(1924) 07 CAL CK 0057

Calcutta High Court

Case No: None

Sh. Krishna Kamini Dasi		APPELLANT
	Vs	
Pratapendra Chandra Pandey and Others		RESPONDENT

Date of Decision: July 10, 1924

Citation: AIR 1925 Cal 1199 : 85 Ind. Cas. 790

Judgement

1. The suit out of which this appeal has arisen was brought by the plaintiff for possession of two fisheries appertaining to the darpatni right in some mouzas purchased by the plaintiff at a sale in execution of a rent decree. The plaintiff look possession of those fisheries along with the other properties purchased by him on the 9th June 1915. On the 3rd December 1915 he applied to the Collector u/s 167, Bengal Tenancy Act, to annul the encumbrance held by the defendants in respect of those fisheries. The appellant) (Defendant No. 3) had set up a seputni right under the darpatni which the plaintiff wanted to avoid. The notice was served by the Sub-Divisional Office;. Subsequently, when the plaintiff discovered that there was no strict compliance with the provision of Section 167, Bengal Tenancy Act, he filed a second application on the 5th August 1918, and notices were again served on the defendants. The present suit; is by the plaintiff for recovery of these jalkars. The defence was that the defendant was not personally liable as she had endowed the jalkars in favour of a Thakur. There was objection as regards the jurisdiction of the Court; and it was submitted that the defendant''s seputni was not an encumbrance but was a protected interest. Lastly, it was urged that the seputni right was not legally annulled and that the notices given by the plaintiff were not legal. The plaintiff''s claim in respect of one of the jalkars called Naugra Buran was dismissed. His suit with regard to the jalkar masua was decreed by both the Courts below. The Defendant No. 3 who was the appellant in the Court below has appealed to this Court on three grounds. In the first place, she has urged that the plaintiff has failed to prove his title to the jalkar. With reference to this objection the first Court has observed that it is alleged in the plaint that the jalkar masua is within the above

mouza and there is no denial on this point in the written statement. The learned District Judge has also proceeded on the defendant''s written statement and found that the plaintiff was clearly entitled to the jalkar. The appellant urges that want of denial on the part of the defendant does not create title in the plaintiff and that it was the duty of the plaintiff be prove his title to the jalkar. It should be mentioned in this connection that the defendant as seputnidar under the darputni purchased by the plaintiff is in possession of the fishery, We fail to see on what ground she can object to the plaintiff''s claim as the holder of the superior interest. It appears from the judgments of the Courts below that this point was not seriously pressed and there was no discussion on it.

2. The second contention of the appellant is that notice u/s 167 was served more than a year after the confirmation of sale. This is based upon the fact that the first application of the plaintiff was considered infructuous inasmuch as notice was served by the Sub-Divisional Officer not specially empowered u/s 167. Admittedly the first notice was served within a year of the date of the plaintiff''s obtaining possession of the jalkar. The plaintiff, therefore, complied with the provisions of Section 167, and as the learned Judge has observed, the plaintiff is not responsible for the subsequent conduct of the Subordinate Officer of the Collector in issuing the notice, Apart from that we'' find that by a notification published in the Calcutta Gazette dated the 7th January 1915 all the Sub-Divisional officers of places to which the Bengal Tenancy Act applies were empowered be issue notices u/s 167. Then again, both the Courts have found, and we see no reason to differ from them, that the application made by the plaintiff on the 5th August 1918 was virtually asking the Collector to issue the notice in pursuance of the plaintiff''s application of the 3rd December 1915, and the notice that was issued before the number of the first application. We do not think that there is any substance in this objection.

3. The third point is with reference to the opinion expressed by the learned District Judge that the service of notice was sufficiently proved by the production of entries in the order sheet stating that the notices bad been duly served. As a proposition of law this opinion of the learned District Judge is open to criticism. It has been held in several cases that a mere production of the order sheet is not sufficient to prove due service of notice and for good reason as u/s 167, Bengal Tenancy Act the encumbrance shall be deemed to be annulled from the date on which the notice is served. That makes it imperative on the plaintiff asking for the annulment of an encumbrance to prove due service of notice, and in the absence of such proof the cause of action fails. See the cases of Prafulla Nath Tagore v. Shital Khan [1918] 22 C.W.N. 788 and Radhay Koer v. Ajodhya Das [1908] 7 C.L.J. 262. Now in this case it appears that in the written statement no objection was taken with regard to the service of notice. The only objection taken was that the notice given by the plaintiff was illegal. There was no issue on the question of the service of notice. The portion of the 6th issue which runs as follows: " Has it been legally annulled by the plaintiff " has reference to the objection of the defendant on the ground that the notice was

not served within one year from the date of sale. The learned Subordinate Judge of the first Court has observed: " The defendants'' objection is that the notices are not legal. Service of notice is not denied." He goes on to discuss the objection with regard to the issue of notice within a year from the date of sale and he ends by saying that the objections taken by the defendant on the ground that notice was not issued within a year, and that the notice was signed by the plaintiff''s ammukhtear and not by the plaintiff, fail, and the issue is decided in the plaintiff''s favour. It is, therefore, manifest that the only objection with regard to the notice that was urged before the first Court was with regard to the plaintiff''s application u/s 187 not being within time; and secondly, that the notice was signed by the plaintiff''s ammukhtear. No issue was joined with regard to the service of notice and there was no sufficient evidence directed to this point. If this objection were taken directly and an issue framed in respect of it, it would not have been very difficult for the plaintiff to prove service of notice through his men and other evidence that might be available. Though we do not agree with all the reasoning of the learned Judge of the Court below, we think that the decision arrived at by him is correct.

4. All the points taken by the appellant having failed this appeal is dismissed with costs.