

Before Mr. Justice Mitra and Mr. Justice Caspersz.

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Feb. 8.

HRIDAYNATH DAS CHOWDHRY

v.

KRISHNA PRASAD SIRCAR AND OTHERS.*

Landlord and tenant—Mortgage of tenures—Decree for rent—Sale of mortgaged tenures—Incumbrances, annulment of—Sale of several tenures free of incumbrance—Bengal Tenancy Act (VIII of 1885) Ch. XIV, s. 167.

A landlord having the same tenant holding different tenures may institute one suit for the rents of all the tenures, but having obtained a decree in such a suit cannot cause the sale of all the tenures together free of incumbrances under the provisions of Chap. XIV of the Bengal Tenancy Act.

In order to take advantage of the special provisions relating to sales for arrears of rent, the landlord must cause the sale of each holding or tenure separately after having obtained a decree as regards the rent of such tenure or holding.

SECOND APPEAL by Hridaynath Das Chowdhry, the plaintiff. This was a suit for recovery of Rs. 4,379-6 on a mortgage bond. In this bond several *jotes* in Kotegaon and Guliara and one *jote* in Martazapur were mortgaged by defendants Nos. 1 to 4 for a sum of Rs. 1,889. The bond was executed on the 12th Bhadra 1299, and on the 19th Bhadra 1299 a sum of Rs. 500 was repaid to the plaintiff.

No more apparently was paid, and in 1897 the plaintiff sued the defendants Nos. 1 to 4 for a sum of Rs. 1,599 giving up a portion of his claim amounting to Rs. 1,061 odd. The amount was decreed, but the *jotes* in Guliara and Kotegaon were not held to be liable. The plaintiff therefore appealed and got a decree, binding all the *jotes* in Kotegaon and Guliara, as well as in Martazapur. The amount of this decree including costs was Rs. 2,300. This decree was executed in 1900; all the *jotes* were sold and the plaintiff purchased them.

* Appeal from Appellate Decree, No. 1940 of 1905, from the decree of W. S. Coutts, District Judge of Dinajpur, dated June 29, 1905, reversing the decree of Akhoy Kumar Chatterjee, Subordinate Judge of Dinajpur, dated Dec. 19, 1904.

After the purchase the plaintiff went to take possession, but was opposed by the defendant No. 5 so far as the Kotegaon and Guliara *jotes* were concerned. Defendant No. 5 then instituted proceedings under section 335 praying not to be ousted from the Kotegaon and Guliara *jotes* alleging previous purchase. This application was allowed in January, 1903.

The plaintiff therefore instituted this present suit to have the Kotegaon and Guliara *jotes* declared liable for the mortgage debt as well as to recover the sum of Rs. 4,379 alleged to be due on the mortgage bond.

The suit was contested by defendant No. 5, who contended that he had purchased the *jotes* in Guliara and Kotegaon in execution of rent decrees, after the mortgage to the plaintiff, but before the institution of the suit in 1897. He stated that the sale being in execution of rent decrees he purchased with power to annul incumbrances, and that in accordance with the provisions of section 167 of the Bengal Tenancy Act he had caused a notice to be served on the plaintiff annulling the incumbrances.

Plaintiff on the other hand alleged that the sale to the defendant was not properly speaking in execution of a rent decree, but that the decree was in effect a money decree, and he also contended that the notice under section 167 was time-barred and illegal.

Several issues were framed by the Court of first instance: the *second* issue was in the following terms:—

“Whether the decrees and execution proceedings and the sale at which defendant No. 5 purchased were under the provisions of the Bengal Tenancy Act, and whether they have the effect of rent decrees, or they were money decrees?”

The learned Subordinate Judge held, *inter alia*, that the decree in execution of which defendant No. 5 purchased, was in effect a money decree, and that the purchase was subject to incumbrances. He further held that the notice under section 167 was in time and legal.

On appeal, the learned District Judge was, however, of opinion that the defendant No. 5 was entitled to annul the incumbrances and that he did so by giving a legal notice under s. 167 of the Bengal Tenancy Act, and that the plaintiff was not

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entitled to proceed against the Kotogaon and Guliara jotes; and he accordingly set aside the order of the first Court and allowed the appeal.

The plaintiff now appealed to the High Court.

Babu Shorashi Charan Mitra, for the appellant.

Babu Dwarka Nath Chuckerbutty and *Babu Tarak Chandra Chuckerbutty*, for the respondents.

MITRA AND CASPERSZ JJ. This is a suit on a mortgage, and it has arisen on account of a proceeding under section 335 of the Code of Civil Procedure after the plaintiff had obtained a decree on his mortgage and caused the sale of the hypothecated properties. The defendants are purchasers in execution of a decree obtained by the superior landlord of jotes or tenures, which were hypothecated to the plaintiff by the tenants. There were several jotes or tenures, which were hypothecated to the plaintiff. The mortgagors held, under the same landlords, 5 jotes in the village of Kotogaon and 11 jotes in the village of Guliarapore. The landlords instituted two suits for the rents of these several jotes. In one suit they claimed rent for 8 jotes, 3 in Kotogaon and 5 in Guliarapore, and, in another suit, they claimed rent for 6 jotes, 4 in Guliarapore, and 2 in Kotogaon. They obtained two decrees, and, in execution of these decrees, caused two separate sales of the holdings covered by each of the decrees. The first suit brought by the plaintiff having been infructuous, the purchaser under the rent decrees not having been made a party to it, and the plaintiff, having been unsuccessful in the proceeding under section 335 of the Civil Procedure Code, has instituted this suit making the original mortgagors as well as the purchaser in execution of the decrees obtained by the landlords parties defendants.

Various questions were raised as indicated by the issues set out in the judgment of the first Court. It is only necessary for the purposes of this appeal to refer to the second issue, which relates to the effect of the mortgage to the plaintiff and the sales held at the instance of the landlords. The third issue as to

notice under sec. 167 of the Bengal Tenancy Act, the fourth issue about limitation, the fifth as to the right of the plaintiff to maintain the suit, have been found in favour of one party or the other by the lower appellate Court, and we see no reason to disturb its conclusions.

But as regards the second issue, the question is one of importance, though it seems to us to be not of much difficulty. That question is, whether a landlord having the same tenant holding different tenures under him can institute one suit for the rents of all the tenures and, having obtained a decree in such a suit, can proceed under the procedure laid down in Chapter XIV of the Bengal Tenancy Act and cause the sale of all the tenures free of incumbrances.

It is not necessary for us to enter into the question, whether such a suit is maintainable or not. The inclination of our mind is that such a suit is maintainable, and the decree that may be passed in such a suit is a good decree capable of execution in the ordinary way, under the Code of Civil Procedure, as a decree passed against the tenant-defendant.

The difficulty, however, of the landlord, who has obtained such a decree, arises when he wishes to proceed under Chapter XIV of the Act. The sections of that chapter of the Bengal Tenancy Act, beginning with section 159, always use the singular—a *tenure* or a *holding*. Under the General Clauses Act, the singular may include the plural; but the definition given in that Act must be read consistently with the intention to be gathered from the context. The General Clauses Act, therefore, does not help us much. We must see whether the sections of the Bengal Tenancy Act dealing with the matter of sale are such as contemplate the sale of two or more tenures or holdings together by one sale.

Section 159 speaks of the general powers of a purchaser as to avoidance of incumbrances, and it speaks of a tenure or holding sold in execution. Section 182 also speaks of a decree for arrears of rent due for a *tenure* or *holding*, that is to say, a decree passed for arrears of rent of *one tenure* or *one holding*. Section 163 deals with the simultaneous issue of the process of attachment and proclamation of sale in respect of a *tenure* or *holding*,

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and it further specifies, in sub-section (2), what the proclamation is to contain : it should specify whether the tenure or holding is to be sold free of incumbrances and it indicates the mode in which the attachment is to be effected. Sub-section (2) also says that a notice of sale should be affixed on the tenure or holding. It evidently does not contemplate that there should be so many notices of sale in respect of the different tenures all lumped up together under one decree. Section 164 speaks of the sale of a tenure or holding subject to registered and notified incumbrances, and it is difficult to conceive that several tenures or holdings are to be notified for sale subject to different registered and notified incumbrances. The section must mean one tenure or holding subject to one set of registered and notified incumbrances. Section 165 speaks of the mode of sale when the tenure is to be sold free of incumbrances, thus practically ruling that it must be one tenure or holding subject to certain incumbrances.

But the most important provision showing the contention of the Act is contained in sections 169 and 171, which speak of the distribution of the sale proceeds and protection from sale. The decree holder being entitled to get not only the amount covered by the decree, but also the subsequent rent of the particular holding or tenure, it is absurd to suppose that the section contemplates the sale and the distribution of proceeds of different tenures or holdings sold under one sale. Section 171 enables the mortgagee of a tenure or holding, or the holder of any other interest voidable under the sale, to pay into Court the amount requisite to prevent the sale. It may be that a person is either an under-tenure holder, or the mortgagee of one tenure, having no interest in another tenure of the same mortgagor under the same landlord. If the landlord were allowed to institute proceedings under Chapter XIV of the Bengal Tenancy Act with reference to two tenures under one decree, the result would be very serious as regards the person desirous of preventing a sale under the provisions of section 171 of the Act.

It appears to us to be plain that, in order to take advantage of the special provisions relating to sales for arrears of rent, the landlord must cause the sale of each holding or tenure,

separately, having obtained a decree as regards the rent of each tenure or holding. Any other view would lead to anomalies, because it would cause great hardships to incumbrancers or under-tenure holders and, not infrequently, the tenant. The object of the special provisions of the Bengal Tenancy Act for sales for arrears is not to deprive third persons of the rights, which they have under the ordinary law, but to protect those rights as far as possible and not to hinder in any way their right to the protection which they are otherwise entitled to. An incumbrancer may have charge over several tenures or holdings, which are to be sold together, and he may find it difficult to pay the money for the protection of all the tenures or holdings, especially when he is not interested as regards the others. The interest, which section 171 speaks of, must be the interest with reference, not to the properties or the tenures to be sold, but with reference to the particular tenure which is advertised for sale.


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The tenant also may not have the power to protect by paying the arrears of all the tenures or the holdings under the same landlord. It may be that he has one tenure or holding, while as regards the others he has no such interest. He is desirous of protecting one holding or his homestead, he may not be desirous of protecting the others, and it would be a great hardship to him if he were compelled to pay all the dues of the landlord in order to protect a tenure, which he is not willing to protect.

For these reasons, we are of opinion that the sales which took place at the instance of the landlords in these cases did not avoid the incumbrances.

The lower Appellate Court has referred, in support of its view, to section 45 of the Code of Civil Procedure and section 2, sub-section (2), of the General Clauses Act. We have already shown that section 2, sub-section (2), is not applicable to a case like this and, as to section 45, it relates to suits and not to special provisions, such as are contained in the Rent Act. We have said that it may be competent to the landlords to institute one suit for the rent of several tenures or holdings; but it is a different thing as regards sales under the special provisions of the Rent Act. The landlord is entitled to proceed in the ordinary way in execution of a decree

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as provided in the Civil Procedure Code, and there is ample authority in the books to show that he has power to proceed either under the special provisions of the Rent Act or under the Code of Civil Procedure. If he is desirous of adopting the procedure laid down in the special provisions of the Rent Act, he must proceed according to the provisions of that Act.

The decree of the lower Appellate Court will, therefore, be set aside and the case sent back to the lower Appellate Court for the consideration of the first issue raised in the case, namely, whether the mortgage, and the plaintiff's previous mortgage suit, decree, and sale, were collusive and fraudulent, and secondly to determine for what amount, if any, the plaintiff is entitled to a decree.

The purchaser defendant stands in the position of a purchaser of the equity of redemption, and it is not necessary for us to add that he is entitled to redeem the plaintiff's mortgage. The costs of this appeal will abide the result.

Appeal allowed; case remanded.

B. D. B.