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was pleaded as having been come to between the parties, before the decree was made, be given effect to, it would have the effect of nullifying the decree; and it seems to us that upon this single ground the objection could not be entertained. A decree was duly made between the parties, and, if they entered into such an agreement, as is now alleged, it should have been incorporated in the decree. The decree being once made, it must be taken to be conclusive between the parties, and an agreement like the one which has been pleaded could not be given effect to.

The learned *vakil* for the appellant has called our attention to the case of *Laldas Narandas v. Kishordas Devidas* (1), decided by a Full Bench of the Bombay High Court, in support of the view that he has propounded. But it seems to us that the question that was discussed before the Bombay High Court was a question somewhat different from the one with which we are now concerned. There, the question raised was whether the existence and validity of an agreement made between the parties before an arbitration decree was made, ought to be determined in execution of the said decree under the provisions of s. 244 of the Code of Civil Procedure, or in a separate suit; and it was held that that question should be determined in the course of execution of the decree, and not in a separate suit. The question, however, that we have to determine is whether an agreement like the one which is said to have been entered into by the parties before the decree was made could be given effect to. We are of opinion that it could not be given effect to. We accordingly overrule this objection.

As to the other objection, it appears to us that, if the money was paid in 1884 (and it was, according to the story of the judgment-debtor, paid in respect of the claim which the decree-holders had, and upon which claim the decree was obtained in 1887), such payment ought to have been raised in the suit itself, and before the decree was made between the parties. [813] It is apparent that the claim of the appellant in regard to the payment made in 1884 is now barred by limitation, and it would, we think, be improper to give effect to such a plea—a plea which, as already stated, ought to have been made in the suit in which the decree was passed.

Upon these grounds we overrule both the objections. The result is that the appeal will be dismissed with costs.

*Appeal dismissed.*

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*Before Mr. Justice Hill and Mr. Justice Brett.*

AKHOY KUMAR SOOR *v.* BEJOY CHAND MOHATAP (MINOR).\*

[2nd and 3rd July, 1902.]

*Sale—Rent—Bengal Tenancy Act (VIII of 1885) ss. 160, cl. (g) and 167—Sale of mortgage of darpatni tenure—Right, title and interest of debtors—Regulation VIII of 1819, ss. 8 and 4—Incumbrance—Limitation Act (XV of 1877) s. 7—Where limitation is determined by the provisions of the Bengal Tenancy Act, whether a minor is entitled to a further period of limitation under the Limitation Act.*

\* Appeal from order No. 193 of 1901, against the order of Babu Prasanna Kumar Ghose, Subordinate Judge of Hooghly, dated the 22nd April, 1901.

(1) (1896) I. L. R. 22 Bom. 463.

The terms "right, title and interest of the debtors," as used in the sale certificate and order must be construed with reference to the circumstances under which the suit was brought, and the true meaning of the decree under which the sale took place as well as the proceedings leading up to the sale.

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In a case where proceedings were taken under the provisions of the Bengal Tenancy Act and application was made for the simultaneous issue of the order of attachment and proclamation as provided in s. 168 of the Act, what was intended to be sold was the entire tenure and not merely the right, title, and interest of the defaulter therein.

*Jotendro Mohun Tagore v. Jogul Kishore* (1) and *Nitayi Behari Saha Paramanick v. Hari Govinda Saha* (2) referred to.

A mortgage created by a darpatnidar of his interest in the taluq does not amount to a "protected interest" within the meaning of s. 160, cl. (g) of the Bengal Tenancy Act.

When a mortgagee of a tenure had enforced his lien and obtained his decree it would no longer remain as an incumbrance on the tenure, which could be avoided under the provisions of s. 167 of the Bengal Tenancy Act.

S. 7 of the Limitation Act allows a minor a further period of limitation in the case of a suit or application for which the period of limitation is [814] provided in the third column of the second schedule of that Act. But in a case where the limitation is determined by the provisions of s. 167 of the Bengal Tenancy Act, s. 7 of the Limitation Act cannot have any application, and the minor is not entitled to any fresh period of limitation.

*Girija Nath Roy Bahadur v. Patani Bibee* (3) referred to.

The purchaser of the interest of a judgment-debtor is his representative for the purpose of execution proceedings.

*Ishan Chunder Sarcar v. Beni Madhab Sarkar* (4) referred to.

THE decree-holder, Akhoy Kumar Soor, appealed to the High Court.

This appeal arose out of an application for execution of a decree. One Hira Lal Sircar mortgaged with other properties his one-third share in taluk Rampore to Akhoy Kumar Soor by a bond dated the 25th November, 1886. In 1891 Akhoy Kumar Soor sued on his mortgage and on the 11th January, 1892, obtained a decree, which was made absolute on the 26th May, 1892. Hira Lal Sircar and his co-sharers defaulted in paying other *putni* rents for the years 1889 to 1892. The minor Maharajah of Burdwan, who was the *putnidar*, through his guardian sued for arrears of rent on the 30th of March, 1893, and obtained a decree on the 27th of July, 1893. In execution of that decree the *darpatni* was sold and was purchased by the Maharajah on the 11th December, 1893. The sale was confirmed on the 9th June 1894, and the sale certificate was granted on the 18th of March, 1895. It appeared that, in the application for execution by the Maharajah, it was prayed that the decretal amount be realized by attachment and sale of the property in arrears mentioned in the schedule, and in which the property was mentioned as "Lot Rampore, bearing an annual jama of Rs. 2,901 situate under Chowki Jahanabad and recorded in the name of *darpatnidar* Kailash Chandra Koer in the *sherista* of the decree-holder Bahadur, being the property in arrear. One item, value Rs. 500." The sale proclamation declared that "the said jote with right of occupancy shall be sold with power to annul all incumbrances." In the sale certificate the property was described "as the right, title and interest of the judgment-debtor in the properties in arrears mentioned in the schedule," although in the schedule, after the description of the property, there was an [815] addition, "the said lot in

(1) (1881) I. L. R. 7 Cal. 357.

(3) (1889) I. L. R. 17 Cal. 268.

(2) (1899) I. L. R. 26 Cal. 677.

(4) (1896) I. L. R. 24 Cal. 62.

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arrears," and in the order confirming the sale, the property sold was described as the right, title and interest of the judgment-debtors in lot Rampore, as described in a schedule attached to the sale certificate.

Akhoy Kumar Soor, after having obtained a decree on his mortgage against Hira Lal Sircar, took out execution against properties other than the mortgaged property of the judgment-debtor and realized same portion of the decretal amount. On the 29th January, 1901, the decree-holder, for the recovery of the balance of his money, applied for execution by sale of the mortgagor's interest in the *darpatni* tenure. He also applied that the Maharajah should be made a party to the execution proceedings, inasmuch as in the meantime he, the Maharajah, had purchased the *darpatni taluq* in execution of his decree; and on the 2nd February, 1901, notice of this application was served on the Maharajah. On the 13th of March, 1901, an application was made on behalf of the Maharajah under s. 167 of the Bengal Tenancy Act to the Collector of Hooghly, for service on Akhoy Kumar Soor of a notice for annulling his mortgage as being an incumbrance on the *darpatni* tenure. On the 23rd March, 1901, the Maharajah took objection under s. 244, Civil Procedure Code, to the execution proceedings taken by the appellant, and contended that the execution proceedings could not be taken out against him, as he was not the representative of the debtor, that he had purchased the *darpatni* tenure at a sale for arrears of its rent with the right to annul the incumbrances thereon, that he had duly served on the mortgagor, the appellant, the notice under s. 167 of the Bengal Tenancy Act annulling his incumbrance, and that the mortgage was not a "protected interest" within the meaning of the Bengal Tenancy Act. The learned Subordinate Judge allowed the objections of the Maharajah.

Dr. Ashutosh Mookerjee and Babu Jadu Lal Kanjilal for the appellant.

Mr. J. T. Woodroffe (Advocate-General) and Babu Ram Churn Mitter (Senior Government Pleader) for the respondent.

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HILL AND BRETT JJ. This is an appeal against the order of the Subordinate Judge of Hooghly, dated the 22nd April, 1901, [816] allowing an objection raised by the respondent in certain execution proceedings to which he had been made a party by the appellant. The order was to the effect that no execution could proceed against him.

The appellant, Akhoy Kumar Soor, was the mortgagee of one Hira Lal Sarkar who, by a bond dated the 25th November, 1886, mortgaged with other property his one-third share in the disputed *taluk* Rampore. The present respondent, the Maharaja of Burdwan, was the owner of the whole of the superior *patni* tenure. In 1891 the appellant, Akhoy Kumar Soor, sued on his mortgage and obtained a decree against his mortgagor, Hira Lal Sarkar, on the 11th January, 1892, which, on the 26th May, 1892, was made absolute.

Meanwhile, the mortgagor and his co-sharers had defaulted in paying their *darpatni* rent for the years 1889 to 1892; and, in consequence, the Maharaja, the *patnidar*, sued them and obtained a decree on the 30th March, 1893; on the 27th July, 1893, the Maharaja applied for execution of his decree against the property of the debtors and the *dardri* was put up for sale and purchased by the Maharaja on the 11th December, 1893. The sale was confirmed on the 9th June, 1894, and a sale certificate delivered to the purchaser on the 18th March, 1895.

After having obtained the decree on his mortgage against Hira Lal Sarkar, the appellant, Akhoy Kumar Soor, took out execution against various properties of his mortgagor other than the *darpatni* tenure and realized some portion of his debt. For recovery of the balance he applied, on the 29th January, 1901, for execution by sale of the mortgagor's interest in the *darpatni* tenure; and, as the Maharaja of Burdwan had in the meanwhile sold up and purchased the *darpatni*, he applied that he should be made a party to the execution proceedings. Notice of the application was served on the Maharaja on the 2nd February, 1901; and the suggestion which has been made in his behalf is that this was the first notice he had of the appellant's mortgage. On the 13th March, 1901, application was made on behalf of the Maharaja under s. 167 of the Bengal Tenancy Act to the Collector of Hooghly for the service on the appellant of a notice [817] annulling his mortgage as being an encumbrance on the *darpatni* tenure which, under his sale and purchase, he had a right to avoid; and, on the 23rd March, 1901, the Maharaja put in an objection under s. 244, Civil Procedure Code, in the execution proceedings taken by the present appellant. In that objection he contended that the proceedings could not be taken out against him for sale of the mortgagor's 5 annas' odd share in the *darpatni*, as he was not the representative of the debtor; that he, the Maharaja, had purchased the *darpatni* tenure at a sale for arrears of its rent with the right to annul all encumbrances thereon; that he had duly served the mortgagor, the appellant, with a notice under s. 167 of the Bengal Tenancy Act annulling his encumbrance; that appellant's mortgage was not a "protected interest" within the meaning of the Bengal Tenancy Act; and that, accordingly, the prayer for execution by sale of the share in the *darpatni* might be rejected.

This objection has been allowed by the Subordinate Judge, and against his order this appeal is preferred.

In support of the appeal our attention has been drawn to the proceedings taken in execution of his decree for rent by the Maharaja, the present respondent. In the application for execution it is prayed that the decretal amount be realized by attachment and sale of the property in arrears mentioned in a separate sheet of the paper (the schedule), and in the schedule the property is described as "lot Rampore, bearing an annual *jama* of Rs. 201, situate under chowki Jahanabad, division Khanakool, and recorded in the name of the *darpatnidar*, Kailash Chundra Koer, in the *sherista* of the decree-holder, Bahadur, being the property in arrear. One item, value Rs. 500." The sale proclamation was an incorrect form under cl. 2 (b) of s. 163 of the Bengal Tenancy Act, and declared that "the said jote with right of occupancy shall be sold by auction with power to annul all encumbrances." In the sale certificate dated the 18th March 1895, the property is described as "the right, title and interest of the judgment-debtor in the properties in arrears mentioned in the schedule," although, in the schedule, after the description of the property, the addition occurs, "the said lot in arrears." And in the order of the 9th June 1894, confirming [818] the sale, the property sold is described as the right, title and interest of the judgment-debtors in the lot Rampore as described in the schedule attached to the sale certificate.

On these materials it is contended that the sale was, in fact, under the Code of Civil Procedure and not under the Tenancy Act; that the

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property sold was the right, title and interest of the debtors in the *darpatni* and not the tenure itself; and that, under the sale, the purchasers acquired no right to annul encumbrances. It is further suggested that the mortgage of the appellant was a "protected interest" within the meaning of s. 160, cl. (g) of the Bengal Tenancy Act.

It is contended, in the second place, that even if the mortgage did not amount to a protected interest, but was an encumbrance only within the meaning of s. 167 of the Bengal Tenancy Act, then the notice served was not a legal notice, as it was signed by Mr. Deb, a Deputy Collector, who is not proved to have been vested under the Act by Government with power to issue a notice under s. 167. The case of *Mohabut Singh v. Umahil Fatima* (1) is relied on in support of this contention; and further it is urged that, even if the notice were otherwise valid in law, the application of the Maharaja for the service of the notice having been made on the 13th March, 1901, which was more than seven years from the date of the sale, *i.e.*, the 11th December 1893, the application was barred by limitation as not being made within one year from the date of the sale or the date on which the Maharaja had first notice of the encumbrance.

And, thirdly, it has been contended that after the applicant had sued on his mortgage and had obtained a decree, the mortgage lien had been extinguished and had become a judgment debt, which could not be annulled under the provisions of s. 167 of the Tenancy Act. At most, the Maharaja, by virtue of s. 65 of the Act, could claim that he had a first charge on the tenure for the rent.

It is not, in our opinion, necessary to go at length into the first and third contentions, as we consider that the Appeal must succeed on the ground of Limitation.

[819] There can be little doubt that what the Maharaja intended to bring to sale in satisfaction of his decree for the rent of the *darpatni* was the tenure itself, and that was in fact what he prayed for in his application. By carelessness or oversight a wrong form was used for the proclamation of sale: that is to say, a form suitable for the sale of an occupancy holding with power to annul all encumbrances. The result was that in the sale certificate and order confirming the sale, the property was wrongly described as the right, title and interest of the debtor in the *darpatni* tenure although, in the schedule attached to each, it is specified as "the lot," or property itself "in arrears." The case is not on all fours with that of *Dwarkanath and others v. Aloke Chunder Seal and others* (2), on which reliance is placed for the appellant, but seems to us to fall rather within the principle laid down by the Privy Council in the case of *Jotendro Mohun Tagore v. Jogul Kishore* (3), as explained and applied in this Court in the case of *Nityai Behary Shaha Paramanick v. Hari Govinda Saha* (4). We consider that the terms "right, title and interest of the debtors," as used in the sale certificate and order, must be construed with reference to the circumstances under which the suit was brought and the true meaning of the decree under which the sale took place, as well as the proceedings leading up to the sale. In this instance, the proceedings were taken under the provisions of the Bengal Tenancy Act, and application made for the simultaneous issue of the order of attachment and proclamation as provided in s. 163, and we are of opinion

(1) (1900) I. L. R. 28 Cal. 66.

(2) (1888) I. L. R. 9 Cal. 641.

(3) (1881) I. L. R. 7 Cal. 357.

(4) (1899) I. L. R. 26 Cal. 677, 685.

that in this case what was intended to be sold was the entire tenure and not merely the right, title and interest of the defaulters therein.

We may say that we are quite unable to accept the suggestion by the learned pleader for the appellant that the mortgage amounted to a "protected interest" within the meaning of s. 160, cl. (g) of the Tenancy Act, or that, having regard to the provisions of ss. 164 and 165, it was necessary for the Maharaja to put up the tenure for sale first, subject to registered and notified encumbrances, and afterwards with power to avoid [820] all encumbrances. It is impossible, in our opinion, so to read the provisions of ss. 3 and 4 of Regulation VIII of 1819 as to hold that, by them, the landlord expressly gives the *darpatnidar* permission to create a mortgage so as to bring the mortgage within the provisions of s. 160, cl. (g) of the Bengal Tenancy Act. This mortgage, too, was admittedly not a registered and notified encumbrance within the meaning of s. 161, cl. (b) of the Act. On the first point therefore the appellant fails.

On the third point, we are inclined to think that he would be entitled to succeed. After, as in this case, the mortgagee had enforced his lien and obtained his decree, it seems difficult to hold that the decree would remain as an encumbrance on the tenure which could be avoided under the provisions of s. 167 of the Tenancy Act.

On the second point, however, we think the appellant must succeed. There is, in our opinion, not much substance in the objection raised on the ground that Mr. Deb, who signed the notice, was a Deputy Collector and not the Collector. The application was undoubtedly made to the Collector, and it seems not impossible that, if Mr. Deb had no power under the Act to issue a notice under s. 167, he may have signed for the Collector.

The point which to us seems to be of most importance, and on which the decision of the appeal turns is, however, whether, when the application under s. 167 of the Bengal Tenancy Act was made on behalf of the Maharaja to the Collector on the 13th March, 1901, that application was barred under the provisions of the section by reason of the fact that it was not made within one year from the date of the sale or the date on which he first had notice of the encumbrance.

The view taken by the Sub-Judge on this point was "that the objector's position as a minor brings his application, by virtue of the provisions of s. 7 of the Limitation Act, beyond the special limitation of one year prescribed by s. 167 of the Bengal Tenancy Act," and he relied on the case of *Maharaj Kumar Guneshwar Singh v. Jagadhatri Pershad Narain Singh* (1) in support of that opinion. He accordingly held that "no limitation applied to the Maharaja's application under s. 167 of the Bengal Tenancy Act, and that the notice issued was valid."

[821] On behalf of the Maharaja, it has been contended that the first notice he had of the encumbrance was when he received, on the 2nd February, 1901, notice of the application to take out execution against the share in the *darpatni* tenure and to make him a party to the execution proceedings. The only evidence, if it can be regarded as such, which appears on the record to support this allegation is the attested copy of the petition made to the Collector of Hooghly for the issue of the notice under s. 167 of the Bengal Tenancy Act. This petition appears to have been put in by one Nil Madhub Majoomdar on behalf of the manager and guardian of the Maharaja. It was not verified and may be

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nothing but a mere hearsay statement. On the other side, there is the deposition of the appellant, Akhoy Kumar Soor, taken before the Subordinate Judge, in which he says that, in May, 1894, he was cited to give evidence on behalf of the Maharaja in a proceeding taken on a petition filed by Hira Lal Sarkar praying that the sale of the *darpatni* tenure in satisfaction of the Maharaja's decree for rent might be set aside. In his evidence, he stated that one-third of Rampore (the *darpatni* tenure) had been mortgaged to him, and he adds that it was on being interrogated by the pleaders for the Raj estate and for the judgment-debtor that he spoke about the aforesaid mortgage. And in corroboration of his statement, his deposition, taken on the 5th May, 1894, has been put in and proved.

The learned Advocate-General has contended that the statements made in that deposition *in diverso in tuitu* cannot be taken as amounting to notice of the mortgage. We are unable to agree with him in that view or to hold that in this case anything of the nature of a formal notice of the mortgage was necessary. We are of opinion that, having regard to the provisions of s. 3 of the Transfer of Property Act, the Maharaja, the objector, had notice of the mortgage in the year 1894, which is certainly more than one year before the date on which the application under s. 167 of the Bengal Tenancy Act was made on his behalf to the Collector; and apart from this, as already intimated, the Maharaja had adduced to evidence to prove at what time he first came to know of the mortgage.

[822] Further, we are unable to agree with the Subordinate Judge in holding that the provisions of s. 7 of the Limitation Act are sufficient to avoid in this case the bar of limitation. The case of *Maharaj Kumar Goneshwar Singh v. Jagadhatri Prasad Narain Singh* (1) on which the Subordinate Judge relies has no application. S. 7 of the Limitation Act allows a minor a further period of limitation in the case of a suit or application for which the period of limitation is provided in the third column of the second schedule of the Act. In this case the limitation is determined by the provisions of s. 167 of the Bengal Tenancy Act. S. 7 cannot therefore have any application to the present case. This is in accordance with the view which has been taken in the case of *Girija Nath Roy Bahadur v. Patani Bibee* (2) with which we agree. Nor have ss. 184 and 185 of the Bengal Tenancy Act the effect of extending the provisions of s. 7 of the Limitation Act to an application under s. 167.

The application, then, not having been made within one year from the date of the sale or the date on which the Maharaja first had notice of the encumbrance, was barred by limitation and the proceedings taken thereunder could have no effect to defeat the claim of the appellant.

We may add that, in our opinion, the case of *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (3) is sufficient authority for holding that the Maharaja is the representative of the original judgment-debtor for the purpose of the execution-proceedings.

We, accordingly, set aside the order of the Subordinate Judge and direct that execution do proceed, as prayed for by the appellant, against the share which originally belonged to Hira Lal Sarkar in the *darpatni* tenure of Rampore and which is now in the hands of the Maharaja respondent. The appeal is decreed with costs.

*Appeal allowed.*

(1) 8 C. W. N. 24.

(2) (1889) I. L. R. 17 Cal. 263.

(3) (1896) I. L. R. 24 Cal. 62.