nath Mahapatro v. Kashi Nath Beg*(5), followed.

Sukhi v. Ghulam Safdar Khan(6), applied.

Bidhumukhi Dasi v. Bhaba Sundari Dasi(7), *Sital Chandra Majhi v. Parbati Charan Chakrabarti*(8) and *Annada Prosad Chatterji v. Phanindra Bhusan Ghatak*(9), not followed.

Hargobind Das v. Ramchandra Jha(10), overruled.

Tariniprosad Roy v. Narayan Kumari Debi(11), *Badlu Pathak v. Sibrum Singh*(12) and *Sourendra Mohan Singh v. Kunjibihari Lal Mander*(13), referred to.

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

(2) (1918) 4 Pat. L. J. 362.

(3) (1902) 6 Cal. W. N. 834.

(4) (1909) 10 Cal. L. J. 640.

(5) (1909) 9 Cal. L. J. 234.

(6) (1921) L. R. 48 Ind. App. 465.

(7) (1920) 24 Cal. W. N. 961.

(8) (1921) 35 Cal. L. J. 1.

(9) (1936) A. I. R. (Cal.) 381.

(10) (1926) I. L. R. 6 Pat. 235.

(11) (1889) I. L. R. 17 Cal. 301.

(12) (1927) I. L. R. 7 Pat. 155.

(13) (1928) I. L. R. 8 Pat. 439.

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If a purchaser in execution of a rent decree fails to annul an incumbrance under section 167 of the Bihar Tenancy Act, 1885, the incumbrance will continue but he will not thereby lose his priority over the holder of the incumbrance.

Therefore, a mortgagee is entitled to redeem or otherwise exercise his right of redemption against a purchaser of the holding at a rent sale who has taken no steps to annul the mortgage under section 167. The latter too, being also a purchaser of the equity of redemption, is entitled to redeem the mortgage, if it has not been formally annulled.

Appeal by the defendant.

The appeal was in the first instance heard by Fazl Ali and Agarwala, JJ. who referred it to a Full Bench.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

S. N. Bose and *G. P. Dass*, for the appellant.

Khurshaid Husnain (with him *Pitamber Missir* and *M. Rahman*), for the respondents.

FAZL ALI, J.—This case was originally heard by my brother Agarwala and myself and we referred it to a Full Bench by our order, dated the 5th May, 1938, which runs as follows:—

“ This appeal raises a question of considerable importance about which the decisions of this Court are unfortunately, by no means, clear. We consider that it is desirable that the appeal should be heard by a larger Bench, and, therefore, direct that it be laid before the Chief Justice for orders under rule 2, Chapter V, of the Rules of the High Court.

The question which arises for decision is whether a purchaser (not being a landlord) of a holding in execution of a decree for rent, has a charge for the amount of the decree for rent as against the holder of a mortgage of the part of the holding executed before the purchase, or is entitled to the same rights as the purchaser of a holding in execution of a decree passed on a prior mortgage.”

The question so formulated arose on the following facts. On the 16th September, 1929, the respondents nos. 5 and 6 executed a mortgage bond

in favour of respondents nos. 1 to 4 hypothecating several items of property including khata no. 325 which was part of a holding belonging to them. In 1929 the landlord of the village wherein the holding is situate brought a rent suit and in execution of the decree passed in his favour in that suit the holding was sold and purchased by the appellant on the 10th March, 1931. On the 5th December, 1933, the respondents nos. 1 to 4 brought the present suits to enforce their mortgage bond, inpleading therein no less than eleven persons including the appellant as defendants. The suit was contested only by the appellant who was defendant no. 11 and by the guardian ad litem of defendant no. 3, a minor son of one of the executants of the bond. The latter attacked the bond on the ground that it was without consideration and not supported by any legal necessity and the appellant took two additional pleas among others, namely, (1) that the incumbrance created by the mortgage had been annulled under section 167 of the Bengal Tenancy Act and (2) that the lands purchased by the appellant were not liable to be sold for the payment of the dues under the bond and that at any rate they could be sold only if the dues under the bond were not realised by the sale of the other mortgaged properties. The Munsif who tried the suit passed a mortgage decree against all the defendants including the appellant, holding, inter alia, that the mortgage bond was genuine and for consideration, that its execution was justified by legal necessity and that the proceeding under section 167 of the Bengal Tenancy Act was of no avail to the appellant as he applied under that section more than a year after having become aware of the plaintiffs' mortgage. The appellant then appealed to the District Judge, but as his appeal did not succeed he has preferred this second appeal.

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The main ground which is put forward on behalf of the appellant in this Court is that he being

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the purchaser of the entire holding of the original mortgagors, has acquired with regard to khata no. 325 a title paramount to that of the plaintiffs and can use it as a shield in that suit. The question, as has been pointed out in the order of reference, is of some importance and requires careful consideration.

Section 55 of the Bengal Tenancy Act, which has been reproduced with a slight variation in the Bihar Tenancy Act of 1935, runs as follows:—

“Where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy-raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon.”

In view of this provision it was held by Mullick, J. in *A. B. Cheoditti v. Quadress*⁽¹⁾ that a purchaser at an auction sale in execution of a decree for rent or road-cess (which is included in the definition of ‘rent’) acquires a title paramount to that of a mortgagee of the same property even though the decree was obtained subsequently to the execution of the mortgage. The decision of Mullick, J. was upheld on appeal under the Letters Patent and was cited with approval in *Surat Lal Chowdhery v. Lala Murlidhar*⁽²⁾ wherein it was held that a purchaser in execution of a rent decree is not liable to be ousted by a person who purchases the same property in execution of a mortgage decree even though the mortgage has not been annulled under section 167 of the Bengal Tenancy Act. The learned Judges who decided the last mentioned case observed in the course of their judgment that the purchaser under a mortgage decree might well be regarded as a second mortgagee. A similar view was expressed by the Calcutta High Court in *S. M. Meherunnesa v. Sham Sundar Bhuiya*⁽³⁾. In that case one of the

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

(2) (1918) 4 Pat. L. J. 362.

(3) (1902) 6 Cal. W. N. 834.

points urged before the High Court was that after the sale of a holding in execution of a rent decree, the rent charge must be taken to have been discharged, so that the plaintiff who was the mortgagee of the holding and whose encumbrance had not been annulled would be entitled to sell the property mortgaged free of that charge. The Judges who heard the case negatived this argument and remarked that the plaintiff may well be regarded in the circumstances as a second mortgagee, the prior charge being in the defendant. Similarly, in *Tariniprosad Roy v. Narayan Kumari Debi*⁽¹⁾ it was held that section 65 of the Bengal Tenancy Act creates a first charge upon the tenure for its rent and puts the landlord in the position of a first mortgagee so far as the rent is concerned; and in *Bibi Taibatannessa Chowdhurani v. Pravabati Dasi*⁽²⁾ it was laid down that a purchaser at a sale in execution of the landlord's claim for rent acquires a title to the whole of the holding preferential to that which a mortgagee by his purchase in execution of his mortgage decree acquires in portions of the holding. The same principle was re-iterated in *Gopi Nath Mohapatro v. Kashi Nath Beg*⁽³⁾.

These decisions which are all based on the language of section 65 of the Bengal Tenancy Act show that the title acquired by the purchaser of a holding at a rent sale, whether he be a landlord or a stranger, is to be regarded as paramount to that of the mortgagee of that holding, even though the decree is obtained subsequent to the execution of the mortgage. The view, however, which has been taken in some of the later decisions of the Calcutta High Court is quite different in spite of the fact that the earlier cases appear to have never been overruled. The view which has been taken in these later

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(1) (1889) I. L. R. 17 Cal. 301.

(2) (1909) 10 Cal. L. J. 640.

(3) (1909) 9 Cal. L. J. 234.

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cases is that a purchaser at a rent sale whether he be a landlord or any one else, is bound to follow the provisions of section 167 and if the mortgage is not annulled on the expiry of one year from the date of the rent sale or from the date when the purchaser had notice of the encumbrance, the holding remains subject to the mortgage and the purchaser at a rent sale is not entitled to possession of the property unless he redeems the mortgage. Among the cases in which this view has been taken may be mentioned *Bidhumukhi Dasi v. Bhaba Sundari Dasi*(1), *Sital Chandra Majhi v. Parbati Charan Chakrabarti*(2) and *Annada Prosad Chatterji v. Phanindra Bhusan Ghatak*(3). The view expressed in these cases is justified by Mookerjee, J. in *Sital Chandra Majhi v. Parbati Charan Chakrabarti*(2) in these words: "In the first place, it was contended that the defendants were entitled to priority, as rent is a first charge on the tenure or holding under section 65 of the Bengal Tenancy Act. This argument, which may find apparent support from the decisions in *Gopinath v. Kashinath*(4) and *Taibatunnessa v. Prarabati*(5), is based upon a misapprehension of the true effect of section 65, which only intends what is explicitly laid down in subsequent sections of the Act, that is, those in Chapter XIV, namely, that the charge should be enforced by the sale of the tenure or holding free of incumbrances, and if in any case the decree for rent either has not been or cannot be enforced by the sale of the tenure or holding, the charge created by section 65 cannot be enforced in any other way."

It may be noted here that the decisions quoted above do not draw any distinction between a transferable holding and a non-transferable one or

(1) (1920) 24 Cal. W. N. 961.

(2) (1921) 35 Cal. L. J. 1.

(3) (1936) A. I. R. (Cal.) 381.

(4) (1909) 9 Cal. L. J. 234.

(5) (1909) 10 Cal. L. J. 640.

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between a landlord purchaser and a purchaser who is not a landlord. It is clear that if the tenant of a holding, notwithstanding the fact that the holding is not transferable, mortgages it to a third person, the landlord of the holding is not bound to recognise the mortgage or admit the mortgagee to be his tenant even though the mortgagee may have obtained a decree on the basis of the mortgage. In such a case if the holding is sold in execution of a rent decree and the landlord himself purchases it, there is nothing to prevent him from ignoring the mortgage without formally annulling the encumbrance under section 167 of the Bengal Tenancy Act of 1885. This was very clearly pointed out by Dawson Miller, C. J. in *Badlu Pathak v. Sibram Singh*⁽¹⁾ in the following passage:—

“ 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 fact, 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

(1) (1927) I. L. R. 7 Pat. 155.

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right against the landlord without the landlord's consent or entitle him to oust the landlord or the tenant claiming under him. "

The same view was re-iterated by Sir Jwala Prasad in *Sourendra Mohan Singh v. Kunjbihari Lal Mander*(1).

These cases have so far as this Court is concerned settled the rights of a landlord purchaser, but the position is not so clear when the holding is purchased by a person who is not a landlord. As I have already stated, the view expressed in the earlier decisions of this Court was that such a purchaser may well be regarded as a first mortgagee, but a contrary view has been expressed in *Har-gobind Das v. Ramchandra Jha*(2). In that case Adami, J. quoted with approval in his judgment the decision of the Calcutta High Court in *Bidhumukhi Dasi v. Bhaba Sundari Dasi*(3) and *Sital Chandra Majhi v. Parbati Charan Chakraborti*(4) and held that a purchaser at a rent sale, who has not under section 167 of the Bengal Tenancy Act annulled a mortgage on the holding, is entitled to redeem the mortgage, but the mortgagee cannot redeem or otherwise exercise his right of redemption against the auction-purchaser. It is contended on behalf of the appellant that this decision should be ignored, first, because it runs counter to the earlier decisions of this Court which have not yet been overruled; secondly, because Macpherson, J., who heard the case with Adami, J., merely "agreed to the order proposed" which shows that he did not concur in all the reasons given by Adami, J. in support of his view; and, thirdly, because Adami, J. seems to have wrongly assumed that in

(1) (1929) I. L. R. 8 Pat. 439.

(2) (1926) I. L. R. 6 Pat. 295.

(3) (1920) 24 Cal. W. N. 961.

(4) (1921) 35 Cal. L. J. 1.

Lala Murlidhar v. Sarat Lal Chowdhery(1), which was decided by Coutts and Ross, JJ., the purchaser of the holding was the landlord of the village though in fact he was a stranger. These facts no doubt detract to some extent from the authority of the decision in question, but as the view expressed in it has been shared also by some eminent Judges of the Calcutta High Court, it requires careful examination.

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Section 65 is one of the sections in Chapter VIII of the Bengal Tenancy Act and section 167 occurs in Chapter XIV which is a different chapter. There is nothing in the Act to show that all the legal consequences which flow from the specific provision made in section 65 of Chapter VIII that rent is a first charge on the holding were exhaustively provided for in Chapter XIV or that the only right which the purchaser of the holding at a rent sale has with reference to the mortgagee of the holding is to annul the mortgage under section 167. If the latter view is correct, it will mean that the provision in section 65 that rent is a first charge on the holding is redundant, because, apart from this section and without any reference to it, section 167 gives the right of annulling incumbrances to a purchaser of a holding in execution of a rent decree. It may be that the charge created under section 65 was not intended to be enforced precisely in the same manner as the charge under section 100 of the Transfer of Property Act; but the fact remains that rent has been made a statutory charge on the holding and the charge is stated to be a first charge. The expression 'first charge' is not an uncommon expression and the least it can connote in the present context is (1) that the rent can be realised by the sale of the holding itself and (2) that the claim for rent will have priority over other charges or incumbrances on the holding. It would thus be anomalous

 (1) (1922) 3 Pat. L. T. 362.

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to hold that one who purchases a holding in execution of a rent decree occupies a position inferior to that of a mortgagee of a holding or a person who purchases it in execution of a mortgage decree. In my opinion, the view taken in the earlier decisions of this Court and the Calcutta High Court, namely, that the position of a purchaser in execution of a rent decree is similar to that of a purchaser in execution of decree based on a prior mortgage, is the better and more logical view. As in a rent suit the landlord is not obliged to implead the mortgagee of a holding as a defendant, if the holding is a non-transferable one, the latter should occupy the same position with reference to a purchaser in execution of a rent decree as a subsequent mortgagee occupies with reference to a purchaser in execution of a decree based on a prior mortgage to which he was not a party. It was held by the Judicial Committee of the Privy Council in *Sukhi v. Ghulam Safdar Khan*(¹) that where the prior mortgagee having obtained a decree is sued by a puisne mortgagee whom he had not joined in the former suit, the former is entitled to use his prior mortgage as a shield, and to have the discharge of his decree made a condition to a sale decree in favour of a puisne mortgagee. I do not see why the same principle should not govern the relation between the purchaser of a holding in execution of a rent decree and its mortgagee. Thus if a purchaser in execution of a rent decree fails to annul an incumbrance under section 167, the incumbrance will continue but he will not thereby lose his priority over the holder of the incumbrance. This priority is acquired by him as a matter of law in consequence of the rent being a first charge on the holding and it should not be confused with the special privilege conferred on him by section 167. Therefore while agreeing with the first proposition laid down by Adami, J. in *Hargobind Das v. Ramchandra Jha*(²),

(1) (1921) L. R. 48 Ind. App. 465.

(2) (1926) I. L. R. 6 Pat. 235.

I respectfully dissent from his second proposition that the mortgagee of a holding cannot redeem or otherwise exercise his right of redemption against the auction-purchaser of the holding at a rent sale, who has taken no steps to annul the mortgage under section 167 of the Bengal Tenancy Act. The first proposition laid down by Adami, J. was that a purchaser at a rent sale is entitled to redeem the mortgage if he has not annulled it under section 167 of the Bengal Tenancy Act. That this must be so is evident from the fact that the auction-purchaser is also a purchaser of the equity of redemption. In my opinion the question referred to the Full Bench should be answered in the affirmative.

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Now so far as the present case is concerned the appellant (defendant no. 11) is not prepared to redeem the plaintiffs' mortgage but both the appellant and the plaintiffs are agreed that if a charge is declared in favour of the former, the proportionate sum chargeable on khata no. 325 will amount to Rs. 350 and in that event the khata no. 325 need be sold only if the mortgage dues are not satisfied by the sale of the other mortgaged properties and if khata no. 325 is sold the defendant no. 1 will be entitled to get Rs. 350 out of the sale proceeds. I would, therefore, partly allow this appeal and direct that a mortgage decree be passed in favour of the plaintiffs on the following terms:—

That if the mortgage dues are not paid within four months from the date of this judgment the mortgaged properties other than the land of khata no. 325 shall be sold in the first instance. If the decree is not satisfied by the sale of those properties, then only the land of khata no. 325 shall be sold, but out of the sale proceeds of this khata the plaintiffs shall pay to the defendant no. 11 a sum of Rs. 350. In case the plaintiffs themselves purchase khata no. 325 they will be entitled to retain possession thereof on payment of Rs. 350 to the appellant. If the decretal

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amount is not satisfied by the sale of the mortgaged properties including the land of khata no. 325 it will be open to the plaintiffs to take such proceedings as they are entitled to take under the law to realise the balance of the dues from the other properties, if any, belonging to defendants nos. 1 to 5. Each party will bear his own costs in this Court and in the Court below but the order of the first Court as to costs will stand.

AGARWALA, J.—I agree.

VARMA, J.—I agree.

Appeal allowed in part.

S. A. K.

REVISIONAL CIVIL.

Before Fazl Ali and Chatterji, JJ.

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May, 9, 11.

RATANSHI HIRJI BHOJRAJ

v.

TRICUMJI JIWANDAS.*

Code of Civil Procedure, 1908 (Act V of 1908), section 60 and Order XXI, rule 53 (4)—preliminary decree in a suit for dissolution of partnership and accounts, whether is attachable.

A preliminary decree in a suit for dissolution of partnership and accounts is attachable under section 60 of the Code of Civil Procedure, 1908, and may be attached in the manner prescribed by Order XXI, rule 53 (4).

* Civil Revision nos. 379, 467 and 468 of 1938, from an order of Babu Jugal Kishore Narayan, Subordinate Judge, Dhambad, dated the 25th May, 1938.