APPELLATE CIVIL.

Before Mr. Justice Holmwood and Mr. Justice D. Chatterjee.

BANBIHARI KAPUR

v.

KHETRA PAL SINGH ROY.*

1911
July 13.

Mortgage—Sale—Purchase by mortgagee—Subsequent purchase by landlord—Mortgage-incumbrance—Mortgagee-purchaser, rights of, to fall back on mortgage—Sale under Bengal Tenancy Act—Ordinary Court-sale, its effect—Decree for rent against real tenant, effect of —Bengal Tenancy Act (VIII of 1885), ss. 164, 165 and 167.

Where the mortgagee of a tenure purchased the mortgaged property in execution of a decree on his own mortgage, and the landlord subsequently purchased the same property in execution of a rent-decree but did not annul the mortgage-encumbrance:—

Held, that the mortgagee-purchaser was entitled to fall back on his mortgage as a shield against the purchase by the landlord.

Akhoy Kumar Soor v. *Bejoy Chand Mohatap* (1), followed and the *obiter dictum* in the case discussed.

Bhawani Koer v. *Mathura Prasad* (2), referred to.

Held, further, that the landlord could not oust the mortgagee from the tenure without annulling the encumbrance under section 167 of the Bengal Tenancy Act, and this would be so even if the mortgagee had not proceeded to sale before the purchase of the landlord.

Where the bidding for a tenure put up to auction under section 164 of the Bengal Tenancy Act did not reach the level of the decretal amount, and a sale of the tenure subsequently followed, but without a second proclamation as contemplated by section 165 of the same Act, the sale must be held to have been an ordinary court-sale and the purchaser to have acquired only the right, title and interest of the judgment-debtor.

Nazir Mahomed Sirkar v. *Girish Chunder Chowdhuri* (3) and *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (1), distinguished.

The special provisions for the sale of tenures under the Bengal Tenancy Act are a part of the public policy intended for the benefit of all parties concerned and the results of such sales are generally destructive of various derivative rights belonging to third parties not

* Appeal from Original Decree, No. 183 of 1909, against the decree of Srihari Lahiri, Subordinate Judge of Hooghly, dated March 29, 1909.

(1) (1902) I. L. R. 29 Calc. 813. (2) (1907) 7 C. L. J. 1, 20.
(3) (1897) 2 C. W. N. 251.

1911

BANBIHARI KAPUR
v.
KHETRA PAL SINGH ROY.

before the Court. The provisions of the Act are therefore very stringent, and if the landlord wants the special results provided for by the Act, he must proceed strictly in accordance with its provisions.

Where a suit for rent has been rightly brought against the real tenant and a decree has been obtained, the decree is a good decree for rent, whether the tenant was recognised as such or not.

Ranee Lalun Monee v. *Sona Monee Dabee* (1) and *Surnomoyee* v. *Denonath Gir Sunnyasee* (2), referred to.

APPEAL by Raja Banbihari Kapur, the defendant No. 1.

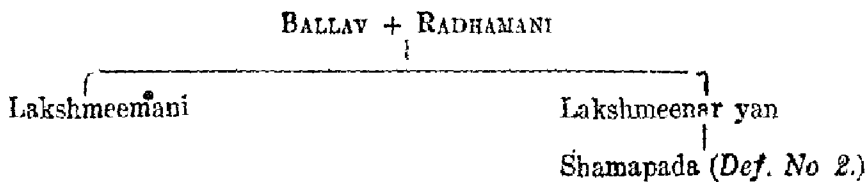
The allegations in the plaint were that one Ballavlal Barman, grandfather of defendant No. 2, held *istimrari taluk* Konarpur, under the Maharaja of Burdwan, at a rental of Rs. 330-12 as, 1 ganda; that Ballavlal Barman, by a deed of sale dated the 25th Kartik 1264 B.S., conveyed it away to his wife Radhamani Bibi, who remained in possession of the *taluk* in her own right, though the name of her husband continued in the landlord's *sherista*; that the defendant No. 1, who had acquired the *taluk* from the Burdwan Raj, and his agents were aware of Radhamani's purchase, and defendant No. 1 got a *kistibandi* mortgage-bond executed by Radhamani Bibi on the 14th Paus 1301, on account of arrears of rent; that Radhamani Bibi made payments in part-satisfaction of this bond-debt; that Radhamani Bibi borrowed Rs. 1,499 and Rs. 999 from the plaintiffs on the 22nd Agrahayan 1301, and the 15th Jaistha 1303, and executed bonds mortgaging this *taluk;* that to avoid these mortgages the defendants No. 1 obtained a fraudulent rent decree against the defendant No. 2; that the plaintiffs on the 26th February 1902 obtained a decree upon the two mortgage bonds against defendant No. 2, he being the representative of Radhamani and in possession of the property, and in execution of the decree purchased the property themselves for Rs. 3,600 on the 15th September 1903; that the defendant No. 2, instituted proceedings under sections 108, 244 and 311 of the Code of Civil Procedure, 1882, and the litigation went up to the High Court, but he was unsuccessful; that a collusive rent suit was brought by defendant No. 1 on the 10th April 1902, and it was decreed *ex parte*; that the rent decree was

(1) (1874) 22 W. R. 334.

(2) (1883) I. L. R. 9 Calc. 908.

executed and the *taluk* was advertised for sale, that though the plaintiffs were willing to pay the decretal money, the sale was postponed from time to time to put the plaintiff off the scent, and at last the execution case allowed to be struck off; that the decree was again executed in 1903 and on the 9th February 1904, the defendant No. 1 purchased the property, in the absence of the plaintiffs or any *bonâ fide* bidders, for Rs. 800 only; that the plaintiffs preferred objections under sections 311 and 244 of the Code of Civil Procedure, but they were unsuccessful, and that the defendant No. 2 subsequently took a lease of that property from the defendant No. 1 in the name of the defendant No. 3. The plaintiffs therefore brought this suit for recovery of possession and *wasilat* and for a declaration that the rent decree and sale were fraudulent.

The following genealogical table will explain some of the principal facts of the case:—



Defendant No. 2, who was admitted by all parties to be the tenant in possession at the time of the mortgage and rent suits did not appear though served in the notice of the suit.

Defendant No. 3 was really the tenant in the land in dispute, he having taken a lease from defendant No. 1.

The main objections of the contending defendants were that the suit was barred under the provisions of sections 244 and 13 of the Code of Civil Procedure of 1882; that the suit was not maintainable in the form in which it was presented; that Shamapada was not the heir of Radhamani but Lakshmeemoni was; that Radhamani had no right or possession in the property in dispute; that the *kabala* of the 25th Kartik, 1264, was not a genuine document; that the mortgage-bonds in favour of the plaintiffs were collusive and fraudulent and were executed without legal necessity; that the mortgage-decrees obtained by the plaintiffs could not bind the estate, and that the sale in execution of the rent-decrees, which were perfectly

1911

BANBIHARI KAPUR v. KHETRA PAL SINGH ROY.

legal and valid, should prevail over the sale in execution of the mortgage-decrees. The defendants also denied all the statements of facts of the plaintiffs.

The Subordinate Judge held that section 244 (c) of the Civil Procedure Code did not apply to a case where the judgment-debtor or his representative-in-interest tried to set aside the effect of the decree, as an execution Court is not competent to question the validity of a decree and that section 13 also had no application, as in the proceeding under section 244 the validity of the decree was not in issue. He held, further, that though Shamapada was not the heir of Radhamani, the mortgage-decree would bind the property, as Shamapada was the tenant then in possession, that Radhamani was the real owner after Ballav, that the purchase of the plaintiff was valid and that the rent-decree was fraudulent, illegal and void. In the result, the suit was decreed in full by the Subordinate Judge.

Defendant No. 1 thereupon appealed to the High Court.

Babu Basanta Kumar Bose (with him *Babu Shorashi Charan Mitra*), for the appellant. On the evidence on record, it is quite plain that the sale in execution of the rent-decree was not fraudulent. There was the arrears of rent to be sure, and the Raja proceeded all along legally. On the contrary, the plaintiffs' actions with regard to the rent-decree obtained by us were unjust and vexatious. Shamapada was not the heir of Radhamani. Her decree against Shamapada is of no consequence, even if the mortgage-decree is valid. As purchasers in a rent-decree, we have a superior title.

Mr. S. P. Sinha (with him *Babu Dwarkanath Chakravarti* and *Babu Saratkumar Mitra*) for the respondents. It is idle to deny the rights of Radhamani. The Raja admitted it in the instalment-bond. The conduct of the plaintiffs is quite justifiable. If we read the evidence carefully we cannot resist the conclusion that the sale in execution of the rent-decree was fraudulent.

Babu Dwarkanath Chakravarti (on the same side). The so-called 'rent-decree' cannot have the force of a rent-decree. The bidding at the first sale was far below the decretal amount.

The final sale was not preceded by a proclamation. By this latter sale, therefore, the decree-holder purchased only the right, title and interest of the judgment-debtor: *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (1). The *obiter dictum* in this case is inconsistent with the main judgment and not good law. The rent-decree was plainly obtained in collusion with the tenant: see *Ram Saran Das* v. *Ram Pergash Das* (2).

The mortgages in favour of the plaintiffs were genuine. The Raja (defendant No. 1) did not annul the encumbrance. The mortgage lien is alive: *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (1), *Surjiram Marwari* v. *Barhamdeo Persad* (3). On the question of the mortgage-suit being brought against Shamaprasad, the Raja also brought it against him. He was the tenant in possession. That is enough for our purpose. Radhamani must be held to be the representative in interest of Ballav: *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (4). It is too late now to deny this.

Babu Shorashi Charan Mitra, in reply. By the rent-sale, the Raja obtained absolute interest in the property, though from the sale-certificate it appears to be otherwise as pointed out by your Lordships: see *Nazir Mahomed Sirkar* v. *Girish Chunder Chowdhuri* (5) and *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (1).

Cur. adv. vult.

HOLMWOOD AND D. CHATTERJEE, JJ. One Ballav Lal Barman was the holder of a permanent tenure under defendant No. 1 and his predecessor in interest. In 1857 Ballav Lal executed a *kabala* in respect of this tenure in favour of his wife Radhamani. Ballav Lal, however, continued as the registered tenant until his death in 1891 or thereabout. He was succeeded by his grandson Shyama Prosad who was a minor at the time living under the guardianship of his grand-mother Radhamani and mother Kali Moti. The collections in the moffusil were made in the name of Radhamani and she mort-

(1) (1902) I. L. R. 29 Calc. 813. (3) (1905) 2 C. L. J. 202.
(2) (1905) I. L. R. 32 Calc. 283. (4) (1878) I. L. R. 4 Calc. 342.
(5) (1897) 2 C. W. N. 251.

1911

BANBIHARI KAPUR *v.* KHETRA PAL SINGH ROY.

gaged the tenure to the plaintiffs on the 7th December, 1894, for Rs. 1,499. About three weeks after this on the 28th December, 1894, defendant No. 1 took from Radhamani a *kistbandy* bond for the arrears due on the tenure. In this document Radhamani described her title under the purchase of 1857, and it can hardly be argued that the effect of the acceptance of that document was not to recognise Radhamani as the tenant of the mehal. On the 27th May, 1896, Radhamani executed another mortgage of the tenure in favour of the plaintiffs who brought a suit upon the two mortgages against Shyama Prosad as heir and grandson of Radhamani and in possession of her estate and obtained an *ex parte* decree on the 26th February 1902. Defendant No. 1 in April 1902, brought a suit for arrears of rent against Shyama Prosad stating that Ballav Lal was the recorded tenant and Shyama Prosad was in possession of the tenure, and obtained an *ex parte* decree on the 21st June, 1902. The plaintiffs executed their mortgage decree and purchased the mortgaged property on the 15th September, 1903, for Rs. 3,600. Defendant No. 1 executed his rent-decree and himself purchased the property in arrear on the 9th February, 1904, for Rs. 800. The plaintiffs applied for setting aside the sale on the ground of fraud and irregularities, but were not successful. They bring the present suit on the ground that the decree itself was fraudulent as well as the sale, and pray for recovery of khas possession on the declaration that their rights were not affected by the sale.

The Lower Court has given the plaintiffs a decree holding that the decree for rent was fraudulent and collusive. Defendant No. 1 has appealed, and on his behalf it has been contended that the finding of fraud is not supported by the evidence in the case. It is quite clear that the findings of fact arrived at by the learned Judge do not make out any case of fraud against defendant No. 1. It is not alleged or shown that there was no arrear due on the tenure and there is no evidence that defendant No. 1 did anything in respect of the suit that he was not entitled to do under the law. It does not also appear that he had any duty to perform towards the plaintiffs

1911

BANBIHARI KAPUR v. KHETRA PAL SINGH ROY.

the breach of which would throw any discredit upon him. We think the finding of fraud is wrong and must be set aside.

The decree of the Lower Court, however, has been supported on the ground that the decree obtained by defendant No. 1 was not a rent decree under the Bengal Tenancy Act, and in any case the sale brought about by him was not in respect of the tenure but only the right, title and interest of Shyama Prosad, so that their rights as purchasers under the mortgage decree were not affected. It has been further contended that the mortgage lien exists notwithstanding the sale, and as no notice under section 167 of the Bengal Tenancy Act has been served, the Raja defendant No. 1, was not entitled to *khas* possession.

With regard to the first point we have seen that defend ant No. 1 recognised Radhamani as his tenant by accepting from her the instalment bond for rent. She was, therefore, his recognised tenant from 1301. Upon her death no one took any steps to register himself or herself as her representative. If her purchase was a *bona fide* one, her daughter Lakhimoni, who was alive at the time of the rent suit, was her legal representative, if she was a *benamdar* for her husband then Shyama Prasad was the rightful heir. In any case Lakhimoni was not in possession and Shyama Prosad was sued as the party in possession and there is no dispute that he was really in possession. In fact, no claim has ever been made on behalf of Lakhimoni and both the contending parties have treated Shyama Prosad as the tenant in possession and the question of *benami* has not been pressed by either party. The suit for rent was, therefore, rightly brought against Shyama Prosad who must be taken as the real tenant. It has been contended that as Shyama Prosad was not recognised as the tenant but was sued merely as he was in possession, the decree obtained is a money decree for compensation for use and occupation. That would have been a legitimate view to take if as a matter of fact Shyama Prosad had not been the real tenant: see *Ranee Lalun Monee* v. *Sona Monee Dabee* (1); *Surnomoyee* v.

(1) (1874) 22 W. R. 334.

1911

BANBIHARI KAPUR v. KHETRA PAL SINGH ROY.

Denonath Gir Sunnyasee (1). As it is, however, the decree was a good decree for rent.

As regards the second point, it appears from the order sheet in the execution case in which defendant No. 1 made his purchase that processes of attachment and sale were issued simultaneously, evidently under section 163, clause 1, of the Bengal Tenancy Act. It may be presumed that clause 2 (a) of that section was also complied with. As the sale took place on the first day of sale, the sale could be held under section 164 only, subject to registered and modified incumbrances if the bidding were sufficient to liquidate the whole amount of the decree and the costs. The bidding, however, did not reach the level of the decretal amount and was in fact several hundred rupees less; so that the sale could not be held under section 164, and as there was no second proclamation and sale as contemplated by section 165, the sale cannot be taken as one held under the Bengal Tenancy Act. The provisions of the Bengal Tenancy Act regarding sales are very stringent and the results are generally destructive of various derivative rights belonging to third parties not before the Court. The State enforces its claims for revenue under the stringent provisions of the sunset law from the *zemindars* and has enacted the stringent provisions of the tenancy laws for enabling the *zemindars* and other landlords to realise rents from their tenants, providing safeguards for the protection of the tenants and those that deal with them. The special provisions for the sale of tenures are a part of a public policy intended for the benefit of all parties concerned. If the landlord wants the special results provided for by the Act, he must proceed strictly in accordance with its provisions. We think he has not done this in this case and he cannot, therefore, claim rights superior to those of an ordinary purchaser at a Civil Court sale. His sale certificate also supports this view as he is certified to have purchased the right, title and interest of the judgment-debtor. The learned vakil for the appellant has referred us to two cases in this connection: *Nazir Mahomed Sir-*

(1) (1883) I. L. R. 9 Calc. 908.

kar v. *Girish Chunder Chowdhuri* (1), and *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (2).

These cases are clearly distinguishable; in the first case the property sold was described as the tenure and the proclamation was for the sale of the tenure under section 59 of Act VIII of 1869 B. C. The learned Judges say "the property advertised was the tenure and the property sold was the tenure, according to the sale certificate, and the mere insertion of a statement that the sale was of the rights and interests of the judgment-debtors would not, we think, have the effect under the circumstances stated of limiting the sale to such rights and interests and not extending it to the tenure itself."

In the second case the description of the property ended with the words "the said lot in arrears," so that the facts are not similar. It was argued in that case that the property should have been put up first subject to registered and notified incumbrances and afterwards with power to avoid all incumbrances, but this argument was met by the remark that the mortgage in question in that case was not a registered and notified incumbrance. The report does not show under what section the sale took place or whether the amount of the bidding was sufficient to meet the decree with costs. Under the circumstances we do not feel in any way hampered by that decision.

As regards the third point, the argument of the learned vakil for the respondent is that notwithstanding the decree and sale, he is still entitled to fall back upon his mortgage lien to defend himself from the attack of defendant No. 1 who claims to oust him. In the case of *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (2) hereinabove quoted, the mortgagee obtained his decree absolute in May 1892. The Maharaja brought his suit for arrears in 1893 and purchased the "lot in arrear" in 1893. The mortgagee then applied for executing his mortgage decree against the Maharaja as purchaser in 1901. The Maharaja then applied for the service of notice under

(1) (1897) 2 C. W. N. 251. (2) (1902) I. L. R. 29 Calc. 813.

1911

BANBIHARI KAPUR v. KHETRA PAL SINGH ROY.

section 167 and the learned Judges held that as this application was not made within the time limited by Section 167 it was barred and the mortgagee was entitled to execute his decree against the mortgaged portion of the tenure. The result of this ruling is, that the incumbrance of the mortgage was in existence notwithstanding the decree absolute on the mortgage. There is, however, an *obiter dictum* in the case that after the mortgage had culminated in a decree there would be no incumbrance to annul under section 167; in the first place the learned Judges say it is not necessary to decide that question and in the second place that opinion is quite inconsistent with the decision on the point of limitation under section 167; for if there was no incumbrance there was nothing to annul and no application for annulment could be barred. In the case of *Bhawani Koer* v. *Mathura Prasad* (1) a revenue sale of an estate under section 54 of Act XI of 1859 took place after a mortgagee had purchased in execution of a mortgage decree of his own and after the sale had been confirmed. The revenue sale was subject to all incumbrances. The Court held that the mortgagee-purchaser was entitled to fall back on his mortgage as a shield against the purchaser at the revenue sale. In the present case if the plaintiff had not proceeded to sale before the purchase of defendant No. 1, the latter would have been at best entitled to annul the plaintiff's incumbrance under section 167; there is no reason why he should be in a worse position by reason of his diligence in proceeding to sale first. It is true he could have paid up the decree of the defendant and saved himself from this tortuous litigation, but he was not bound to do that. He was not liable for the rent before his purchase and his remedy over, if any, against his mortgagor by way of contribution might be an illusory remedy after all. In any case he is entitled to rely on all defences legitimate to his juridical position, and we think that the Raja defendant was, even if he had taken all proceedings according to law, not entitled to oust him without annulling his incumbrance

(1) (1907) 7 C. L. J. 1, 20.

under section 167 of the Bengal Tenancy Act, and this has not been done in this case.

1911
BANBIHARI KAPUR v. KHETRA PAL SINGH ROY.

Under these circumstances although we set aside the judgment of the Court below, we confirm the decree of the said Court but without costs in either Court.

S. M.

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

JOYMANGAL PERSHAD NARAIN SINGH
v.
JHAGROO SAHU.*

1911
July 17.

Criminal Revision—Practice—Jurisdiction of High Court—Rule issued on one or more of several grounds in a petition, and ultimately discharged—Fresh Rule on the other grounds of the same petition.

When a rule has been granted on one or more of several grounds contained in a petition and is ultimately discharged, the High Court has no jurisdiction to issue a fresh rule, in the same case, on the other or some of the other grounds of the petition, which were considered on the first occasion, unless permission was given to the party, at the time of the discharge of the first rule, to renew the application on the other grounds or some of them.

Rai Radha Gobind v. *Gossain Mohendra Gir* (1) and *Bibhuty Mohan Roy* v. *Dasimoni Dassi* (2) referred to.

On 5th September 1910, a proceeding under s. 145 of the Criminal Procedure Code, was drawn up by Babu P. N. Mookjee, Deputy Magistrate of Hazaribagh, against Jhagroo Sahu, as first party, and the petitioner, Raja Joymangal Pershad Narain Singh and others, as second party, in supersession of a previous proceeding under s. 144 of the Code based on a petition by the first party. On the 30th November, Babu H. P. Ghose, another Deputy Magistrate, took the case on his own file, and after taking evidence declared the first party to be in possession, by his order dated the 13th February

* Criminal Revision, No. 546 of 1911, against the order of Haripada Ghose, Deputy Magistrate of Hazaribagh, dated Feb. 13, 1911.

(1) (1901) 6 C. W. N. 340. (2) (1902) 10 C. L. J. 80, 82.