(1912) 05 CAL CK 0007

Calcutta High Court

Case No: None

Hari Moni Debi		APPELLANT
	Vs	
Moti Sheikh		RESPONDENT

Date of Decision: May 8, 1912

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 159, 161(a)

Citation: 15 Ind. Cas. 30

Hon'ble Judges: N. Chatterjea, J; Carnduff, J

Bench: Division Bench

Judgement

1. The point of law raised by this second appeal is as to the burden of proving the existence or non-existence of a "protected interest" for the purposes of Section 159 and the following sections of the Bengal Tenancy Act, 1885.

2. The plaintiff, who is the appellant before us, was the purchaser at a sale held in execution of a decree for rent of the tenure or holding of one Nistarini Debi, and having, in pursuance of the provisions of Section 167 of the Tenancy Act, served a notice on the defendant-respondent, as being the subtenant of Nistarini and, therefore, an incumbrancer within the meaning of the Act, he sued the latter for the recovery of khas possession of the land concerned. The defence was that Nistarini Debi was a tenure-holder, that the respondent was an occupancy-tenant under her, and that consequently the incumbrance, which the appellant was seeking to annul, was, under Clause (d) of the definition in Section 160, a protected interest" which could not be annulled. Both the Courts below held that the onus was on the appellant to prove that the respondent''s interest was not a "protected interest," and that, as he had failed to discharge the onus, his suit must be dismissed.

3. We are unable to accept this view of the law as to the onus probandi in a case of this kind. Section 159 gives the auction-purchaser power to annul, in the prescribed manner, any "incumbrance" such as is defined by Section 161, Clause (a), and at the

same time provides that he shall take subject to any "protected interest" within the meaning of Section 160. Now, no doubt, it rests upon the auction-purchaser in the first instance to show that the interest which he wishes to annul, is an "incumbrance": but it seems to us that if, and when that is established, the onus shifts on to the incumbracer to prove that his incumbrance is saved through being a protected interest." In other words, it was for the appellant to show at the outset that the respondent''s sub-tenancy was a sub-tenancy created by the defaulting tenant, Nistarini Debi; but, as soon as this was established, it was for the respondent to prove that Nistarini Debi was a tenure-holder and that he had acquired a right of occupancy under her. This is, we think, in accordance with first principles. For the general rule is, that the burden of proving any particular fact rests on him who alleges, not on him who denies it: that is to say, the issue must be proved by the party who states the affirmative, and not by the party who states a negative. Moreover, the provision as to "protected interests" has the effect of introducing a restriction upon, or exception to, the rights of the auction-purchaser, and, as was explained in Hash Behari Basil v. Haramoni Debya 15 C. 555 at. p. 557, the person pleading a certain exception is bound to bring himself within it. And, finally, the existence of such a ''protected interest" as a right of occupancy is a matter specially within the knowledge of the person claiming it, on whom, therefore, the onus is placed by Section 106 of the Indian Evidence Act, 1872. We observe, too, that our view accords with that taken by Mookerjee and Teunon, JJ., in Somir Jama v. Mahabharat Bakta 7 Ind. Cas. 919 while it is not, as will presently appear, opposed to the decision of Brett and Chitty, JJ., in Normada Sundari Debi v. Tarip Mollah 1 Ind. Cas. 596 : 9 C.L.J. 490 : 13 C.W.N. 720.

4. Returning to the facts before us, we find that there was really no onus of proof for the appellant to discharge. For the respondent had admitted in his written statement that he held, and had from the inception of his sub-tenancy held, under Nistarini Debi and her predecessors-in-interest, and it was, therefore, of course, unnecessary for the appellant to adduce any evidence to show that the respondent''s sub-tenancy was a subtenancy created by Nistarini Debi, that is to say, an incumbrance" within the meaning of Section 163, Clause (a), of the Tenancy Act. And this distinguishes the case from that of Narmada Sundari Debi v. Tarip Mollah 1 Ind. Cas. 596 : 9 C.L.J. 490 : 13 C.W.N. 720, in which it was not only not admitted that the defendant''s tenancy was a sub-tenancy under the defaulting gantidar, but expressly alleged that the sub-tenancy had been created long before the ganta.

5. Our conclusion, then, is that the onus was wrongly placed upon the appellant by both the Courts below. But it is contended by the respondent that, even if this be so, there was evidence on both sides, and no question of onus arises. As to this contention, it must be conceded that, as soon as there is a conflict of evidence, the question of onus disappears. But conflict implies and predicates not only the existence of evidence on both sides, but also consideration of both by the Court; and in this case, it seems to us patent that if any evidence was produced by the

respondent, the lower Court of appeal, at all events, ignored it altogether. The judgment speaks for itself and cannot be misunderstood. It deals exclusively with the appellant''s evidence, oral and documentary; it decides nothing but that that evidence was insufficient to prove that Nistarini was a raiyat and not a tenure holder; and nothing could be clearer than that the learned District Judge would have dismissed the appeal and the suit even if the respondent had not adduced a scrap of evidence of any kind. In these circumstances, we think that we must require him to re-consider the case anew in the light of our ruling as to the initial mistake made both by him and by the Court of first instance. Should a case be made out for the admission of further evidence, it will be open to him to receive it or direct that it be taken by the first Court.

6. In the result, the appeal is allowed, the appellate judgment discharged and the case remanded for re-disposal in accordance with the foregoing directions. Costs will abide the result.