

1895

QUEEN-
EMPRESS
v.
IMAM ALI
KHAN.

I would, therefore, set aside the conviction and sentence and order a retrial.

HILL, J.—I agree in the view of the case taken by my learned colleague. The conviction and sentence will, therefore, be set aside and there will be a new trial.

S. C. B.

Conviction set aside.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Gordon.

1895
July 5.

CHUNDRASAKAI AND ANOTHER (DEFENDANTS) v. KALLI PROSANNO
CHUCKERBUTTY (PLAINTIFF). *

*Bengal Tenancy Act (VIII of 1885), section 161—Exchange of land—
Incumbrance—Suit for recovery of possession of land.*

Exchange of land is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act.

THIS appeal arose out of an action brought by the plaintiff to recover possession of three plots of land, on the allegation that he had purchased the said lands at a sale in execution of a decree for arrears of rent obtained by the *putnidar* against Moni Ram and Ram Chandra Mundul, the registered tenants. The defence was that the lands in dispute did not appertain to the *jama* of Moni Ram and Ram Chandra Mundul; that the defendant, about thirty or thirty-two years ago, obtained under exchange plots Nos. 2 and 3 from Moni Ram and Ram Chandra; and he held possession of the said land by excavating a tank and raising an embankment thereon since then. The Court of first instance dismissed the suit, but on appeal the Subordinate Judge reversed the judgment of the first Court, holding that, though the lands of plots Nos. 2 and 3 were obtained by exchange more than thirty years ago, yet, as the landlord did not ratify it, the plaintiff was entitled to a decree, as the sale passed the entire right, not only of the

* Appeal from Appellate Decree No. 2245 of 1893, against the decree of Babu Abinash Chunder Mitter, Subordinate Judge of 24-Pergunnahs, dated the 24th of August 1893, reversing the decree of Babu Gopal Chundra Banerjee, Munsif of Diamond Harbour, dated the 6th of August 1892.

judgment-debtors, but of those who were said to have held the land in dispute by exchange.

From this judgment the defendants appealed to the High Court.

Dr. *Asutosh Mookerjee* for the appellants.

Babu *Chunder Kant Sen* for the respondent.

Dr. *Asutosh Mookerjee* for the appellants.—The plaintiff is not entitled to *khas* possession simply because he has purchased the holding at a sale for arrears of rent. Under section 159 of the Bengal Tenancy Act the purchaser takes subject to protected interests, and with power to annul incumbrances in the manner provided in section 167 of the Act. The incumbrances are not avoided, *ipso facto* , by the sale, but must be annulled under section 165. See the observations of the Judicial Committee in the case of *Surnomoyee v. Suttees Chunder Roy* (1); the provisions of section 37 of Act XI of 1859 may also be contrasted.

The definition of ‘incumbrance’ in section 161 of the Bengal Tenancy Act is wide enough to include the interest acquired by the defendant. The plaintiff nowhere alleges in his plaint that he has complied with the provisions of section 167; such compliance is mandatory under sections 164 and 165. The plaint, therefore, discloses no cause of action, and the suit ought to fail, as the plaintiff has failed to comply with a condition precedent. See the observations of Wilson, J., in the case of *Gonesh Chandra Pal v. Shoda Nund Surma* (2). I further contend that the defendants’ interest comes within the definition of a “protected interest” in section 160.

Babu *Chunder Kant Sen* for the respondent.—The defendant has no interest in the land, as he acquired an interest in part of the holding from the registered tenant, without the written consent of the landlord as required by section 88 of the Bengal Tenancy Act. The defendant had, therefore, no interest amounting to an incumbrance and requiring to be annulled under section 167. Moreover the plea of notice does not appear to have been expressly taken in the lower Court, and ought not to be allowed here.

Dr. *Asutosh Mookerjee* in reply.

The judgment of the High Court (NORRIS and GORDON, JJ.) was as follows:—

(1) 10 Moo. I. A., 123 (145).

(2) I. L. R., 12 Calc., 138.

1895

CHUNDRASARAI
v.
KALLI
PROSANN
CHUCKER-
BUTTY.

1895

CHUNDRA
SAKAI
v.
KALLI
PROSANNO
CHUGKER-
BUTTY.

GORDON, J.—The plaintiff brought this suit to eject the defendants from three plots of land which he purchased at an auction sale for arrears of rent due in respect thereof. The defendants denied the plaintiff's title and the judgment-debtor's right to possession over the disputed land.

The first Court gave effect to the defence and dismissed the suit.

On appeal, the Subordinate Judge has reversed the decree of the Munsif.

On second appeal, it is contended before us that the plaintiff is not entitled to eject the defendants, because he purchased his holding under section 159 of the Tenancy Act subject to an incumbrance as defined in section 161 of that Act; and that he could annul that incumbrance only in the manner provided in section 167.

We think that this contention must prevail.

The Subordinate Judge has found that there was an exchange of land, and that the defendants have held this land under that exchange for more than thirty years; but he was of opinion that the exchange was not valid, because it was not ratified by the landlord. We do not think that the question, whether the exchange was valid or not, because it was not ratified by the landlord, arises in this case. We think that the exchange was an incumbrance within the meaning of section 161. That section runs thus: "For the purpose of this chapter (2) the 'term incumbrance' used with reference to a 'tenancy' means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section." It seems to us that the exchange by which this and was acquired by the defendants was in limitation, if not, in fact, in destruction of the original tenant's right in the holding.

That being so, the plaintiff was not entitled to eject the defendants without having taken proper proceedings to annul the incumbrance as provided by law.

The appeal is allowed, the decree of the lower Appellate Court set aside, and that of the first Court dismissing the plaintiff's suit restored with costs.

S. C. G.

Appeal allowed.