

(1931) 05 PAT CK 0003
In the Patna High Court

Parmeshwar Sahu

APPELLANT

Vs

Nandkishore Lal and Others

RESPONDENT

Date of Decision : 04-05-1931

Acts Referred:

Bengal Tenancy Act, 1885 — Section 167

Citation : AIR 1932 Patna 123

Hon'ble Judges : Scroope, J; Muhammad Noor, J

Bench : Full Bench

Judgement

Muhammad Noor, J.—This appeal arises out of a suit instituted on 14th November 1927, to enforce a simple mortgage executed on 17th June 1921, by defendant 1 in favour of the plaintiffs respondents for a sum of Rs. 1,000, the due date being Kartick 1329, corresponding to 15th November 1921. The mortgaged property is 59 bighas and 5 cottahs of land forming part of the occupancy holding of defendant first party. It appears that on 17th April 1923, subsequent to this mortgage, the occupancy holding was sold in execution of a rent decree of the landlord and purchased by the appellant, defendant 3.

2. After the institution of the present suit that defendant (defendant second party) proceeded u/s 167, Ben. Ten. Act, to annul the encumbrances of the plaintiffs and contested the suit so far as the passing of the mortgage decree was concerned. The mortgagor-defendant did not enter appearance either in the suit or in the appeal before us. The question to be decided by the Court below was: (1) whether the application before the Collector filed by defendant 3 for the issue of notices u/s 167 was within one year of his having come to know of the encumbrances and (2) whether the said notices were properly served upon the plaintiffs. The lower Court has decided both these points against defendant 3 and has passed a decree for sale in the usual terms. He has held that defendant 3 came to know of the mortgage at the time of the sale or soon after it and that the notices were not properly served. Defendant 3 has appealed.

3. On his behalf it has been contended by Mr. Manuk that the notices were

properly served and the view of the law taken by the Court below about the onus of proof, effect of the order of Collector and the sufficiency of service is wrong and that it has not been proved that defendant 3 came to know of the encumbrances prior to the date of knowledge alleged by him. In my opinion these contentions are well founded and must prevail.

4. I take up the question of knowledge. The plaintiffs' first contention is that defendant 3 came to know of the mortgage at the time of the sale itself. The only evidence on this point is that of Puran Lal Dutt, witness 3 for the plaintiffs. This witness says that he was one of the bidders at the sale and having been informed by defendant 6 that the property was encumbered he did not bid high. This story is obviously unreliable. In a sale held in execution of a rent decree the question of encumbrances is not a factor which a bidder takes into his consideration. A holding is sold with a right to the purchaser to annul the encumbrances by taking steps u/s 167, Ben. Ten. Act. Then looking at the bidsheet (Ex. 2) it appears that this witness did bid up to Rs. 1,025. The bids were as follows:

Rs. Puran Lal Dutt 700 Decree-holder 800 Defendant 3 1,000 Decree-holder 1,020 Puran Lal Dutt 1,025 Defendant 3 1,041 5. From this it is clear that Puran Lal Dutt did bid up to Rs. 1,025 and the property was knocked down to defendant 3 at Rs. 1,041. Therefore the story that he refrained from bidding high on the ground of there being an encumbrance on the property cannot be believed. His bid was almost as high as that of defendant 3. Then again it is strange that having seen defendant 3 outbidding him he still acted upon his information. The story is obviously a got up one and I do not believe it.

6. The next contention of the plaintiffs is that at any rate defendant 3 came to know of the mortgage soon after the sale. It appears that the principal defendant, the mortgagor, applied to set aside the sale under Order 21, Rule 90 and in that proceeding summoned the plaintiff as a witness to appear and produce "a rehan bond executed by Biseswar Chaudhury and others." It is urged that the summons gave defendant 3 information of the mortgage. I am unable to uphold this contention. It appears from the order-sheet of the execution case (Ex. 4) that the application for setting aside the sale was dismissed for non-prosecution. There is nothing to show that any rehan deed was produced before the Court or that the plaintiff appeared in response to the summons. Rather it is clear that on the date fixed the objector's (principal defendant in this case) witnesses were not present. There is no evidence that defendant 3 came to know of the contents of the summons.

7. A part from this the words "rehan bond executed by Biseswar Chaudhury and others" in the summons were not enough to give anyone any idea that it referred to the mortgage bond in suit. There is no mention of the property mortgaged nor of the person in whose favour the mortgage was executed. I therefore hold that it has not been proved that defendant 3 came to know of the mortgage prior to

the date of knowledge alleged by him.

8. Coming to the question of the service of notices upon the plaintiffs, it appears that the notices were taken to them on two occasions, once on 3rd January 1928, and then again on 24th January 1928. On both the occasions the plaintiffs were not found and there were, what is called, substituted services. Afterwards defendants 3 sent a notice by registered post which was returned unserved and the postal peon Prayagdat Missir (witness 2) swears that he took the notice to the plaintiffs and they refused to take it. I see no reason to disbelieve this witness. Though this postal notice is not a legal notice, it proves that the plaintiffs were avoiding the services of the notices on them. The story put forward by the plaintiff is that Nandkishore Lal, one of the plaintiffs, had been during this period ill at Bhagalpur and it is argued that no step was taken to have the notice served upon him there; but on this point the evidence of the witnesses is contradictory. P.W. 2 (Sundar Lal) deposed that Nandkishore the plaintiff was ill at home while the P.W. 4 (Mukti Narain Prasad) deposed as follows:

My uncle Nandkishore is ill at Bhagalpur. He is there from December last.

9. It is impossible to believe these contradictory statements of the plaintiffs' witnesses. It is clear from the record that defendant 3 was anxious to have the notice served upon the plaintiffs: he took all possible steps which he could. When on the first occasion the notice was returned after a substituted service the Collector directed their re-issue and to have them served again. Defendant 3 took steps to do so and to be on the safe side sent a notice by post and this also the plaintiffs refused to accept. The peon who went to serve the first notice has been examined but the one who took out the notices on the second occasion was not available. The Collector was however satisfied as to the proper serving of this notice and there is a note to this effect in his order-sheet.

10. The learned advocate for the respondents has however relied upon the case of Hitnarain Singh Vs. Rambarai Rai and Others, and argued that an entry in an order-sheet of the Collector in a proceeding u/s 167, Ben. Ten. Act, to the effect that notice has been served is no proof of the service of the notice. In this case referring to the order-sheet of the Collector, Das, J., observed as follows:

The order-sheet in this case merely records an opinion of the Collector that the notices were served but the opinion of the Collector is in no way binding upon the civil Court and the civil Court has a right to determine for itself the question whether the notices were in fact served or not.

11. No doubt the observation is on somewhat wide terms; but this view of the law is contrary to what has been laid down in various decisions of the Division Bench of this Court. In Kuldip Narain Tewari and Others Vs. Ram Lal Mandal and Others, , Das, J., himself, relying upon the decision of Nand Kishore Chaudhury and Others Vs. Maharajdhiraj Sir Rameshwar Singh Bahadur, , held that once the notice was issued the onus is upon the person questioning the validity of the notice to establish that the notice u/s 167 was not served in accordance with law,

and held that it was for the plaintiff to establish that notice was not served upon him within the period of limitation. It will thus appear that one of the learned Judges who was a party to the decision of Hitnarain Singh Vs. Rambarai Rai and Others, held otherwise in an earlier case and Kulwant Sahay, J., agreed with this view which is supported by the decision of Sir Dawson-Miller, C. J., and Mullick, J., in the case of Nand Kishore Chaudhury and Others Vs. Maharajdhiraj Sir Rameshwar Singh Bahadur, referred to above and the case of Ram Protap v. Jhoomak Jha 39 Ind.Cas. 943 decided by Roe and Jwala Prasad, JJ. Mr. Shambhu Saran has relied upon some Calcutta cases; they have been referred to in Hitnarain Singh Vs. Rambarai Rai and Others, . I do not however propose to discuss them in detail. In my opinion the weight of the judicial decisions of this Court is in favour of the view that a certificate in the order-sheet of the Collector that the notice has properly been served is prima facie evidence that such a notice has been served but it is not conclusive. It is open to the other party to challenge it and show that the notices were not served in time, but, in the absence of any evidence to the contrary, such a service must be presumed. As I have said, the case of Hitnarain Singh Vs. Rambarai Rai and Others, seems to lay down otherwise but the weight of authority is against this view.

12. I am satisfied on the evidence adduced that the notices were properly served. Under the rules of the Government of Bengal the notice u/s 167, Ben. Ten. Act, is to be served in a manner provided for the service of summons under the Civil Procedure Code. Mr. Sambhu Saran has relied upon a number of decisions as to the sufficiency or otherwise of a substituted service. I do not propose to deal with them. I am satisfied that the plaintiffs were avoiding the service of notices upon them.

13. The result is that the appeal must be allowed; the decree of the lower Court for the sale of the mortgaged properties should be set aside and the plaintiffs' suit as against defendant 3 must be dismissed; but under the circumstances the said defendant should bear his own costs throughout. Plaintiffs are however entitled to a simple money decree against defendants 1 and 2. Simple mortgage prima facie carries with it a stipulation to pay the debt. In the bond in suit there is a clear promise of payment. The bond is a registered one and the suit is within six years of the due date. There is a cross-objection on behalf of the plaintiffs as to the amount of interest. I see no reason to interfere with the direction exercised by the lower Court and would dismiss it. There will therefore be a simple money decree in favour of the plaintiffs against defendants 1 and 2 with costs and interest at the rate ordered by the Court below till the institution of the suit and thereafter at 6 per cent per annum. "The plaintiffs will bear their own costs of this appeal. The suit as against defendant 3 is dismissed but without costs.

Scroope, J.

14. I agree. The weight of judicial decisions in this Court is in favour of the view that once there has been a proceeding before a Collector under Section.167,

Ben. Ten. Act, with a view to annulling an encumbrance and the Collector had certified the due services of notice in such a proceeding the onus of establishing non-service is on the person who alleges it. I refer to the decision in Kuldip Narain Tewari and Others Vs. Ram Lal Mandal and Others, which followed two previous decisions of this Court, Dhunmun Singh v. Lachmilal AIR [1920] Pat. 65 and Nand Kishore Chaudhury and Others Vs. Maharajdhiraj Sir Rameshwar Singh Bahadur, . It is difficult to reconcile the decision in Hitnarain Singh Vs. Rambarai Rai and Others, relied on for the respondents in which it was held in effect that the Collector's certificate in such a proceeding was merely a record of his opinion and left the matter completely open for the civil Court, with the decision in Kuldip Narain Tewari and Others Vs. Ram Lal Mandal and Others, to which one of the learned Judges who decided Hitnarain Singh Vs. Rambarai Rai and Others, was a party. In Kuldip Narain Tewari and Others Vs. Ram Lal Mandal and Others, that learned Judge in dealing with this question observed;

The decisions of this Court are perfectly clear. It was held by this Court in Nand Kishore Chaudhury and Others Vs. Maharajdhiraj Sir Rameshwar Singh Bahadur, that the onus is upon the person questioning the validity of notice to establish that the notice u/s 167 was not served in accordance with law.

15. The only dissenting decision of this Court is the subsequent decision of the same learned Judge in the latter Patna case.