APPELLATE CIVIL.

Before Mr. Justice Harington and Mr. Justice Brett.

1904
January 12.

SRIMANT ROY
v.
MAHADEO MAHATA.*

First charge—Bengal Tenancy Act (VIII of 1885), s. 65—Ticcadar—Lease—Rent—Execution proceedings—Landlord.

A *ticcadar* on the expiry of his lease obtained a decree against a tenant for rent, which fell due during the pendency of his lease. In execution of this decree, the tenure was sold and purchased by *A*. The landlord obtained a decree for rent for subsequent years against the same tenant. In the proceedings in execution taken on the decree obtained by the ticcadar, the landlord decree-holder put in an application stating that he had obtained a decree for arrears of rent for later years. Subsequently the landlord took out execution of his decree and had the tenure put up to sale. *A* then intervened objecting to the sale of the tenure.

Held, that under s. 65 of the Bengal Tenancy Act, rent being a first charge on the tenure, that first charge did not stand in favour of the ticcadar for the rent, which fell due during the pendency of his lease, but it stood in favour of the landlord in possession, for the rent which fell due afterwards, and that the ticcadar in execution of his decree could not sell the tenure itself so as to pass all rights in it to the auction purchaser *A* and annul the first charge standing on it in favour of the landlord. The tenure itself was liable to sale under the decree obtained by the landlord against the tenant.

Hem Chunder Bhunjo v. *Mon Mohini Dassi*(1) referred to.

APPEAL by the landlord Srimant Roy.

One Deep Lal Misser was the *ticcadar* of a certain village. His *ticca* lease expired in 1895. He instituted a suit for arrears of rent for the years 1301-2 (1894-95) and obtained a decree against a tenant on the 30th November 1897. In execution of

* Appeal from Order No. 462 of 1902, against the order of W. B. Brown, District Judge of Patna, dated the 8th of September 1902, affirming the order of Moulvi Hamiduddin, Munsiff of that Court, dated the 20th of June 1902.

(1) (1894) 3 C. W. N. 604.

the said decree the tenure was sold on the 18th April 1901 and was purchased by one Mahadeo Mahata, the objector. On the expiration of the *ticcadar's* lease, the landlord took khas possession and on the 15th August 1899, he obtained a decree against the same tenant for arrears of rent for the years 1303—1305 F.S. On the 17th April 1901 he put in an application in the execution proceedings taken on the decree obtained by the *ticcadar*, stating that he had obtained a decree for arrears of rent. The landlord subsequently took out execution of his decree and put up the tenure to sale. Mahadeo Mahato then on the 14th June 1901 put in an application objecting to the sale of the tenure. The Court of First Instance allowed the objection holding that the tenure was not liable to sale. On appeal the order was confirmed by the District Judge of Patna.

Babu Surendra Mohun Das for the appellant. The case of *Chhatrapat Singh* v. *Gopi Chand Bothra*(1) is not in conflict with the case of *Hem Chandra Bhunjo* v. *Mon Mohini Dassi*. This case only decides that the "trustees," who hold for the benefit of the heirs of the landlord, are not "assignees" within the meaning of section 148, clause (*h*) of the Bengal Tenancy Act. The amount might have been due to the *ticcadar* as rent within the meaning of s. 3, cl. (5), and the *ticcadar* might have obtained a decree for rent; but he could not execute the decree by sale of the tenure under the provisions of the Bengal Tenancy Act, unless he was the landlord at the time the sale took place. He could only sell the right, title and interest of the judgment-debtor in the tenure subject to the other charges existing at the time of the sale.

Babu Umakali Mookerjee for the respondent. The amount was due as rent, and the decree could only be executed as a rent decree by sale of the tenure. The only person, who could execute the decree, was the *ticcadar:* See *Dwarka Nath Sen* v. *Peari Mohan Sen*(2). Even if the present landlord's decree was notified at the time of sale, it was illegal under s. 170 of the Bengal Tenancy Act. The case of *Faez Rahaman* v. *Ram Sukh Bajpai*(3) is an authority for the proposition that once the tenure is sold it cannot

(1) (1899) I. L. R. 26 Calc. 750. (2) (1896) 1 C. W. N. 694.
(3) (1893) I. L. R. 21 Calc. 169.

1904

SRIMANT ROY v. MAHADEO MAHATA.

be resold for the arrears of rent accruing due after the date of the decree.

Babu Surendra Mohun Das in reply.

Cur. adv. vult.

HARINGTON AND BRETT JJ. In this appeal, the landlord of Nadpore Satar is the appellant, and the respondent is the purchaser of a holding, which was sold in execution of a decree for arrears of rent obtained in a suit brought by a *ticcadar* of a 12-anna share of the village after the expiration of his lease. The lease expired in 1895, and the suit was brought and the decree obtained against the tenant for arrears of rent for 1301-2 (1894-95) on the 30th November, 1897. The tenure was sold in execution of the decree, and was purchased by the respondent on the 18th April 1901.

On the expiry of the *ticcadar's* lease, the appellant, the landlord, took khas possession, and on the 15th August 1899, he obtained a decree against the same tenant for arrears of rent for the years 1303—1305. On the 17th April 1901, he put in an application in the proceedings in execution taken on the decree obtained by the *ticcadar* stating that he had obtained a decree for arrears of rent for later years and praying that the application be read out at the time of the sale of the tenure under that decree. Subsequently, the appellant took out execution of his own decree and had the tenure put up for sale. The respondent then intervened on the 14th June 1901, with a petition objecting to the sale of the tenure in satisfaction of that decree.

The objection of the respondent has been allowed by the Court of first instance, and the tenure has been exempted from sale, and, on appeal, that order has been confirmed by the District Judge. The landlord has accordingly appealed to this Court.

In support of the appeal it is contended that, after the expiry of his lease, the *ticcadar* was not entitled to bring the tenure to sale in satisfaction of his decree, but that he could only sell the right, title and interest of the tenant, and in support of this view,

the ruling of this Court in the case of *Hem Chunder Bhunjo* v. *Mon Mohini Dassi*(1) is relied on.

It is also argued that the District Judge is wrong in holding that there is a conflict between the decision in that case and the decision in the case of *Chhatrapat Singh* v. *Gopi Chand Bothra*(2), which he has quoted in support of his conclusion that the tenure could be sold in satisfaction of the decree obtained by the *ticcadar*.

On the other hand, it is contended that the only suit which the *ticcadar* could bring to recover arrears of rent from the tenant was one under the Bengal Tenancy Act, and that, as in the case of *Dwarkanath Sen* v. *Peary Mohan Sen*(3) it has been held that the assignee of such a decree could not apply for execution, having regard to the provisions of section 148, cl. 1 of the Bengal Tenancy Act, the only person who could take out execution was the *ticcadar* and he only under the provisions of the Bengal Tenancy Act. He could only take out execution by bringing the tenure to sale, and as the provisions of section 282 of the Code of Civil Procedure, under which alone a notification of a previous lien could be made, are by section 170 of the Bengal Tenancy Act expressly excluded from applying to proceedings in execution under the Bengal Tenancy Act, the petition presented by the appellant on the 17th April 1901, even if it had been read at the time of the sale on the 18th April 1901, could not have affected the rights of the purchaser at that sale.

The question raised in the case is not free from difficulty, and the District Judge's method of dealing with it is hardly satisfactory. It has first to be determined whether the *ticcadar* after the expiration of his lease could bring an action against a tenant for the recovery of arrears of rent, which had fallen due during the pendency of his lease, and if so, whether he could bring such an action under the provisions of the Bengal Tenancy Act. The action is one for rent and for nothing else, and as such we have no hesitation in holding that it could be brought under the provisions of the Bengal Tenancy Act. There is nothing in the decision

(1) (1894) 3 C. W. N. 604. (2) (1899) I. L. R. 26 Calc. 750.

(3) (1896) 1 C. W. N. 694.

1904

SRIMANT ROY v. MAHADEO MAHATA.

of the case of *Hem Chunder Bhunjo* v. *Mon Mohini Dassi*(1), which is opposed to this view.

The next point for consideration is whether the *ticcadar*, when he brought this suit more than two years after the expiration of his lease and had brought the tenure to sale more than five years after he had ceased to be in possession of the property, and when in the meantime the landlord had entered into possession of the property and had obtained a decree against the tenant for arrears of rent falling due after the termination of the lease, could under section 65 of the Bengal Tenancy Act sell the tenure, free of any charge for the rent, which had accrued due to the landlord. The rent is by section 65 of the Act declared to be a first charge on the tenure, and the question really is whether that first charge stood in favour of the *ticcadar* for the rent which fell due during his lease or in favour of the landlord, for the rents which fell due afterwards. In the case of *Hem Chunder Bhunjo* v. *Mon Mohini Dassi*(1) it was held that there could not be two first charges standing simultaneously against the tenure, and that the only person under such circumstances entitled to the first charge was the landlord in possession. We agree in that view, which is, in our opinion, the only one consistent with the law and the protection of the rights of landlords. We hold therefore that, at the time of the sale under the *ticcadar's* decree, the tenure was subject to the first charge existing in favour of the landlord for the rents which had fallen due after the termination of the lease.

We are of opinion that the case of *Faez Rahaman* v. *Ram Sukh Bajpai*(2) on which the Munsiff has relied has no application to the present case. In that case it was held that a landlord, after he had sold the tenure in execution of a decree for arrears of rent, could not sue the auction purchasers of the tenure for rent which had fallen due between the date of his decree and the date of their purchase under that decree. The Judges in that case referred to the provisions of section 169, cl. 3 of the Bengal Tenancy Act, and held that the intention of the Legislature was that the charge in respect of any rent falling due between the date of suit and the date of sale, in satisfaction of the decree passed therein should be

(1) (1894) 3 C. W. N. 604. (2) (1893) I. L. R. 21 Calc. 169.

transferred from the tenure to its sale-proceeds, and pointed out the evident disadvantages to both parties, which would result from the contrary view. That case was wholly different from the present. Here the *ticcadar* brought his suit and obtained the decree after the arrears of rent for subsequent years had fallen due to the landlord, and the sale under the decree was not held till the landlord had obtained a decree for the recovery of those arrears. The plaintiffs in the two suits are also different persons.

Nor does the ruling in the case of *Chhatrapat Singh* v. *Gopi Chand Bothra*(1) apply to the present case. All that was held in that case was that trustees, when they applied to execute decrees for rent under an assignment from the original landlord, that assignment being for the benefit of the heirs of that landlord, were not "assignees" within the meaning of Section 148 cl. (*h*) of the Bengal Tenancy Act and were not precluded from executing the decrees by reason of the fact that the landlord's interest in the land had not become vested in them. There is, moreover, no conflict, such as is suggested by the District Judge between the ruling in that case and the ruling in the case of *Hem Chunder Bhunjo* v. *Mon Mohini Dassi*(2). The facts of the two cases are entirely different.

It remains for us to determine whether the *ticcadar* in execution of his decree could sell the tenure itself so as to pass all rights in it to the auction-purchaser and annul the first charge standing on it in favour of the landlord. We hold that he could not sell the tenure so as to annul the charge. All that he could sell was the right, title and interest of the tenant as existing at the time of the sale, or, in other words, the tenure subject to the charge existing in favour of the landlord for the rent, which had fallen due since the termination of his lease.

We consider therefore that both of the lower Courts erred in holding that the tenure was not liable to sale. We are also of opinion that they were in error in holding that the tenure could only be sold after a regular suit had been brought against the purchasers. The tenure itself was liable for sale under the decree obtained by the landlord against the tenant, and it is not necessary

(1) (1899) I. L. R. 26 Calc 750. (2) (1894) 3 C. W. N. 604.

1904

SRIMANT ROY v. MAHADEO MAHATA.

for the landlord to prove in a regular suit against the auction-purchaser his right to sell the tenure in satisfaction of his decree.

We accordingly decree the appeal, set aside the findings and orders of both the lower Courts and direct that execution do proceed by sale of the tenure as prayed. We direct that the appellant do recover his costs from the respondents in this and both the lower Courts.

S. C. G. *Appeal allowed.*