1938.

SHIVA SHANKAR SAH v. MANBHARAN RAY.

AGARWALA, J.

the plaintiff, after the hearing of the suit had been completed, in which he alleged that Lakshman Rai had filed an affidavit of service at an earlier stage of the proceedings. Manbharan Rai's affidavit was for the purpose of inducing the court to call for this affidavit of service. The application was rejected and, therefore, the defendants had no occasion to controvert the allegation made in it. The Court below was not entitled in a suit to take evidence by affidavit. If it was necessary to secure the plaintiff's evidence with regard to any point, the other side was entitled to cross-examine.

The result of this appeal, therefore, is that with regard to items 1422, 1425 and 3562 the decree of the Courts below is set aside and the plaintiff's suit is dismissed. With regard to the other two items, namely, 1276 and 3565, the plaintiff claims in these a one-fourth share which he seeks to partition and to that extent his suit succeeds and the appeal with regard to those two items is dismissed. The parties will bear their own costs throughout.

HARRIES, C. J.—I entirely agree.

Appeal allowed in part.

S. A. K.

APPELLATE CIVIL.

1938.

November, 10.

Before James and Chatterji, JJ.

SREE SREE RAMCHANDERJI

v.

HEM CHANDRA SINGH.*

Bengal Tenancy Act, 1885 (Act VIII of 1885), sections 86(6) and 167—landlord purchasing under a rent decree, whether bound to annul encumbrance—section 86(6), whether

* Appeal from Appellate Decree no. 237 of 1937, from a decision of Babu Jadunath Sahay, Additional Subordinate Judge of Bhagalpur, dated the 16th July, 1936, affirming a decision of Babu Ramchandra Misra, Munsif at Bhagalpur, dated the 31st January, 1935.

1938.

SREE SREE RAM-CHANDERJI v. HEM CHANDRA SINGH.

applies to non-transferable occupancy holding—Bihar Tenancy Act, 1885 (Act VIII of 1885), sections 26-B and 26-N, whether protect a mortgagee.

Section 86(6) of the Bengal Tenancy Act, 1885, does not apply to a non-transferable occupancy holding.

A purchaser under a rent decree as such is bound by an encumbrance which he has not annulled under section 167 of the Bengal Tenancy Act, 1885, but if the purchaser happens to be the landlord, he, in his capacity as landlord, is entitled to disregard the encumbrance if not made with his consent, and may take possession of the purchased holding and may successfully maintain it in opposition to the claims of the encumbrancer.

Hargobind Das v. *Ramchandra Jha*(1), *Badlu Pathak* v. *Sibram Singh*(2) and *Sourendra Mohan Singh* v. *Kunjbihari Lal Mander*(3), followed.

Sections 26-B and 26-N of the Bihar Tenancy Act, 1885 (since repealed by Bihar Act XI of 1938), which in terms apply to transfers by sale, exchange, gift or will do not apply to mortgages and cannot, therefore, protect a mortgagee.

Appeal by the plaintiffs.

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

Chandeshwar Prasad Sinha, for the appellants.

S. M. Mullick and *Nitai Chandra Ghose*, for the respondents.

CHATTERJI, J.—This is a second appeal by three Hindu deities represented by their shebait, Rameshwar Prasad Singh, who brought a suit under Order XXI, rule 103, of the Civil Procedure Code. The dispute relates to an area of 33 bighas 13 kathas out of a nakdi jote which belonged to the defendants second party. They executed a sudbharna bond, dated the 14th June, 1921, in respect of the disputed

(1) (1926) I. L. R. 6 Pat. 235.
(2) (1927) I. L. R. 7 Pat. 155.
(3) (1928) I. L. R. 8 Pat. 439.

1938.

SREE SREE RAM-CHANDERJI v. HEM CHANDRA SINGH.

CHATTERJI, J.

33 bighas 13 kathas in favour of the plaintiff. In 1930 the defendants first party who are the landlords of the holding brought a suit for rent against the defendants second party, describing the holding to be of 36 bighas 7 kathas 3 dhurs, and obtained a decree in execution of which they purchased the holding and took possession of it on the 18th May, 1932. The plaintiffs then filed an application under Order XXI, rule 100, of the Civil Procedure Code but it was dismissed on the 16th January, 1933. Thereupon they brought the present suit on the 15th January, 1934. Their main allegations were that the decree for rent obtained by the defendants first party was a money decree because the suit was brought in respect of a portion of the holding, the area of the entire holding being 38 bighas 1 katha 3 dhurs, and all the tenants interested in the holding were not made defendants in the suit. They further asserted that even if the decree was a rent decree their encumbrance not having been annulled under the provisions of section 167 of the Bengal Tenancy Act, the defendants first party as purchasers had no right to dispossess them.

The main defence in the suit was that the sudbharna bond of the plaintiffs was not a bona fide transaction and that the decree in question was a rent decree, the suit being in respect of the entire holding and against the entire body of tenants. It was alleged that though the previous area of the entire holding was 38 bighas 1 katha 3 dhurs the raiyats surrendered two plots of the holding, namely, plots 54 and 373, having an area of 1 bigha 14 kathas, in 1331 and since then the landlords were in khas possession of those two plots. The area of the holding was thus reduced to 36 bighas 7 kathas 3 dhurs and it was for this area that the rent suit was brought.

The learned Munsif who tried the suit dismissed it holding that the decree in question was a rent decree because the claim was for an entire holding and all the tenants interested in the holding were

made defendants in the suit. On the question whether the sudbharna bond of the plaintiffs was a bona fide transaction he found in their favour. On appeal his decision has been affirmed by the Additional Subordinate Judge. Hence this second appeal.

The first point raised on behalf of the appellants is that the decree for rent was a money decree. The first ground urged in support of this contention, namely, that all the tenants interested in the holding were not made defendants in the suit is concluded by the concurrent findings of fact. Both the courts below have found that all the persons who were recorded in the landlord's books were made parties to the suit. That being so, the plea that the suit was not brought against the entire body of tenants must fail.

On the question whether the suit was in respect of a portion of the holding it has also been found by the courts below that at the time of the suit the area of the holding was 36 bighas 7 kathas 3 dhurs and the suit was for the rent of this holding. The previous area of the holding of course was 38 bighas 1 katha 3 dhurs, but in 1331 the raiyats surrendered the plots 54 and 373 comprising an area of 1 bigha 14 kathas and this has been found by both the courts below. The learned Advocate for the appellants, however, contends that the two plots 54 and 373 being included in their sudbharna bond, there could be no valid surrender in respect of those plots without their consent. In support of this contention reliance is placed on section 86, clause 6, of the Bengal Tenancy Act. The learned Subordinate Judge has found that since the surrender in 1331 the landlords have been in possession of the surrendered plots 54 and 373 and the plaintiffs never raised any objection to their possession. The learned Subordinate Judge has therefore held that there was implied consent of the plaintiffs to the surrender. Apart from this fact,

1938.

SREE SREE RAM-CHANDERJI v. HEM CHANDRA SINGH.

CHATTERJI, J.

section 86, clause 6, of the Bengal Tenancy Act does not, in my opinion, seem to apply to a non-transferable holding. Though the section speaks in general terms of a holding it has to be read with the other provisions of the Act. Occupancy holdings in the absence of proof of any custom to the contrary are presumed to be non-transferable. Suppose a raiyat after mortgaging his holding surrenders it without the mortgagee's consent to his landlord who comes into possession; the mortgagee then sues upon his mortgage and obtains a decree in execution of which he purchases the holding and seeks to obtain possession. The landlord unless he has given his consent to the purchase is entitled to ignore it altogether and though he might have come into possession on the strength of an invalid surrender he can successfully resist the purchaser's claim for possession. The purchaser cannot force himself upon the landlord as his tenant without his consent. If this is the position of the mortgagee, how can he claim that the surrender could not be valid unless it was made with his consent? Thus section 86, clause 6, would obviously be of no avail to him.

The next contention on behalf of the appellants is that their encumbrance, not having been annulled under the provisions of section 167 of the Bengal Tenancy Act, is effective and binding against the defendants first party who are the purchasers under the rent decree. The answer to this contention is that the defendants first party are themselves the landlords and they need not have annulled the encumbrance. Indeed section 167 by its terms does not exclude a landlord-purchaser but the section has to be read in accordance with the general provisions of the Act. In the case of a non-transferable holding, as I have already pointed out, the mortgagee cannot by enforcing his rights under the mortgage claim possession from the landlord unless he has recognised him as his tenant. Of course a purchaser under a rent decree as such is bound by an encumbrance which he

has not annulled under section 167 of the Bengal Tenancy Act, but if the purchaser happens to be the landlord he, in his capacity as landlord, is entitled to disregard the encumbrance, if not made with his consent, and may take possession of the purchased holding and may successfully maintain it in opposition to the claims of the encumbrancer. The view I take is in accordance with the decisions of this Court in *Hargobind Das* v. *Ramchandra Jha*(1), *Badlu Pathak* v. *Sibram Singh*(2) and *Sourendra Mohan Singh* v. *Kunjbihari Lal Mander*(3). The learned Advocate for the appellants contends that these decisions are no longer good law because under the amended provisions of section 26 of the Bihar Tenancy Act of 1934 all occupancy holdings have been made transferable. The relevant clauses of that section are 26-*B* and 26-*N*. Section 26-*B* runs as follows:—

"(1) An occupancy raiyat shall have power to transfer his occupancy holding or any portion thereof, together with the right of occupancy therein, by sale, exchange, gift or will, but, except as provided in sub-section (2), no such transfer shall be valid against the landlord unless he has given, or is deemed under section 26-F to have given, his consent thereto."

Section 26-*N* runs as follows:

"Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before the first day of January, 1923, and, in the case of the transfer of a portion of a holding, to have accepted the distribution of the rent of the holding as stated in the instrument of transfer, or if there is no such instrument, as settled between the transferor and the transferee."

These sub-sections by their terms apply to transfers by sale, exchange, gift or will. They do not apply to mortgages and, therefore, do not protect the plaintiffs who are sudbharnadars. It may, however, be said that when a mortgage is followed by a sale in execution of a decree on the mortgage the execution

(1) (1926) I. L. R. 6 Pat. 235.
(2) (1927) I. L. R. 7 Pat. 155.
(3) (1928) I. L. R. 8 Pat. 429.

1938.

SREE SREE RAM-CHANDERJI v. HEM CHANDRA SINGH.

CHATTERJI, J.

sale may be treated on the same footing as a voluntary sale and would therefore come within the purview of section 26-*B*. Assuming for a moment that this view is correct, it does not hold good with regard to usufructuary mortgagees. The plaintiffs are usufructuary mortgagees and they claim to have been in possession of the mortgaged lands till they were dispossessed by the landlord-purchasers. Even under the amended provisions of the Bihar Tenancy Act their claim cannot be enforced against the landlord.

There is another aspect of the case. The plaintiffs as usufructuary mortgagees were liable to pay rent of the mortgaged property which formed the major portion of the holding. They did not pay the rent and for the arrears, the bulk of which was payable by them, the rent suit was brought. Rent is a first charge on the holding and the holding having been sold in execution of the rent decree, it is now too late for the plaintiffs to assert their right as encumbrancers against the landlord-purchasers.

There is no substance in any of the contentions raised by the appellants and I would dismiss the appeal with costs.

JAMES, J.—I agree.

Appeal dismissed.

S. A. K.

REVISIONAL CIVIL.

Before Khaja Mohamad Noor and Dhavle, JJ.

1938.

December, 16.

HALUMAN PRASHAD MAHASETH

v.

PURAN TATMA.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 74—kathiari, *whether is an* abwab—*landlord, when entitled to* kathiari—abwab, *meaning of.*

*Civil Revision no. 384 of 1938, from an order of Babu Jagannath Lall, Munsif, 2nd Court, Madhubani, dated the 30th April, 1938.