

(1923) 11 PAT CK 0028
In the Patna High Court

Nand Kishore Chaudhury and Others	APPELLANT
Vs	
Maharajdhiraj Sir Rameshwar Singh Bahadur	RESPONDENT

Date of Decision : 12-11-1923

Acts Referred:

Bengal Tenancy Act, 1885 — Section 167
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25

Citation : AIR 1924 Patna 515

Hon'ble Judges : Dawson Miller, C.J.; Mullick, J

Bench : Full Bench

Judgement

Dawson Miller, C.J.—This appeal is brought under the Letters Patent against a decision of Mr. Justice Boss reversing the decree of the District Judge,

2. The appellants, Nand Kishore Chaadhuri and others, instituted the suit out of which this appeal arises on the 25th January, 1919, claiming certain declarations in respect of a mortgage upon the holding of Ashrafi Jha and Bhudhan Jba granted by their deceased father. The two persons named are the first party defendants in the suit. Sometime before the suit was instituted, namely on the 9th September, 1917, the holding had been sold at auction in execution of a rent decree obtained by the landlord the Maharajdhiraja of Darbhanga who himself purchased the holding. The landlord was impleaded as the second party defendant in the present suit. The plaintiffs averred that the rent decree obtained by the landlord and the subsequent sale in execution thereof were fraudulent transactions brought about by collusion between the landlord and the tenants and further that no notice u/s 167 of the Bengal Tenancy Act annulling the incumbrance had been served upon the plaintiff. The plaintiffs claimed a declaration that as no notice had been served by the auction-purchaser u/s 167 of the Bengal Tenancy Act the purchase in execution could not bind the mortgaged property, and a further declaration that the decree in the rent suit and the subsequent sale were collusive and fraudulent and should be set aside.

3. The defendants first party did not enter appearance but the landlord, the

second party defendant, on the 18th July, 1919, filed a written statement traversing the allegations in the plaint and pleading that he had no knowledge of the plaintiffs' mortgage until he received the summons in the suit. On the 6th August, 1919, that is within 12 months of the service of the summons in the suit he applied to the Collector u/s 167 of the Bengal Tenancy Act to serve notice on the plaintiffs annulling the incumbrance. The plaintiffs appeared in that proceeding and filed an objection alleging that the landlord's application was barred by limitation as he had notice of the incumbrance more than 12 months before the application. The hearing was adjourned by the Collector to enable evidence on the point to be called. On the day fixed, namely the 19th November, 1919, the objectors failed to produce any evidence and their objection was dismissed. The Collector issued the notice of annulment u/s 167. On the following day the 20th November the plaintiffs amended their plaint by adding a prayer asking for enforcement of their mortgage by sale of the property.

4. No issue was raised at the trial raising the question as to whether the landlord had notice of the incumbrance more than a year before the application to annul. The only issues framed were:

1. Is the mortgage bond in suit genuine and for consideration?
2. Is the defendant second party bound to pay the debt under the mortgage bond in suit?
3. To what relief, if any, are the plaintiffs entitled and against which defendant?
4. Whether the decree in rent suit No. 417 of 1916 was obtained by the fraudulent suppression of summons and whether the sale in execution case No. 510 of 1917 was also obtained by fraudulent suppression of notice and other processes.
5. The issues were decided by the Munsif as follows. No. 1 in the affirmative, Nos. 2 and 4 in the negative. With regard to No. 3 he was of opinion that although the plaintiffs had appeared and filed objections in the proceedings u/s 167 of the Act and although, notwithstanding the objection, the notice had been issued by the Collector such notice was not binding upon the plaintiffs as it was filed during the pendency of the present suit. He came to no conclusion as to when the landlord first became aware of the incumbrance. In the result he ordered the plaintiffs to pay the landlord within two months the amount due to him under the rent decree and subject thereto he passed a mortgage decree in favour of the plaintiffs ordering the sale of the property to satisfy their claim.
6. The landlord appealed to the District Judge who differed from the Munsif in so far as the latter had held that a notice served after the institution of the present suit could not be valid. In this respect the learned District Judge, in my opinion, took a correct view of the law. The fact that a mortgage suit or any other suit has been instituted by the incumbrancer cannot deprive the auction purchaser of his right to annul the incumbrance under the Bengal Tenancy Act, if the

application is made within the time prescribed by the section, that in to say within one year of the date of the sale or the date on which the purchaser first had notice of the incumbrance. The learned District Judge, however, found that as the notice was admittedly given more than a year after the sale and as there was no evidence to show that the landlord came to know of the incumbrance at a later date the notice could not be deemed to have been given within the time limited by law and was therefore not a valid notice. He accordingly dismissed the appeal on that ground.

7. The landlord then appealed to the High Court. The appeal was heard before Mr. Justice Boss. The learned Judge was of opinion that the Collector had jurisdiction to entertain the application for service of a notice u/s 167 if he were satisfied that it was within time or to reject it if not so satisfied and that having issued the notice after objection by the plaintiffs it must be deemed that the Collector was satisfied as to the propriety of issuing the notice. Clause 3 of Section 167 provides as follows:

When an application for service of a notice is made to the Collector in manner prescribed in this section, he shall cause the notice to be served in compliance therewith, and the incumbrance shall be deemed to be annulled from the date on which it is so served.

8. Under the Section once the Collector has issued the notice the incumbrance must be deemed to have been annulled. This does not mean that the validity of the notice and the consequent annulment of the incumbrance cannot afterwards be called in question. I consider, however, that the effect of the Section is to cast the burden of proof upon the person questioning the validity of the notice. It was, therefore, incumbent upon the plaintiffs in the present case to prove that the landlord had in fact notice of the incumbrance more than 12 months before he made the application to the Collector. The learned District Judge treated the case as one in which the onus lay upon the landlord. In this respect he was in my opinion misinterpreting the section. The landlord appears to have given no evidence upon the point and no issue was raised upon it which may account for his failure to do so. Had no evidence been given at all upon this point I should have agreed with the decision of Mr. Justice Boss who, in my opinion, rightly placed the onus upon the plaintiffs who questioned its validity. We have been informed, however, by the learned Vakil for the appellants that the plaintiffs did at the trial adduce some evidence in support of their contention that the landlord had notice of the incumbrance more than 12 months before the application u/s 167. The learned District Judge did not mention this fact and did not deal with this part of the evidence and say whether he accepted it or not.

9. In this condition of affairs I think the proper course to pursue is to remand the case to the lower appellate Court under Order 41, Rule 25 of the CPC to determine the following issue:

Did the second party defendant present to the Collector his application u/s 167 of

the Bengal Tenancy Act within one year of the date on which he first had notice of the plaintiffs' incumbrance.

10. As no issue was framed upon this point both parties will be permitted to tender fresh evidence upon it. The District Judge shall determine the issue and return his finding and the reasons therefore together with the evidence as soon as possible to this Court for final disposal of the appeal.

Mullick, J.

11. I agree.