

(1928) 02 CAL CK 0052
In the Calcutta High Court

Makhan Lal Modak

APPELLANT

Vs

Bejoy Gopal Nundy and Others

RESPONDENT

Date of Decision : 15-02-1928

Acts Referred:

Bengal Tenancy Act, 1885 — Section 167

Citation : AIR 1928 Cal 892 : 114 Ind. Cas. 481

Judgement

1. This is an appeal by defendant 1. The plaintiff sued the defendants in ejectment on the ground that he had taken a settlement of the land in question from the landlord who had purchased the holding in execution of his own rent decree. The plea of the defendant shortly stated was that he had obtained a decree in execution of a mortgage created on the holding by the previous tenant and after enforcing his mortgage he obtained a decree and purchased the property in question. He cannot therefore be ousted by the plaintiff. The plaintiff's suit was decreed by the lower appellate Court. Defendant 1 appealed to this Court and on the previous hearing a Division Bench sent down an issue for trial on the question whether or not the landlord had knowledge of the circumstance more than one year before the date of the application u/s 167, Ben. Ten. Act for service of notice. The notice was served by the landlord after the institution of the suit out of which this appeal, arises. The application was admittedly made more than a year after the date of the sale. The notice can only annul the incumbrance in favour of defendant 1 if the necessary step was taken within one year from the date on which the purchaser in execution of the rent decree had first notice of the incumbrance. The purchaser in execution of the rent decree as already stated in this case was the landlord. The Subordinate Judge has sent his finding to this Court on the issue on which his finding was required. He observed that defendant 1 has entirely failed to discharge the onus that was upon him to show that the landlord purchaser had knowledge of the incumbrance more than a year from, the date of notice.

2. It has been contended on behalf of the defendant-appellant that the finding ought to have been in his favour, because there is absolutely no evidence on

behalf of the plaintiff that the purchaser had no notice of the incumbrance, previous to one year of his application for service of notice. His contention is that the Subordinate Judge has misplaced the onus of proof, and having done so he has dealt with the evidence adduced on behalf of the defendant and has come to the conclusion that the defendant has failed to discharge the burden of proof, upon him. The Subordinate Judge relied upon the case decided by Patna High Court and reported in Nand Kishore Chaudhury and Others Vs. Maharajdhiraj Sir Rameshwar Singh Bahadur, : in support of his view that in every case falling within Section 167, Ben. Ten. Act it is for the incumbrancer to show that the purchaser had knowledge of the incumbrance in order to establish the fact that there has been no annulment of the incumbrance on proper service of notice. In our view the learned Subordinate Judge has misread the case which he relies upon in support of his view. That was a case in which a mortgagee sued for possession as plaintiff and the acution-purchaser pleaded that the incumbrance had been annulled by due service of notice. In order to succeed in that case the plaintiff was bound to prove that he had a subsisting right and in that view the learned Judges held that the burden of proof was upon the plaintiff to show that the incumbrance which he claimed was not annulled by proper and legal notice. In our opinion it cannot be laid down as a general rule of law that the burden of proof is on the incumbrancer to show in every case that the purchaser had knowledge of the incumbrance more than one year before his application to the Collector for service of notice for annulment of the incumbrance. The mere reading of the section in our view displaces such a contention. The section provides that the purchaser 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. Who is to show that the date when he has first notice of the incumbrance is later than the date of the sale? Obviously it must be the purchaser who makes the application for annulling the incumbrance. It is the purchaser who seeks the extension of one year's time for presenting the application to the Collector upon that ground and certainly he is to prove the fact in order to claim the extended period in his favour.

3. It is, however, contended on behalf of the respondents that in this case apart from the question of onus the evidence shows that the purchaser had knowledge of the incumbrance within a year of the presentation of his application. This evidence is said to have been given by a gomastha of the landlord. The Subordinate Judge has observed that defendant 1 admits that he never went to the house of the landlord. It is not necessary for the incumbrancer to go to the house of the landlord in order to give him notice. But it is for the landlord purchaser to give evidence that he was not aware of the incumbrance within the time specified. There being no evidence given by him to that effect we must hold that the incumbrance has not been proved to have been annulled according to law.

4. The result therefore is that this appeal must be decreed, the judgment and decree of the lower appellate Court set aside, and the decree made by the trial Court restored with costs in all Courts.