

(1922) 06 CAL CK 0060
In the Calcutta High Court

Jatindra Mohan Chakravarti and Others

APPELLANT

Vs

Bijoy Chand Mahatab

RESPONDENT

Date of Decision : 29-06-1922

Acts Referred:

Bengal Tenancy Act, 1885 — Section 167

Citation : AIR 1924 Cal 396

Hon'ble Judges : Sanderson, C.J; Ghose, J

Bench : Full Bench

Judgement

Ghose, J.—These two appeals are by the defendants, and they arise out of two suits brought by the plaintiff for possession of certain lands on the ground that the defendants had been in possession of these lands adversely to the putnidars of the mahals to which these lands appertain for over twelve years. It is alleged that the putnis were created in 1849, The plaintiff purchased these two mahals which are named Monoharpur and Bankati in execution of a rent-decree in May 1905. The plaintiff is the Zamindar. The plaintiff I says that the defendants are incumbrancers on the lands, and he purchased the mahals with power to annul all incumbrances under the provisions of the Bengal Tenancy Act. There are two sets of the defendants. The first set alleged that these lands are their brahmotter granted to them by a former Raja of Bishanpur in the year 1754, and they gave a permanent lease of these lands in 1843 to the second set of defendants who claim as cultivators. The plaintiff alleges that he had served notice u/s 167 of the Bengal Tenancy Act for annulment of the incumbrances and seeks to recover possession of these lands in suit, the area of which in each case is small, being only about 4 bighas, and 6 bighas. The Bengal Tenancy Act makes it imperative that notice should be served for the purpose of annulment of an incumbrance, and Sub-section (1) of Section, 167 of the Act runs in these terms:

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." The application, it is alleged, was presented in March 1915, that is, about ten years after the date of the sale. Therefore, it was not done within one year from the date of the sale. The plaintiff can only succeed if he can prove that the application was made within one year of the date on which he first had notice of the incumbrances. In the plaint, the plaintiff does not state anywhere, as he ought to have stated, when he actually had notice of these incumbrances. He states in paragraph 7 of the plaint: "That the plaintiff has now come to know that at the time when the putni of the aforesaid two lots was granted, the land of Mouzah Monoharpur mentioned in Schedule (ka) and of Mouzah Bankati mentioned in Schedule (kha) were lying patit as khals and bunds. Thereafter, during the period of the putni, these were gradually reclaimed and became fit for cultivation, and the defendants in collusion with one another trespassed into the lands mentioned in Schedules (ka) and (kha) and came into possession of these lands without having any right thereto, through the carelessness of the putnidars of both the mouzahs." In order to enable the plaintiff to succeed in his suit, the plaintiff must apply for the service of notice of annulment u/s 167 of the Bengal Tenancy Act; within one year of his knowledge of the incumbrance. The judgment of the lower appellate Court on this point is this:

The learned pleader for the appellant drew my attention to the fact that there was no evidence in the case to show that notices u/s 167 of the Bengal Tenancy Act had been served within a year of the plaintiff's coming to know of the existence of the incumbrances. But the evidence of the plaintiff's Amin, Dina Nath Bhadra, would show that he came to know of these incumbrances when surveying the putni taluks on behalf of his master only in Falgoon 1321 B.S., and this was only a few months before the notices u/s 167 of the Bengal Tenancy Act were taken out for service." The judgment, therefore, does not state anything about the date of the plaintiffs' knowledge of the incumbrance, but only speaks of the knowledge of the plaintiff's Amin, Dina Nath Bhadra. Therefore the finding of the learned Judge is not sufficient for the purpose of holding that the notice, as required u/s 167 of the Bengal Tenancy Act, was served within one year of the knowledge of the plaintiff. We had the evidence read out to us. The Amin, Dina Nath Bahdra, does not himself state anything about his knowledge of the incumbrance, but only says that he came to know the lands in Falgoon 1321 B.S. when he was sent there to survey the mouzah. There were other local agents of the plaintiff on the spot and, therefore, the fact that the Amin did not know anything of the lands before 1321 B.S. does not entitle the plaintiff to bring the suit on the basis of the notice alleged to have been served, as there is no evidence to show that applications for service of the notices were made within the time prescribed by the Act. This alone is sufficient to dispose of the appeals and on this ground only the plaintiffs suits are liable to fail.

2. I ought to state that several other points were urged on behalf of the appellants in support of their appeals, but having regard to our decision on the

question of notice, I do not think that it is necessary for us to decide the other questions raised. It was urged on behalf of the respondent that there ought to be a remand in order to enable the plaintiff to adduce evidence of the facts required to be proved under the Act, on the ground that both the Courts below held on the evidence which was adduced that the notice was served within the time limited by the provisions of Section 167 of the Bengal Tenancy Act. But, having regard to the fact that the plaint itself does not state when the plaintiff had notice of the incumbrance and the fact, that, although this question was disputed from the very commencement by the defendants, the plaintiff did not produce the evidence that was necessary to establish his right, we do not think that the plaintiff can ask for a remand in order to prove this fact by new evidence at this stage of the proceedings specially as this suit was instituted in 1916, that is, about eleven years after the date of the plaintiff's purchase of the putni and the litigation for lands of comparatively small value has now been going on for about six years. The plaintiff ought to have come to Court with a definite statement of facts necessary for him to succeed in his case and with all his evidence.

3. It is also urged on behalf of the respondent that the interest which the dedendants have acquired is not an incumbrance under the provisions of Section 161 of the Bengal Tenancy Act, and, therefore, it was not necessary for him to serve any notice as provided u/s 167 of the Bengal Tenancy Act in order to succeed in ejectment. Even assuming that there is substance in this argument, it is not open to him now to raise the question, he having come to Court on the allegation that the defendants were incumbrancers and that the plaintiff was entitled to possession of the lands having, as he said, annulled the incumbrance as provided under the Bengal Tenancy Act. We are of opinion that the plaintiff is not entitled at this stage to change his whole case and rely upon some other title.

4. The appeals are, therefore, decreed and the suits of the plaintiff dismissed with costs in all the Courts.

Sanderson, C.J.

5. I agree.