

(1936) 08 CAL CK 0031
In the Calcutta High Court

Serajganj Loan Office Co. Ltd.

APPELLANT

Vs

Sasimukhi Debi and Others

RESPONDENT

Date of Decision : 27-08-1936

Acts Referred:

Bengal Land Revenue Sales Act, 1859 — Section 37
Bengal Tenancy Act, 1885 — Section 167

Citation : AIR 1937 Cal 36

Hon'ble Judges : R.C. Mitter, J

Bench : Division Bench

Judgement

R.C. Mitter, J.—This appeal is on behalf of defendant 9, in a suit instituted by the plaintiff-respondent to enforce her charge for maintenance on the properties described in Sch. Ka of the plaint which consists of many items of property. In this appeal I am only concerned with item 11 of the said schedule. Jadav, Satish and Purna, the husband of the plaintiff, were brothers. They had inherited from their father Immovable properties, which included a patni taluk held under Jogesh Chandra Chowdhury. On Purna's death his widow, the plaintiff, inherited his properties in which she had the estate of a Hindu widow. Jadav and Satish were her husband's reversioners. On 23rd January 1890 she surrendered her estate in favour of Jadav and Satish. Whether the deed operates as a complete relinquishment under the Hindu law or not is not material for this appeal, for by the document of transfer it cannot be doubted that she at least transferred her life estate in favour of Jadav and Satish. In consideration of the said transfer Jadav and Satish executed on the same date a deed in her favour by which they promised to pay her maintenance at the rate of Rs. 18 per month and charged the properties of the said Sch. Ka for the same. Defendants 1, 3, 4, 7 and the father of defendants 2, 5 and 6 who were the heirs of Jadav and Satish borrowed money from defendant 9, the Serajgunj Loan Office, and on 21st September 1923 executed in favour of the latter a mortgage securing the re-payment of the loan. The patni taluk held under Jogesh Chandra Choudhury as also some other items of property of Sch. Ka was included in this mortgage. Defendant 9

instituted a suit on the mortgage, obtained a decree, and in execution of the same purchased the said patni taluk and some of the other mortgaged properties. Defendants 8 and 10 to 20 have purchased the remaining items of Sch. Ka. It is the finding that the purchases made by defendants 8 to 20 of the different items of Sch. Ka were with notice of the plaintiff's charge. The properties purchased by them have been declared by both the Courts below to be charged with the arrears of maintenance claimed by the plaintiff in the suit and a decree for sale has been made. This decree so far as it relates to the properties of Sch. Ka other than item 11 has not been challenged before me. The only controversy is with regard to item 11. Defendant 9, who is the appellant before me, assails the judgments and decrees of the Courts below relating to this item. Item 11 is described in the plaint as a putni taluk held by defendant 9 under Jogesh Chandra Chowdhury.

2. The facts bearing upon this controversy are as follows: The putni taluk charged by the deed of 23rd January 1890 was purchased by defendant 9 at the sale in execution of its mortgage decree on 20th November 1931. This sale was confirmed on 23rd January 1932. In the meantime Jogesh Chandra Chowdhury had instituted a suit for recovery of arrears of rent of the said putni taluk. He obtained a decree for rent and put it in execution under the special procedure of Ch. 14, Bengal Tenancy Act. At the Court sale he, Jogesh Chandra Chowdhury, purchased the putni taluk on 17th November 1931. The said sale was confirmed on 4th January 1932. As Jogesh Chandra Chowdhury purchased the putni taluk at a rent sale before the sale at which defendant 9 purchased the same, the title to the said putni taluk vested in Jogesh Chandra Chowdhury with power to annul incumbrances upon it. Jogesh Chandra Chowdhury thereafter on 19th June 1932 granted a putni taluk in respect of the lands covered by the putni which he had purchased at the aforesaid rent sale to defendant 9 at the old rent. Thereafter on 16th July 1932, about a month after the grant of this putni by him to defendant 9, he filed an application in the civil Court under the provisions of Section 167, Bengal Tenancy Act, to annul the charge for maintenance of the plaintiff which had been created on the putni taluk purchased by him by the deed which Jadav and Satish had executed in favour of the plaintiff on 23rd January 1890. The notice contemplated by Section 167, Tenancy Act was served on the plaintiff through Court on 8th August 1932. Defendant 9 contends that the plaintiff's charge is no longer existing on the putni taluk which was created in its favour by Jogesh Chandra Chowdhury on 19th June 1932. Both the Courts below have repelled the contention, the lower appellate Court holding that Jogesh Chandra Chowdhury was not entitled to file the application u/s 167, Tenancy Act, on 16th July 1932, after he had granted the putni to defendant 9. The question is whether this view is correct. In my view it is not.

3. It is necessary to bear in mind that the putni taluk which was granted by Jogesh Chandra Chowdhury to defendant 9 on 19th June 1932 is not the putni taluk which was charged in the year 1890 with the maintenance of the plaintiff. It is a new interest altogether. If at the rent sale held on 20th November 1931 the

charged putni taluk had been purchased by another person, say P, with notice of the charge, the said putni taluk in his hands would have been charged with the plaintiff's maintenance till that person P had avoided the charge by serving a notice on the plaintiff u/s 167, Bengal Tenancy Act. If P failed to proceed in accord, once with that section within the time allowed the putni taluk in his hands could be sold at the instance of the plaintiff for her claims in enforcement of her charge. If before that contingency P granted to defendant 9 a darputni or any another permanent tenure the plaintiff's charge would-not have shifted from the putni taluk in the hands of P to the darputni or permanent tenure created by P in favour of defendant 9. It may be that the purchaser of the charged putni taluk at a sale held at the instance of the plaintiff for enforcing her charge would not take it subject to this darputni or permanent tenure if at the time of the creation of the darputni or permanent tenure defendant 9 had notice of the charge, but that would be on a principle analogous to the principle on which a permanent lease or tenure created by the mortgagor after the mortgage is held to be not binding on the mortgagee or the purchaser at the sale held in enforcement of the mortgage. Notwithstanding the creation of the darputni or permanent tenure, P would be the person affected by the plaintiff's claim as being the owner of the charged putni taluk. In these circumstances I fail to see why he would lose the right of serving a notice u/s 167, Tenancy Act, on the plaintiff annulling her charge simply because before applying under the said section to the civil Court he had created a permanent tenure under his putni taluk.

4. In my judgment, that the zamindar, Jogesh Chandra Chowdhury himself purchased the putni taluk at the rent sale would make no difference in principle. The existence of the charge in favour of the plaintiff would prevent merger of the putni taluk with his zamindari interest. For the purpose of the plaintiff's claim the putni taluk in his hands would be deemed to exist and the position of defendant 9 under the putni created in its favour on 19th June 1932, would be analogous to the position of a tenure holder or permanent lessee from the owner of the equity of redemption, I accordingly hold that Jogesh Chandra Choudhury remained affected by the plaintiff's claim even after the grant of the patni to defendant 9 and had an interest in filing the application u/s 167, Tenancy Act, and in having the notice served on the plaintiff. I accordingly disagree with the lower Courts. In support of its conclusions on the point of law the lower appellate Court has relied upon two cases, namely Sreemanta Ram De v. Kookoor Chand (1871) 15 WR 481 and Ananda Chandra Poddar v. Kunja Behary Pal (1908) 8 C L J 177 and the learned advocate for the respondent has cited before me three other cases, namely Koylash Chandra Dutt v. Jubar Ali (1874) 22 WR 29, Narayan Chandra Kangsabanik v. Kasiswar Roy (1905) 1 C L J 579 and Sooharam Barma v. Doorga Charan Das (1907) 5C L J 264. These cases have in my judgment no application. The learned advocate for the appellant cited before me the case in Pearilal Roy v. Moheswari Debi (1898) 25 Cal 551, but the point I have to decide though raised was not decided there. I would therefore examine

the cases on which the appellate Court relied and the cases cited before me by the learned advocate for the respondent. These cases lay down the proposition that the right of the purchaser of an entire revenue paying estate sold for arrears of revenue to annul under-tenures u/s 37, Revenue Sales Act, is an assignable right. It passes to a purchaser from such a purchaser and also to a patnidar of a patni created by the purchaser at the revenue sale whose patni includes the under-tenure. In *Sreemanta Ram De v. Kookoor Chand* (1871) 15 WR 481 there is however an observation that after the grant of such a patni, the patnidar and not the purchaser at the revenue sale who had granted the patni has the power to annul an under-tenure u/s 37, Revenue Sales Act. It is on this observation that the lower appellate Court relied in holding that Jogesh Chandra Choudhury had no right on 16th July 1932 to make the application u/s 167, Tenancy Act. This position will have to be examined critically.

5. The word "incumbrance" as used in the Bengal Tenancy Act is of wider import than the same word as used in Section 37, Revenue Sales Act. An under-tenure created by the defaulting tenure-holder would be an incumbrance within the meaning of Section 167, Tenancy Act, according to the definition given in Section 161, but is not an incumbrance within the meaning of Section 37, Revenue Sales Act: AIR 1931 314 (Privy Council) . In *Sreemanta Ram De v. Kookoor Chand* (1871) 15 WR 481 the purchaser at a revenue sale created a patni taluq in favour of the plaintiff who sued to recover possession from the defendant who was treated as a lessee. To get the relief it was necessary to annul his rights as a lessee. The purchaser at the revenue sale could not at that time sue for possession as he had already parted with the right to take khas possession in favour of the patnidar. The effect of the patni was to interpose an estate between him and the persons in possession, either holding as tenants or otherwise. He could only get the patni rent reserved and the right to eject the tenants or trespassers in occupation was vested in the patnidar. The object of annulling an under-tenure is to get possession of the lands in the possession of the under-tenure-holder. As the purchaser had no right to get possession after the creation of the patni in question from such persons it was held necessarily that he had at that time no right to annul the under-tenure but that right had passed to the patnidar who alone had the right to recover possession from the under-tenure-holder or lessee. It may be that these principles have application in the case of purchasers at rent sales held under the Bengal Tenancy Act where the incumbrance sought to be avoided is an under-tenure and relief asked is possession, but I consider them to be not applicable when the incumbrance sought to be avoided is a mortgage or charge, where the relief for possession is neither necessary nor prayed for. The nature of the incumbrance as defined in Section 161, Tenancy Act, has to be kept in view.

6. I accordingly hold that the property, No. 11, Sch. Ka, is not subject to the plaintiff's charge, and it must be excluded from the decree for sale. The appeal is accordingly allowed in part. Defendant 9 will have from the plaintiff-respondent the costs of this appeal subject to this modification: that he would get half the

amount which he paid for court-fees on the memorandum of appeal to this Court, and half the costs of the Courts below.

7. 27th August 1936.-Having read the application filed on behalf of the plaintiff-respondent, and heard the learned advocates on behalf of the parties, I think I ought to modify my order for costs. The order for costs would be in the following terms: Defendant 9, Serajgunge Loan Office, would get from the plaintiff half the costs of the lower appellate Court and full costs of this Court, subject to the modification that it would get half the amount of the court-fees in the memorandum of appeal filed in this Court. With regard to the costs of the Court of first instance the plaintiff and defendant 9 would bear their respective costs. This does not disturb in any way the decree for costs which the plaintiff has obtained against the other defendants in the Court of first instance.