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On the other hand, in *Joykishen Mookerjee* v. *Ataoor Rohoman* (1) a clear distinction appears to be drawn between an order under s. 206 and a review of judgment. In *Surta* v. *Ganga* (2) it was expressly held that no appeal lies from an order under s. 206. In *Abdul Hayai Khan* v. *Chunia Kuar* (3), and *Muhammad Sulaiman Khan* v. *Fatima* (4) appeals were allowed, because the orders appealed against were orders passed in execution and were therefore orders passed under s. 244 and appealable. In both these cases it appears to be implied that there is no appeal against an order under s. 206.

In this case there is this further reason for holding that the order of the Munsif was not a review of judgment, that the Munsif who amended the decree was not the Munsif who passed the original decree which was subsequently amended, and there does not seem to have been any clerical error apparent on the face of the decree so as to make the second Munsif competent to review his predecessor's decree under s. 624, Code of Civil Procedure.

We must therefore dismiss this appeal with costs, and this order will govern the second appeal, No. 2550 of 1898, which is of a similar character.

B. D. B. *Appeals dismissed.*

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice and Mr. Justice Banerjee.

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August 8.

NRITYA GOPAL HAZRA (DEFENDANT No. 4) *v.* GOLAM RASOOL AND OTHERS (PLAINTIFFS).*

Bengal Tenancy Act (VIII of 1885), s. 167—Incumbrance—Application to avoid an incumbrance mentioning a wrong person as the incumbrancer—Another application after the period of limitation, for amending the previous application, effect of—Collector's power to amend such application.

An application to avoid an incumbrance under s. 167 of the Bengal Tenancy Act was made by an auction-purchaser within one year from the

* Appeal from Original Decree No. 245 of 1896, against the decree of Babu Beni Madhub Mitter, Subordinate Judge of Hughly, dated the 12th of June 1896.

(1) (1880) I. L. R., 6 Calc., 22.
(2) (1885) I. L. R., 7 All., 875.
(3) (1886) I. L. R., 8 All., 377.
(4) (1889) I. L. R., 11 All., 314.

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date on which he had notice of the incumbrance, mentioning therein a wrong person as the incumbrancer. After the period of limitation another application was made by him to amend the previous application by substituting the name of the real incumbrancer, which was allowed by the Collector.

Held, that the Collector, who was merely a ministerial officer in the matter, had no power to make any such amendment; and that the application to serve a notice on the real incumbrancer, not having been made within one year from the date on which the purchaser had notice of the incumbrance, was barred by limitation.

THIS appeal arose out of an action brought by the plaintiff for a declaration that his darmokurari right was not affected by a sale brought about by the landlord, as also for the recovery of possession of the tenure. His allegation was that he and one Enatulla held in equal shares a darmokurari right in a *Chak Nafra*; that the mokuraridar obtained a decree for arrears of rent against the said Enatulla and caused his share of the darmokurari right to be sold, which he (the plaintiff) purchased in the name of his servant Bakaullah (defendant No. 5) on the 8th February 1885, and took possession of the same; that he was informed that the mokuraridars (defendants Nos. 1, 2, and 3) not having paid the rent due to the superior landlord, late Harihur Mookerjee, a decree was obtained against the said defendants, and in execution of that decree the mokurari tenure was sold and the defendants Nos. 1, 2, and 3 having purchased it benami in the name of their relative Nitya Gopal Hazra, on the 7th December 1892, took possession of the tenure and dispossessed the plaintiff. Hence this suit was brought by the plaintiff for a declaration that the defendants Nos. 1, 2, and 3 having brought about the sale fraudulently, the darmokurari undertenure could not be set aside by the said defendants; and even if the sale be held to be valid still the defendants having failed to serve a notice under s. 167 of the Bengal Tenancy Act upon the plaintiff or upon the defendant No. 5 within proper time, the plaintiff's undertenure could not be annulled.

The defence mainly was a denial of all the allegations made by the plaintiff in the plaint, and, as to the notice, the statement made by the defendant No. 4 was that, although he did not know whether there really was a darmokuraridar or not, still,

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relying upon the petition filed on the 4th February 1893 by the defendant No. 5 under s. 311 of the Civil Procedure Code, he had applied to the Collector of the District under s. 167 of the Bengal Tenancy Act on the 2nd February 1894 to annul the said darmokurari undertenure. It appeared from the evidence of defendant No. 4 that he had become aware of the existence of the darmokurari on the 4th February 1893, and that he had applied to the Collector of the District on the 2nd February 1894, to serve a notice on Enatulla (who was not the darmokurarídar at the time) under s. 167 of the Bengal Tenancy Act. From a document filed by the plaintiff it also appeared that defendant No. 4 again applied on the 10th May 1894 to the Collector to serve a notice upon Bakaullah.

The Court of First Instance, held, that inasmuch as the application to serve a notice under s. 167 of the Bengal Tenancy Act upon the incumbrancer was not made within one year from the date the defendant No. 4 had notice of the incumbrance, the darmokurari undertenure was not annulled, and that the defendant No. 4 illegally dispossessed the plaintiff, and decreed the suit.

Against this decision the defendant No. 4 appealed to the High Court.

Dr. *Rash Behary Ghose*, and Babu *Shiva Prosonno Bhattacharya*, for the appellant.

Babu *Srinath Das*, and *Moulvi Mustapha Khan*, for the respondents.

Dr. *Rash Behary Ghose*.—In execution of a decree for arrears of rent a person purchased a mokurari right, and within one year from the date he had notice of an incumbrance he gave a notice to annul the same, in the name of a person who appeared to be not the right man, but after a year had elapsed the notice was amended and the right man's name was inserted. Now the question is whether what was done will save limitation. It is a clear case of mistake. Whether or not there was a proper application to annul an incumbrance within the meaning of s. 167 of the Bengal Tenancy Act, a notice was served on the holder of the darmokurari. All that s. 167 requires is, that a notice should be given to the incumbrancer to the effect that the incumbrance is annulled. If a wrong

name is given that would not vitiate the application or the notice; it was quite open to the Collector, if he thought fit, to allow the application to be amended. The point is to see whether the description is sufficient to identify the incumbrance. Mere misdescription does not vitiate the notice unless it prevented identification.

The cases of *Samia Pillai* v. *Chockalinga Chettiar* (1) and *Balkishen Das* v. *Bedmati Koer* (2) were referred to in the course of the argument.

The respondent was not called upon.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.) :—

MACLEAN, C. J.—The question raised upon this appeal is a short one, and not, to my mind, one that presents any real difficulty. The real question is, whether the application made by the defendant No. 4, who was an auction-purchaser, requesting the Collector to serve on the incumbrancer a notice declaring that the incumbrance is annulled, was presented by him to the Collector, under s. 167 of the Bengal Tenancy Act, within the period prescribed by that section. Defendant No. 4 was doubtless entitled under sub-s. 2 of s. 165 of the Act, to have the incumbrance annulled, for that sub-section says: "He" (the auction-purchaser) "may in manner provided by s. 167 and not otherwise annul any incumbrance on the tenure or holding."

We have to consider whether he has complied with the provisions of s. 167, for it is only by compliance with the provisions of that section that he is entitled under the statute to annul the incumbrance on the tenure or holding.

S. 167 of the Bengal Tenancy Act runs as follows: "A purchaser having power to annul an incumbrance under any of the foregoing sections, and desiring to annul the same, may within one year from the date of the sale, or the date on which he first has notice of the incumbrance, whichever is later, present to the Collector an application in writing requesting him to serve on the incumbrancer a notice declaring that the incumbrance is

(1) (1893) I. L. R., 17 Mad., 76.
(2) (1892) I. L. R., 20 Calc., 384.

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annulled." The purchaser, therefore, has two periods given to him within which to make an application, either a year from the date of the sale or a year from the date on which he first has notice of the incumbrance, and the application must be one in writing requesting the Collector to serve on the incumbrancer a notice declaring that the incumbrance is annulled. That section, to my mind, presupposes that the application must state who is the actual incumbrancer, as the person upon whom the notice is to be served, and the effect of that notice is stated in sub-s. (3) of s. 167. The facts of this case are not open to dispute and they lie within a very narrow compass. It is not disputed that the appellant first had notice of the incumbrance on the 4th of February 1893, and it can scarcely be disputed, upon the appellant's own evidence, that he knew who the incumbrancer was. He tells us, as I read his evidence, that he knew that a man named Bakaullah was the incumbrancer as he in fact was. His evidence is a little confused, but this, I think, is what he means. At any rate just as the year was expiring, on the 2nd of February 1894, he made an application to the Collector, and the person mentioned in that application as the incumbrancer and as the person upon whom the statutory notice under s. 167 was, at his request, to be served, was one Sheikh Enatulla.

The appellant tries to explain in his evidence how this name came to be inserted, but I do not think that this is very material. Sheikh Enatulla was admittedly not the incumbrancer, and consequently not the person upon whom the statutory notice was to be served. The then incumbrancer was Sheikh Bakaullah, and he was the person upon whom the notice ought to have been served. The appellant seems to have found this out, for, on the 10th May 1894, he presented another petition, and that petition is in these terms : "In the suit mentioned above, I, Nitya Gopal Hazra, submit to the effect that I have applied for service of notice on Enatulla opposite party. But I have come to learn from enquiry that the property is in possession of Bakaullah inhabitant of Dandhralima within thana Chanditala. The above-mentioned opposite party Sheikh Enatulla is dead. Hence I pray by this petition that notice may be ordered to be served upon Bakaulla according to the section mentioned above," *viz.*,

s. 167 of the Bengal Tenancy Act. The last application was obviously out of time not being within a year from the date on which the purchaser first had notice of the incumbrance. To obviate this difficulty it is suggested that this second application was only an application to amend the first, by substituting the name of Bakaullah as the incumbrancer for that of Enatulla. There is nothing on the face of the second application to suggest that it was a petition merely for amendment, and even if that were so, I am not aware what power the Collector, who is merely a ministerial officer in the matter, could have to make any such amendment to the prejudice of the person alleged to be the incumbrancer and whose tenure or holding is sought to be annulled. All the Collector has to do and can do, after the application has been presented, is to cause the notice to be served, and if it is duly served, the consequences ensue which are mentioned in sub-s. 3 of s. 167. No difficulty arises on the construction of s. 167, the language of the section is perfectly clear; and the real question is whether the application of the appellant to the Collector was made in time. The answer, I think, is reasonably clear, *viz.*, that there was no application within the year requesting the Collector to serve the statutory notice on the incumbrancer, though there was an application within the year to serve it upon somebody else who admittedly was not the incumbrancer. But that won't do; it must be an application to serve the notice on the incumbrancer. The statute gives the auction-purchaser a whole year in which to discover who the incumbrancer is, so that he has not much to complain of on that head. If the appellant's contention were well founded, the applications might go on for an indefinite period. The statute confers a special privilege on the purchaser, and I do not think he is entitled to that privilege unless he strictly complies with the provisions of the statute. S. 166 says he is only to enjoy that privilege if he does comply with those provisions, and in this case he has not done so.

We have been referred to two cases, one in the High Court of Madras, the case of *Samia Pillai* v. *Chockalinga Chettiar* (1), and another decided by this Court, the case of *Balkishen Das* v.

(1) (1893) I. L. R., 17 Mad., 76.

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Bedmati Koer (1). Those decisions are entitled to every respect; but they were not cases dealing with the question now before us. They are decisions upon what is or is not an application to take a step in aid of execution within the meaning of art. 179 of the second schedule of the Limitation Act, a question somewhat remote from that which we now have to decide. No doubt those cases decided that the application did not fail to operate, as one to take a step in aid of execution, by reason of the circumstances that the real judgment-debtor was by mistake not made a party. Here, however we have to deal with quite a different question, dependent upon the language of the particular Act of the Legislature to which reference has already been made.

In my opinion, the application under s. 167 of the Bengal Tenancy Act was out of time, and consequently not in compliance with the section, and the appeal fails and must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The question for determination in this appeal is whether the application for notice to annul the darmokurari tenure of the plaintiff was, as required by s. 167 of the Bengal Tenancy Act, made within one year from the date when the purchaser of the superior tenure had notice of the incumbrance, that being in this case the later date referred to in that section. The contention on behalf of the appellant is that it was made within the statutory period, *first*, because the application of the 2nd of February 1894, which was within the time allowed, was by itself a sufficient application within the meaning of the law; and, *secondly*, because even if the name of the incumbrancer was necessary to be specified by the appellant, still the application was in time, as the subsequent application for the insertion of the correct name of the incumbrancer was only in the nature of a petition for amendment of the previous application, and had been allowed by the Collector.

The first branch of this contention proceeds upon the assumption that all that it was necessary for the applicant to specify in the application under s. 167 of the Bengal Tenancy Act was

(1) (1892) I. L. R., 20 Calc., 388.

the incumbrance, it being left to the Collector to serve the notice on the proper party. I am unable to accept this view as correct. Sub-s. (1) of s. 167 requires the purchaser to present to the Collector "an application in writing requesting him to serve on the incumbrancer a notice declaring that the incumbrance is annulled." It requires then the service of a notice on the incumbrancer and not merely on the property which is the subject-matter of the incumbrance; and there is nothing in s. 167 or in any other part of the Bengal Tenancy Act to show that it is for the Collector to ascertain who the incumbrancer is. The Collector is simply required by the law to do the ministerial part of the work and serve the notice, it being left to the applicant, to name the person on whom he desires such notice to be served.

Then with reference to the second branch of the contention I would observe that s. 167 of the Bengal Tenancy Act makes no provision for the Collector allowing any amendment of the application. His functions, as I have just said above, are purely ministerial under that section, and he, therefore, is not called upon to exercise any discretion in the matter of allowing or disallowing any amendment of the application.

Two cases were cited to show that a mere misdescription of name in regard to persons against whom proceedings are intended to be taken upon an application for execution of decree, will not have the effect of making the application *null* and *void* so far as regards the purpose of saving limitation. These are the cases of *Sama Pillai* v. *Chockalinga Chettiar* (1) and *Balkishen Das* v. *Bedmati Koer* (2). But with reference to applications for execution, s. 245 of the Code of Civil Procedure makes special provision authorizing the Court to allow amendment; and where such amendments are allowed, the petition amended would have effect from the date on which it was first presented. There being no similar provision with regard to the application for annulment of an incumbrance under section 167 of the Bengal Tenancy Act, I do not think that the cases cited furnish any argument in favour of the appellant's contention.

Appeal dismissed.

(1) (1893) I. L. R., 17 Mad., 76.
(2) (1892) I. L. R., 20 Calc., 388 (396.)