

(1917) 01 PAT CK 0006
In the Patna High Court

Mahabir Prasad and Others

APPELLANT

Vs

Baiju Lal and Others

RESPONDENT

Date of Decision : 11-01-1917

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1917 Patna 398 : 39 Ind. Cas. 230

Hon'ble Judges : Edward Chamier, C.J; Sharfuddin, J

Bench : Division Bench

Judgement

Chamier, C.J.—Some occupancy tenants mortgaged their holding to the plaintiffs in 1893. A suit was brought on the mortgage in 1909, which resulted in a decree for sale dated September 1st, 1910. Meanwhile in 1909, the landlords who are defendants Nos. 1--7, brought a suit for arrears of rent against the tenants and obtained a decree on January 5th, 1910, in execution of which on July 11th, 1910, they purchased the holding themselves. In due course they caused a notice to be issued u/s 167 of the Bengal Tenancy Act declaring that the incumbrance was annulled. When the plaintiffs sought to bring the holding to sale, defendants Nos. 1--7 objected. The objection was upheld and the plaintiffs then brought the present suit for a declaration that the decree held by defendants Nos. 1--7 had been obtained by fraud, was not binding upon the plaintiffs, and did not prevent them from putting the holding up for sale in execution of their decree upon the mortgage. In the alternative the plaintiffs prayed for a declaration that they were entitled to bring the holding to sale after paying off the amount for which defendants Nos. 1--7 had obtained a decree. The Munsif dismissed the suit as barred by Section 47 of the Code of Civil Procedure. The District Judge held that it was not barred by that section. Both the Courts below held that the plaintiffs had failed to prove the defendants Nos. 1--7 obtained their decree by fraud, but they decided that the sale held in execution of that decree was not binding upon the plaintiffs inasmuch as the sale was not proclaimed u/s 163 of the Bengal Tenancy Act.

2. It is common ground that the decree obtained by defendants Nos. 1--7 satisfied the requirements of Section 158B of the Act and that the holding was sold in execution of that decree. Prima facie, therefore, the holding passed to the purchasers (defendants Nos. 1--7) and they had power to annul the incumbrance held by the plaintiffs. But it is contended that the incumbrance has not been annulled, and that the plaintiffs are entitled to bring the holding to sale, by reason of the fact that the provisions of Section 163 regarding the contents of the proclamation of sale were not strictly complied with. The defects charged are, (1) that the heading of the proclamation referred to Section 287 of the Code of Civil Procedure, 1882, and not Section 163 of the Bengal Tenancy Act, and (2) that the proclamation did not state that the holding would be sold with power to annul all incumbrances.

3. The fact that the heading of the proclamation refers to Section 287 is obviously immaterial. Indeed with reference to the terms of Section 163 of the Bengal Tenancy Act it is not by any means clear that the heading of the proclamation ought not to have referred to Section 287 of the CPC (or Order XXI, Rules 66 and 70 of the Code of Civil Procedure, 1908).

4. Section 163 of the Bengal Tenancy Act provides that the proclamation shall, in addition to stating and specifying the particulars mentioned in Section 287 of the Code of Civil Procedure, 1882 (Order XXI, Rules 66 and 70 of the Code of 1908), announce in the case of an occupancy holding that the holding will be sold with power to annul all incumbrances. The proclamation did state and specify all the particulars required by Section 287 (Order XXI, Rules 66 and 70), but it did not state that the holding would be sold with power to annul all incumbrances. There can be no doubt that the holding was sold in execution of a decree for arrears due in respect thereof within the meaning of Sections 158B and 159 of the Bengal Tenancy Act, and the only question is whether the omission to state that the holding would be sold free of all incumbrances deprived the purchasers of the right to annul the incumbrance. It may be conceded that the omission is an irregularity which would be a ground for setting aside the sale under Order XXI, Rule 90, if it was proved that substantial injury resulted therefrom. On the findings it must be taken that the plaintiffs had notice of the sale and of the proceedings taken to annul the incumbrance; yet they made no application under Order XXI, Rule 90, and it has never been suggested that any injury, substantial or otherwise, resulted from the omission complained of. On behalf of the plaintiffs it is contended that it is the statement in the sale proclamation that the holding will be sold with power to annul all incumbrances which gives the purchaser the right to take proceedings u/s 167 and that the omission to enter that statement is not a mere irregularity in publishing the sale. It was said in one case that, in order to determine the question whether the purchaser has acquired the right to annul incumbrances, the test to be applied is twofold, namely, first, whether a tenure or holding was sold, and secondly, whether the decree in execution whereof the sale took place was a decree for arrears due in respect of that tenure or holding--*Chandra Mohini Debi v. Kenaram Chiti* 19 Ind. Cas. 776 :

19 C.L.J. 324. But in that case the proclamation of sale was presumably in order as nothing is said about it. One object of requiring the Court to enter in the proclamation of sale of an occupancy holding the statement that the holding will be sold with power to annul all incumbrances, is presumably to inform people that they will have the right to do that if they purchase the holding. The omission to enter the statement in the proclamation might affect the price which people would be prepared to pay for the property and, as said above, might be a ground for setting aside the sale. But it appears to me that the omission to enter the statement in question can have the result suggested by the plaintiffs only if the right to annul incumbrances is part of the property put up for sale, i.e., that the right to annul incumbrances is sold to the purchaser. But the right to annul incumbrances is obviously not part of the property sold. The statement that the purchasers will have the right to annul incumbrances is almost equivalent to a statement that the holding is sold free of incumbrances, and the statement takes the form required by Section 163, because the Act by a later Section (167) provides machinery for declaring in effect that the purchaser in ends to hold free of incumbrances. In my opinion, the omission to enter the statement in question is not even a misdescription of the property put up for sale. It appears to me that the right to annul incumbrances depends, not on the statement, in the proclamation that the purchaser will have that right, but upon the nature of the decree and of the property put up for sale, i.e., the purchaser will have that right under sale duly confirmed by the Court if the property sold was a holding and the decree satisfies the requirements of Section 158B of the Bengal Tenancy Act, It often happens that the purchaser does not acquire the right to annul incumbrances, although the proclamation of sale stated that he would have that right. The question whether he has or has not that right depends upon a consideration of the nature of the decree and the property proclaimed for sale.

5. For the above reasons, I am of opinion that this suit should have been dismissed. I would allow this appeal and dismiss the suit with costs in all three Courts.

Sharfuddin, J.

6. I agree.