

**(1898) 03 CAL CK 0017**  
**In the Calcutta High Court**

Peari Lal Roy

APPELLANT

Vs

Moheswari Debi and Others

RESPONDENT

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**Date of Decision :** 01-03-1898

**Acts Referred:**

Bengal Tenancy Act, 1885 — Section 164, 167

**Citation :** (1898) ILR (Cal) 551

**Hon'ble Judges :** Rampini, J;O"Kinealy, J

**Bench :** Division Bench

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**Judgement**

O"Kinealy and Rampini, JJ.—The learned pleader for the appellant in the case raises two contentions: first, that the service of notice u/s 167 of the Bengal Tenancy Act has not the effect ipso facto of annulling an incumbrance; and, secondly, that the purchaser was not in possession at the time of annulling the incumbrance, the property having then been made over to the grandson of the original mortgagor.

2. We think there is no force in either of these contentions. We quite agree with the learned Judge in the Court below that service of a notice u/s 167 does have the effect of annulling an incumbrance without it being necessary for the purchaser to bring a declaratory suit to have it declared that the incumbrance is annulled. This is quite clear from the second clause of Section 164 read with Section 167.

3. The learned pleader has also contended that the notice was bad, inasmuch as it was not served within one year from the date of the sale, or of the purchaser having become aware of the incumbrance. But this point was not raised in either of the lower Courts, and there are no facts before us upon which we could form any opinion upon it.

4. Then his second ground of appeal also seems to us to fail. There is no reason why an incumbrance should not be annulled simply because the property at the time of the service u/s 167 was in the possession, not of the purchaser, but of

somebody else. The learned pleader urges that the notice u/s 167 was not served until after the transfer of the property in question by the purchaser at the sale under the mortgage decree, and that therefore it can have no effect. But we do not think it necessary to say anything further about this plea than that such does not appear from the proceedings of the Court below to be the case. There are no facts stated either in the pleadings or in the proceedings in the lower Courts upon which we could give effect to this contention, if we thought it necessary to do so.

5. For these reasons we dismiss the appeal with costs.