

APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Brett.

1900
May 3 &
25, June 15.

MASTULLA MANDAL (JUDGMENT-DEBTOR) v. JAN MAMUD SHA
(DEGREE-HOLDER).^o

Bengal Tenancy Act (VIII of 1885), ss. 165, 167—Sale with power to avoid all incumbrances—Procedure for annulling incumbrances whether necessary, when the incumbrancer and the purchaser are one and the same person—Sale for arrears of rent—Transfer of Property Act (IV of 1882), ss. 90, 101—Mortgage lien—Extinguishment of charges—Personal covenant by mortgagor.

When the mortgagee of a property purchases it at a sale in execution of a rent decree under s. 165 of the Bengal Tenancy Act, and takes out the balance of the surplus sale proceeds, and applies it *pro tanto* to the satisfaction of a mortgage decree which he had obtained, his mortgage lien on the property is extinguished by his purchase, although he may not have taken steps to annul the incumbrance under s. 167 of the Bengal Tenancy Act.

Goluk Chunder Das v. Ram Sunker Dutt (1) dissented from.

ONE Jan Mamud Sha obtained a mortgage decree against one Mastulla Mandal, the decree being in the usual terms directing the sale of the mortgaged property in the first instance. Subsequently the mortgaged property was sold in execution of a rent decree obtained in respect of the arrears of rent of the mortgaged property and three other *jotes*; the sale was held under the provisions of Chapter XIV of the Bengal Tenancy Act, and the said mortgagee decree-holder purchased the property at that sale. He then drew out from the Court the balance of the surplus sale proceeds, and for the balance of the mortgage debt still due to him he applied for the attachment and sale of other properties of the judgment-debtor, Mastulla Mandal. The judgment-debtor objected to the execution on the ground that the decree-holder

^o Appeal from Appellate Order No. 369 of 1899, against the order of Babu Sarbeswar Mozumdar, Subordinate Judge of Dinajepur, dated the 4th of July 1899, reversing the order of Babu Dino Nath Dey, Munsif of Phoolbari, dated the 29th of March 1899.

could not proceed against his other properties before bringing the mortgaged property to sale, and that although the mortgaged property was sold in execution of a rent decree, the decree-holder's lien on the property was not extinguished.

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The Munsif held that the *jote* itself did not pass at the sale in execution of the rent decree; and that even assuming that it did, the purchaser not having annulled his incumbrance under s. 167 of the Bengal Tenancy Act, his lien was not extinguished. He, therefore, allowed the judgment-debtor's objection and rejected the application for execution.

On appeal by the decree-holder, the Subordinate Judge held that under s. 101 of the Transfer of Property Act, the decree-holder's mortgage lien had been extinguished, and that the decree-holder was entitled to proceed in execution of his decree against the other properties of the judgment-debtor. He accordingly decreed the appeal.

The judgment-debtor appealed to the High Court. The appeal came on for hearing on the 3rd and 25th May, 1900.

Babu Mohini Mohan Chakravarti, for the appellant, contended that the decree-holder must proceed in the first instance against the mortgaged property, the incumbrance not having been annulled as provided by s. 167 of the Bengal Tenancy Act. See also s. 159, proviso 1 (b), of that Act; *Beni Prosad Sinha v. Rewat Lall* (1). S. 101 of the Transfer of Property Act does not apply; the right of the mortgagee purchaser must be regulated by the special provisions of the Bengal Tenancy Act, under which the sale took place, and not by the general law laid down in the Transfer of Property Act. There is no inherent absurdity in the purchaser being required to have notice served on himself, the object being to remove all uncertainty about the date from which the annulment or extinguishment of the mortgage is to take effect. See s. 167, clause (3), of the Bengal Tenancy Act.

The case of *Goluk Chunder Das v. Ram Sunker Dutt* (2) is on all fours with the present case, and I rely on it.

Moulavi Siraj-ul Islam, for the respondent, relied on the Transfer of Property Act, s 101, and cited *Fisher on Mortgage*,

(1) (1897) I. L. R., 24 Cal., 746.

(2) (1899) 4 C. W. N., 268.

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4th Edition, p. 752 ; Coote on *Mortgage*, 4th Edition, pp. 644 and 645 ; Dart on *Vendors and Purchasers*, 6th Edition, pp. 1040 and 1041 ; Lewin on *Trusts*, 9th Edition, p. 823. It is a question of intention whether the lien is kept alive or merges. See *Gokaldas Gopaldas v. Puran Mal Premasukhdas* (1), and *Gopal Chunder Sreemany v. Herembo Chunder Holdar* (2). The Transfer of Property Act applies : *Rai Ramani Dasi v. Surendra Nath Dutt* (3).
Cur. adv. vult.

1900, JUNE 15. The judgment of the High Court (AMEER ALI and BRETT, JJ.) was as follows : —

The decree-holder, respondent in this Court, is the mortgagee of a certain property belonging to the judgment-debtor appellant. The respondent appears to have obtained a decree against the appellant on the basis of his mortgage, directing, in the first instance, the sale of the mortgaged property. Subsequently the mortgaged premises were sold, as has been found by the Subordinate Judge, for arrears of rent due therefor, and were purchased by the mortgagee. The Subordinate Judge finds that the respondent drew out from the Court the balance of the surplus sale proceeds, and we have it that he applied it *pro tanto* to the satisfaction of the mortgage decree. He now seeks to proceed for the balance of his decree against the other properties of the judgment-debtor.

An objection was taken by the judgment-debtor appellant in this Court, that the decree-holder, mortgagee, was bound, under the terms of his mortgage decree to put up to sale in the first instance the mortgaged property.

The Munsif gave effect to that objection. The Subordinate Judge has overruled it, and allowed the mortgagee decree-holder to take out execution against the other properties of the mortgagor.

The judgment-debtor, mortgagor, appeals to this Court and the objection which was urged in the Courts below is urged here

(1) (1884) I. L. R., 10 Calc., 1035.

(2) (1889) I. L. R., 16 Calc., 523.

(3) (1896) 1 C. W. N., 80.

that inasmuch as the mortgagee, who was the purchaser of the mortgaged premises at the sale for arrears of rent, did not, under s. 167 of the Bengal Tenancy Act, take proceedings for setting aside his own incumbrance, that incumbrance subsists, and he is bound to proceed first against the mortgaged premises, the contention being that it was a sale under s. 165 of the Act. S. 167, to which reference has been frequently made in this Court provides as follows:—“(1) 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 annulled. (2) Every such application must be accompanied by such fee for the service of the notice as the Board of Revenue may fix in this behalf. (3) When an application for service of a notice is made to the Collector in manner prescribed by this section, he shall cause the notice to be served in compliance therewith, and the incumbrance shall be deemed to be annulled from the date on which it is so served.” If the argument of the learned pleader for the appellant be correct, the incumbrancer must go before the Collector and ask for service of a notice upon himself, and the notice must be served although he himself is to receive it. In our opinion the proposition is wholly untenable; for, looking at the words of the section itself, it appears to us that the purchaser there contemplated is a purchaser other than the incumbrancer. The Legislature in making this provision had in view, we think, the fact that the person who purchased property under s. 165 was different from the person who claimed to have a charge or incumbrance on that property, and intended that the purchaser, if he wanted to destroy anybody else’s interest in the property purchased by him, was bound to proceed in accordance with the provisions of s. 167. We cannot impute to the Legislature the enactment of any provision of law which in its application would lead to an absurdity. In our opinion the law applicable to a purchase made by an incumbrancer is s. 101 of the Transfer of Property Act, which provides that “where the owner of a charge or other

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incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit." It will be noticed that this section is of general application. On the other hand s. 167 of the Bengal Tenancy Act applies only to sales under that Act. Its provisions cannot affect the general provisions of s. 101 of the Transfer of Property Act, and if the spirit of the two sections is kept in view the intention of the Legislature will be perfectly clear. In s. 167 the *destruction* or *annulment* of a certain right is contemplated. In s. 101 the *preservation* of a certain right is kept in view. For example, a person may have a charge upon a certain property and he may become the owner in fee, or, to use the language of the section, may become absolutely entitled to that property, the law says that if he desires to keep up his charge or whatever the incumbrance may come to, he must evince an intention either by express words or by necessary implication that he means to keep up that charge or incumbrance, otherwise it will be extinguished; and the object of this is perfectly clear, for in many cases a person, who is the holder of an annuity or who has even got a mortgage, may like to keep it subsisting for the benefit of others or for his own benefit, on the chance of the property being lost to him. In the present case, the Subordinate Judge finds there is nothing to show that at the time of his purchase the decree-holder declared by express words or necessary implication that the mortgage incumbrance would continue to subsist. On the contrary the fact is that he drew out from the Court the balance of the surplus proceeds of the mortgaged property, which would indicate that his intention was to use these proceeds to satisfy *pro tanto* his lien on the property. We must, therefore, take it upon the findings of fact and on the view of the law which we have expressed that his mortgage lien on this property was, under the circumstances of the case, extinguished.

The question then arises, is the decree-holder entitled to proceed for the balance of his decree against the other properties of the judgment-debtor. No authority or principle of law has been cited before us to support the contention that because the lien has

been satisfied *pro tanto* the decree-holder is not entitled to proceed for the satisfaction of the balance of his decree against the other properties of the judgment-debtor, and in equity it would be impossible to give effect to such a contention. The suit which is brought upon a mortgage is brought not only upon the lien but also upon the personal covenant. It is on the basis of the personal covenant that a decree is made under s. 90 of the Transfer of Property Act, that is, with regard to any portion of the claim that might remain unsatisfied out of the sale proceeds of the mortgaged premises. The learned pleader for the appellant in support of the construction of s. 167 contended for by him relied upon the case of *Gobuk Chunder Das v. Ram Sunker Dutt* (1). In that case no one appeared in this Court for the respondent and the question which has been raised here under s. 101 of the Transfer of Property Act, and the other matters to which we have referred were not in issue, and we do not think that we are bound by it.

Having regard to all the circumstances we are of opinion that the view taken by the Subordinate Judge is correct, and that this appeal ought to be dismissed with costs.

Appeal dismissed.

M. N. R.

Before Mr. Justice Ameer Ali and Mr. Justice Brett.

WOOMESH CHANDRA MAITRA (DEFENDANT) *v.* BARADA DAS
MAITRA AND OTHERS (PLAINTIFFS). *

1900
May 18, 25.

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13, Explanation II—Suit for rent—Landlord and tenant—Illegal cess not objected to in former suit—Bengal Tenancy Act (VIII of 1885), s. 74.

Where in a suit for rent, the rent claimed expressly includes an item which is objected to as an illegal cess, the mere fact that, in a previous rent suit between the same parties regarding the same tenure, the defendant did not raise the same plea, although he could have done so, would not, in the absence of a judicial determination of the point in the previous suit, preclude him from raising the plea in the subsequent suit.

* Appeal from Appellate Decree No. 2058 of 1898, against the decree of Alfred F. Steinberg, Esq., District Judge of Rajshahi, dated the 24th of June, 1898, affirming the decree of Babu Upendra Chandra Ghose, Munsif of Nattore, dated the 11th of August 1897.

(1) (1899) 4 C. W. N., 268