

APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Rampini.

PASUPATI MOHAPATRA (PRINCIPAL DEFENDANT No. 1) v. NARAYANI
DASSI (PLAINTIFF) AND OTHERS (PRO FORMA DEFENDANTS.)^o

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March 8.

Bengal Tenancy Act (VIII of 1885), sections 161, 171—Payment by person interested to prevent sale—Mortgage—Incumbrance.

A mortgage created by the operation of section 171 of the Bengal Tenancy Act (VIII of 1885) is not an incumbrance within the meaning of section 161 of that Act, and is not liable to be annulled as such at the instance of a purchaser of a holding at a sale in execution of a decree for arrears of rent.

THE facts of the case sufficiently appear from the judgment of the High Court.

Babu *Bepin Behari Ghose* for the appellant.

Babu *Tara Kishore Chowdhry* and Babu *Bidhu Bhrusan Ganguli* for the respondents.

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

The question raised by this appeal is whether a mortgage created by the operation of section 171 of the Bengal Tenancy Act is an incumbrance within the meaning of chapter XIV of that Act, and as such liable to be avoided by the purchaser of a holding at a sale in execution of a decree for arrears of rent.

The facts found by the lower Appellate Court are as follows : Subordinate to a certain *putni* tenure there were two holdings, one of which was in the occupation of a person named Sumitra, and the other in that of Sundari and Nityamoyi.

On the 14th Pous 1296 the husband of Matungini, the second defendant in the present suit, purchased both these holdings from the tenants.

Afterwards in the year 1891 the *putnidars* instituted two suits

^o Appeal from Appellate Decree No. 885 of 1895, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of Midnapur, dated the 16th of February 1895, reversing the decree of Babu Kanti Chandra Bhaduri, Munsif of Garbetta, dated the 11th of September 1894.

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for arrears of rent for the years 1295 to 1298, one against Sumitra and the other against Sundari and Nityamoyi. Matungini intervened in both suits as purchaser, and ultimately a compromise was arrived at between her, the *putnidars*, and the sons of Sundari and Nityamoyi, under which Matungini confessed judgment for the rent claimed in the suits, and it was agreed that the sons of Sundari and Nityamoyi should hold both the holdings as *raiyats* under her.

On the 2nd Assin 1299 Matungini granted a *dur-mokurari* lease of Sumitra's holding to Pasupati, the first defendant in the present suit; and shortly afterwards pending proceedings in execution taken by the *putnidars* in the suits already mentioned, she sold her *mokurari mourasi* interest to the third defendant in the present suit, Srimanta Lal Bera, he undertaking to satisfy the decrees out of the purchase money. This, however, was not done, and Pasupati then, in order to save the holdings from sale, paid the amount of both the decrees into Court. In the year 1892 the rent of the holdings being again in arrear the *putnidars* brought a suit against Srimanta Lal Bera for its recovery. They obtained a decree, in execution of which the holdings were brought to sale and purchased by Kasinath, the fourth defendant in the present suit. In 1893 Pasupati sued Matungini for recovery of the money paid by him into Court as mentioned above. He obtained a decree against her for the amount claimed, together with a declaration that, by virtue of section 171 of the Bengal Tenancy Act, he was entitled as mortgagee to bring the holdings to sale. This he proceeded to do; whereupon Kasinath put in a claim to the property, but, having failed in that, he procured the issue of notices under section 167 of the Tenancy Act, and then sold his interest in the holdings to the plaintiff. Under these circumstances the present suit has been brought for avoidance of Pasupati's mortgage and *dur-mokurari* lease. The Court of first instance dismissed the suit, but its decree was reversed in appeal by the Subordinate Judge who held both the mortgage and *dur-mokurari* to be voidable at the instance of the plaintiff as the successor in interest of Kasinath the purchaser of Srimanta's *mokurari*.

In appeal before us it was argued that, in so far at least as the mortgage is concerned, the decision of the Subordinate Judge

is wrong, inasmuch as a mortgage created by the operation of section 171 of the Tenancy Act cannot be regarded as an incumbrance in the sense in which the term is used in chapter XIV of the Act. We think that this contention is correct. The term "incumbrance" is defined for the purposes of chapter XIV by section 161 of the Act, and means, according to that section, "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." In order to satisfy this definition, it is clear that, whatever the nature of the particular incumbrance may be, it must be the creation of the tenant, but in the case now before us the mortgage interest claimed by Pasupati was not created by the tenant, but arose independently of him by the operation of section 171 of the Act. We think, therefore, that it is not an incumbrance within the meaning of Chapter XIV, and consequently that it is not an incumbrance which may be annulled at the instance of a purchaser under the provisions of that chapter.

We think, however—and in this we agree with the Subordinate Judge—that the effect of the payment made by Pasupati must be limited to the holding of Sumitra to which his *dur-mokurari* interest was subordinate. The sale of the holding of Sundari and Nityamoyi would not have affected his position.

The appeal will accordingly be decreed in part, and the decree of the lower Appellate Court be modified to this extent, that the suit, in so far as it seeks the avoidance of the mortgage held by Pasupati over the holding of Sumitra, will be dismissed. In other respects the decree will stand. We make no order as to costs.

H. W.

Decree varied.

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