1905 FEB. 14.

ORIGINAL CIVIL.

32 C. 631=9 C. W. N. 394

the freedom of dealing with such property both in this and every other country. And I think that such a decision would be contrary to all law as hitherto laid down or expressed, and contrary in my opinion to the laws which ought to govern and do govern the disposition of immoveable properties. I therefore hold that the property in question being the proceeds of immoveable property, the subject of the settlement and the power under the settlement having been duly exercised by Joseph Alexandre Charriol, the moneys must be distributed according to the terms of the power as executed.

[642] The costs of all parties will be paid out of the estate.

Attorneys for the plaintiffs : *Orr, Robertson & Burton.*

Attorneys for the defendants : *Dignam & Co.*; *Ghose & Kar* ; *Rutter & Co.*

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32 C. 643 (=9 C. W. N. 670.)

[643] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Pargiter.

MANINDRA CHANDRA NANDY *v.* JAMAHIR KUMARI.*

[14th March, 1905.]

Contribution, suit for—Patni taluk—Mortgage—Sale in execution—Arrears of rent due previous to sale—First Charge—Contract Act (IX of 1872) s. 69.

A mortgaged a certain patni taluk to B.

B subsequently brought a mortgage suit against A, and in execution brought the property to sale and purchased it himself.

In the meantime the rent due to the zemindar had fallen into arrear, and the zemindar obtained a rent decree, and in execution thereof advertised the patni for sale.

The mortgagee to save the property paid in the amount of the decree and afterwards sued the mortgagor for contribution.

***Held*, that a mortgagee, who purchases property at an execution sale, is under a legal liability to pay the rent due upon the property at the time of purchase, and therefore cannot claim, under s. 69 of the Contract Act, contribution from the mortgagor.**

***Maharani Dasya* v. *Harendra Lal Roy Chowdhry* (1) and *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose* (2) relied on.**

[Dist. 11 C. C. 279 ; 13 I. C. 144=16 C. L. J. 156 ; Ref. 22 I. C. 720 ; 14 C. W. N. 699 =60 I. C. 341 ; 62 I. C. 881 ; Fol. 29 M. L. J. 639=18 M. L. T. 464=30 Mad. 795 =31 I. C. 255.]

APPEAL by Maharaja Manindra Chandra Nandy, the plaintiff.

This was a suit brought by the plaintiffs for contribution from the defendant of a part of a rent decree paid by him. The plaintiff obtained the decree in respect of a patni taluk, which had been mortgaged by the defendant's husband to Raja Pramatha Nath Rai and purchased by the plaintiff in execution of the decree obtained on the mortgage. The patni taluk was attached and was about to be sold in execution of a rent decree, when the plaintiff paid in the decretal amount to save the taluk from sale. The plaintiff then brought a suit for **[644]** contribution before confirmation of the purchase of the patni at the sale in execution.

The Subordinate Judge decided, on the 18th August 1903, that as the plaintiff's case was that he had paid up the decree to save his own interest,

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* Appeal from Original Decree, No. 388 of 1903, against the decree of Jogendra Nath Ghose, Subordinate Judge of Rungpore, dated Aug. 18, 1903.

(1) (1896) 1 C. W. N. 458. (2) (1902) 6 C. W. N. 794.

1905 MARCH 14.

APPELLATE CIVIL.

32 C. 643=9 C. W. N. 670.

the interest purchased by the plaintiff would pass at the sale under the rent decree, although the decree was in the name of the defendant's wife. That the plaintiff had purchased the property subject to the rent charge, and by paying the decree for the rent was only paying the rent charge, which he was bound to pay; and he accordingly dismissed the suit with costs.

The plaintiff appealed to the High Court.

Babu *Sree Nath Dass*, Babu *Hemendra Nath Sen* and Babu *Pramatha Nath Sen*, for the appellant.

Babu *Dwarka Nath Chuckerbutty*, Babu *Digambar Chatterji* and Babu *Joy Gopal Ghose*, for the respondent.

GHOSE, J. This appeal arises out of a suit for contribution. The facts may be shortly stated thus:—A certain patni taluq which belonged to Chhatraput Singh was mortgaged by him to Raja Pramada Nath Roy. Upon this mortgage the mortgagee obtained a decree on the 26th June 1895, and in execution the patni was brought to sale, and was purchased by the plaintiff on the 20th September 1899. The sale was confirmed on the 20th November 1899, and the purchaser, the plaintiff took possession on the 25th February 1900. In the meantime the rent due to the zemindar fell into arrears; and it would appear that, for the rent due for the years 1306 and 1307 up to Assar, the zemindar obtained a decree on the 29th August 1900, and in execution of this decree, he advertised the patni for sale. The plaintiff thereupon paid in the amount of the decree and saved the patni from being sold; and he subsequently brought the present suit to recover from the mortgagor, or rather from his assignee, the amount which he had to pay for the purpose of saving the patni from sale, in respect of the rent due for the period antecedent to the confirmation of the sale at which he purchased the property.

[645] The Court below has dismissed the suit, relying upon two cases decided by this Court—*Maharani Dasya* v. *Harendra Lal Roy Chowdhry* (1) and *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose* (2).

The point raised in appeal before us by the learned vakil for the appellant is not, we must confess, altogether free from difficulty or doubt. The matter, however, stands thus:—Under section 65 of the Bengal Tenancy Act, the zemindar was entitled to bring to sale the patni tenure, notwithstanding the sale in execution of the mortgage decree the rent due upon the said tenure being the first charge thereon. And it may be taken that, when the plaintiff purchased the property in execution of the mortgage decree, he purchased it subject to the liability of discharging the rent that was then due upon the property. If that be his true position, it seems to be obvious that he was bound to pay the rent for which the zemindar had taken out execution, and as such, he could not rightly call upon the defendant to make good the payment he made. But then our attention has been called to section 69 of the Indian Contract Act. That section runs as follows:—" A person, who is interested in the payment of money, which another is bound by law to pay and who therefore pays it, is entitled to be reimbursed by the other." And it has been contended by the learned vakil for the appellant that, inasmuch as the defendant, the mortgagor, was in possession of the patni during the period in respect of which the contribution has been claimed, and as such enjoyed the rents and profits thereof, he was bound in law to pay the rent due, and that the plaintiff being interested in the payment of that money is entitled in equity, as

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1905 MARCH 14.

APPELLATE CIVIL.

32 C. 643=9 C. W. N. 670.

enunciated in section 69 of the Contract Act, to call upon the defendant the mortgagor, to make good the amount, which he had to pay. At first sight, it might, no doubt, appear that the contention set up by the defendant is supported by section 69 of the Contract Act. But, looking into the matter more closely, it would seem that the section contemplates a case where the person, who makes the payment, is under no legal liability to make it, and he pays the money for another person, who is bound in law to pay. In that case, the former is entitled [646] to call upon the latter to make good the amount that he has paid. If that be the true view of the sections, it is obvious that the plaintiff being under the legal liability to pay the rent that was due upon the property, when he made the purchase, could not be regarded as a person who under section 69 of the Contract Act was entitled to call upon the defendant to make good the amount that he paid. It may well be said that the defendant having been in the enjoyment of the rent and profits of the property during the period in question, is bound in equity to make good what the plaintiff paid for him; but we do not know whether the plaintiff, when he made the purchase, subject to the liability of paying the rent then due, did not succeed in making the purchase at a lower price than he would have had to pay, or anybody else would have paid, if the property were sold free from such liability. If he, by reason of the liability existing upon the property, purchased it at a less price, it is not equitable that he should be entitled to call upon the defendant to make good what he had to pay in order to free the property from such liability.

As we have already stated the question is not altogether free from difficulty or doubt, but then we find that in the two cases to which the Subordinate Judge has referred, and in which the facts were very similar to those that exist in the present case, this Court has held that: "Rent is by operation of law the first charge on a tenure, and a person, who purchases the same at an execution sale, must, in the absence of anything to denote the contrary, be taken to purchase it, charged with the rent which is due in respect of it at the time of its purchase and, there being no privity between him and the judgment-debtor, he cannot recover from the latter the money which he is obliged to pay for the rent so due at the time of the purchase." Upon consideration I am not prepared to dissent from the view that has been thus expressed. The result is that we agree with the Court below in the decision that it has arrived at, and that the appeal is dismissed with costs.

PARGITER, J. I agree generally in the judgment which has been delivered by my learned brother. The question involved in the facts of this case does not come before us for decision as a [647] new one. It has already been dealt with in the two rulings cited by the lower Court, and following those rulings I think the appeal must be dismissed with costs.

Appeal dismissed