

(1917) 04 CAL CK 0038
In the Calcutta High Court

Nanda Lal Banerjee

APPELLANT

Vs

Umes Chandra Das

RESPONDENT

Date of Decision : 20-04-1917

Acts Referred:

Bengal Tenancy Act, 1885 — Section 167

Citation : 40 Ind. Cas. 996

Hon'ble Judges : Newbould, J; Fletcher, J

Bench : Division Bench

Judgement

Fletcher, J.—This is an appeal from a decision of the learned District Judge of the 24-Pergannahs affirming the decision of the Subordinate Judge at Alipore. The plaintiff sued for a declaration of his right to a putni which he had purchased at a sale for arrears of rent held under the provisions of the Bengal Tenancy Act. The sale at which the plaintiff purchased took place on the 16th Decamber 1907. Litigation ensued after the sale and the sale was not confirmed until the 5th September 1908. On the 22nd September 1908, the plaintiff took possession and the present defendant then set up a dur-putni right. On the 8th March 1909, an application was made u/s 167 of the Bengal Tenancy Act to annul the defendant's encumbrance and the notice was served on the 13th April 1909. The present suit was brought on the 12th April 1912. The defence as raised by the defendant in his written statement was, first of all, that the plaintiff was the benamidar of the defaulting tenant. That was found against the defendant. So was also the defence raised that no notice had been served under the terms of Section 167 of the Bengal Tenancy Act. But the suit was dismissed on the ground that the plaintiff had notice of the defendant's encumbrance before he purchased the property and, therefore, he was out of time under the terms of Section 167 in not having served the notice to annul the defendant's encumbrance in time. It has been argued in this appeal that that point was not raised in the defence and no issue had been settled with regard to it and that the defendant ought not to have been allowed to enter into that defence. There is a good deal to say with regard to that. In the view that I take of the authorities of this Court, I am

unable to agree with the view of the learned Judge of the lower Appellate Court that the date of the sale was the 16th December 1907, and not the date on which the sale was confirmed, namely, the 5th September 1908. If the "date of sale" mentioned in Section 167 of the Bengal Tenancy Act is the date when the sale is confirmed, then it is quite clear that the notice that was served on the 13th April 1909 was within one year from the date of the sale. The sale to the plaintiff was made under the provisions of the CPC of 1882 and, u/s 316 of that Code, the title to the property sold in execution vested in the purchaser from the date of the certificate of sale and not before. Section 65 of the present CPC is in different terms. The question as to what is the meaning of the words "date of sale" as used in the sections of the Bengal Tenancy Act has formed the subject of judicial decision in certain cases before this Court. The first case that reference may be made to is the case of Matangini Chaudhurani v. Sreenath Das 7 C.W.N. 552 where Maclean, C.J., and Mr. Justice Stevens held that the words "date of sale" used in Section 169, Sub-section (1), Clause (c), of the Bengal Tenancy Act meant the date of the confirmation of sale and not the actual date of sale. It is quite true that that decision was on Section 169, but there cannot be any difference, so far as I can see, between the meaning of the words date of sale" as used in Section 169 and in Section 167. It is quite true that subsequent to that decision, the Legislature amended Section 169 by altering the words "date of sale" to "the date of the confirmation of sale;" but still the decisions of this Court remain unaffected that the words date of sale" used in the Act as they existed before the amendment meant the date when the sale was confirmed. There is no reason why that decision should not govern the words date of sale" as used in Section 167. The next decision that reference may be made to is the decision in the case of Yusuf Gazi v Asmatullah 15 Ind. Cas. 430 : 17 C.W.N. 440 : 16 C.L.J. 131, a decision of Mr. Justice Brett and Mr. Justice Sharfuddin. There the learned Judges held that the words date of sale" in Section 167 meant the date on which the sale of the holding or tenure had actually taken place and the reason on which they based their judgment is this: that as Section 169 as amended referred to the date of the confirmation of the sale, therefore, in Section 167 where the words the date of the confirmation of the sale" did not appear, the words date of sale" must refer to a period other than the date of the confirmation of the sale. In my opinion, there is a manifest fallacy. Section 167 and Section 169 prior to the amendment both used the same words, namely, the words "date of sale." It was judicially declared in this Court that the words date of sale" in Section 169 meant the date of the confirmation of the sale and the Legislature in amending Section 169 clearly did not consider the terms of Section 167, and Section 167 remained unaffected by that amendment. I think that the learned Judges who decided the case of Yusuf Gazi Asmatullah 15 Ind. Cas. 430 : 17 C.W.N. 440 : 16 C.L.J. 131 were not justified in distinguishing the case, or, at any rate, in departing from the decision in the case of Matangini Chaudhurani v. Sreenath Das 7 C.W.N. 552 on the ground that by a subsequent amendment of Section 169 different words had been used to those that appeared in Section 167. It may be doubted whether the same learned Judges in a subsequent case

did not to some extent go back upon that decision, because in the case of *Taibatannessa Chowdhurani v. Pravabati Dasi* 4 Ind. Cas. 750 : 10 C.L.J. 640 those learned Judges came to the conclusion that in certain circumstances the words "date of sale" as mentioned in Section 167 of the Bengal Tenancy Act. meant the date of the confirmation of the sale. With all due respect to the learned Judges, the conduct of a defendant cannot alter the meaning of the words used by the Legislature in a particular section of an Act. I think the learned Judges in the decision reported as *Taibatannessa Chowdhurani v. Pravabati Dasi* 4 Ind. Cas. 750 : 10 C.L.J. 640 have shown that in certain cases at any rate, the words "date of sale" as used in Section 167 of the Bengal Tenancy Act mean the date when the sale is confirmed. The next decision that has been referred to is the decision of a Judge sitting singly in this Court; that is, the decision of Mr. Justice N.R. Chatterjea in the case of *Banko Behary Das v. Krishna Chandra Bhowmick* 9 Ind. Cas. 528 : 18 C.W.N. 349 : 18 C.L.J. 170 on L.P.A. 21 Ind. Cas. 419. There the learned Judge held distinctly that the words "date of sale" used in Section 167 of the Bengal Tenancy Act meant the date when the sale was confirmed and he did so relying upon the decision of this Court 4 Ind. Cas. 750 : 10 C.L.J. 640. in the case of *Matangini Chaudhurani v. Sreenath Das* 7 C.W.N. 552. It is quite true that that decision is not binding on us; but the opinion of the learned Judge is, of course, entitled to the highest respect. In his view, the case was covered by the case of *Matangini Chaudhurani v. Sreenath Das* 7 C.W.N. 552 and I think he rightly held so. The case of *Matangini Chaudhurani v. Sreenath Das* 7 C.W.N. 552 which is the first of these authorities is not distinguishable from the present case. It is quite true that against the decision of Mr. Justice N.R. Chatterjea a Letters Patent Appeal was preferred; but the judgment of the learned Judges who heard the Letters Patent Appeal rested on grounds other than that as to the meaning of the words "date of sale" as used in Section 167, but they cast no doubt upon the correctness of the decision of Mr. Justice N.R. Chatterjea in that respect. I think the words "date of sale", especially where the sale took place under the Code of 1882 and where the purchaser could acquire no interest until the sale certificate was issued, mean clearly the date of the confirmation of the sale. To hold otherwise would practically in some cases take away from the plaintiff the right to annul encumbrances at all because, as in the present case where the plaintiff has been found to have known of the encumbrance before the date of the actual sale and litigation ensued, and the sale was not confirmed for a considerable time after the date of the sale, if the date referred to in Section 167 of the Bengal Tenancy Act be the date of the actual sale, then the purchaser will have no period within which he can annul encumbrances unless he elects to annul the encumbrances before his title to the property has been finally determined. I think that the view that was expressed by Mr. Justice N.R. Chatterjea in the case of *Banko Behary Das v. Krishna Chandra Bhowmick* 9 Ind. Cas. 528 : 18 C.W.N. 349 : 18 C.L.J. 170 on L.P.A. 21 Ind. Cas. 419. is the correct view and that the words "date of sale" referred to in Section 167 of the Bengal Tenancy Act mean the date when the sale is confirmed, and not the date when the property is actually sold to the

purchaser. That being so, even if this defence was open to the defendant in this case, I think it was not sufficient to bar the plaintiff's suit. The learned Judge of the lower Appellate Court dismissed the plaintiff's suit on his finding that the plaintiff was out of time for the purpose of annulling the encumbrance. There were other issues arising on the merits and they have not been determined. The case must, therefore, go back to the lower Appellate Court to have the appeal re-heard with reference to the other issues which have not been disposed of. Costs will abide the result of the re-hearing by the lower Appellate Court.

Newbould, J.

2. I agree.