
(1926) 03 CAL CK 0060

Calcutta High Court

Case No: None

Nirode Kanta
Chakraburttty

APPELLANT

Vs

Kripendra Kumar
Chakraburttty and
Others

RESPONDENT

Date of Decision: March 2, 1926

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 167

Citation: AIR 1926 Cal 1192 : 96 Ind. Cas. 698

Hon'ble Judges: Cuming, J; B.B. Ghose, J

Bench: Division Bench

Judgement

B.B. Ghose, J.

This appeal arises out of a suit to enforce a mortgage with regard to certain properties which, included a jote, defendant No. 1 was the mortgagor. Defendants Nos. 2 to 6 were made parties on the ground that they had acquired an interest in the equity of redemption and were necessary parties to the suit.

2. Defendants Nos. 2 to 5 claim to be the sole landlords of the raiyati holding. They alleged that they sold the holding in execution of a rent-decree obtained by them and had purchased it, and after their purchase they served notice upon the plaintiff to annul his mortgage encumbrance u/s 167 of the Bengal Tenancy Act, so the mortgage with regard to the jote had been annulled. Defendant No. 6 is the tenant under them. On this state of the pleadings the trial Court went into the question whether the property in the hands of defendants Nos. 2 to 6 was liable for the mortgage-debt. It held that it was not, as these defendants had obtained the property, free from all encumbrance by annulling the mortgage under the provisions of the Bengal Tenancy Act. A mortgage-decree was passed against defendant No. 1 with regard to those properties only which are still in his

possession. The plaintiff appealed against that decision and the Subordinate Judge has affirmed the decision of the trial Court. The Subordinate Judge has found the questions referred to by the Munsif in favour of defendants Nos. 2 to 6. He found that defendants Nos. 2 to 5 were the sole landlords and that they had purchased the holding in execution of their rent-decree. He also held that service of notice had been proved. Upon these findings he held that the property was not liable to sale in their hand for the mortgage of the plaintiff. A prayer was made to the effect that the plaintiff might be allowed to redeem the rent charge of the landlords as a subsequent mortgagee. That was also rejected on the ground that the suit was not brought for the purpose of redemption but for the purpose of enforcing the mortgage on the ground that the contesting defendants were only purchasers of the equity of redemption and that the suit could not be changed into one for redemption.

3. The plaintiff appeals to this Court. The first contention before us on behalf of the plaintiff is that the contesting defendants having set up a prior right to the properties they ought to have been discharged from the suit and it was urged that we should in second appeal make an order discharging these defendants from the suit and direct that a proper mortgage-decree should be passed with respect to all the mortgaged properties as against defendant No. 1. It is, no doubt, true that in a suit on a mortgage it is inexpedient, that a paramount title should be brought into controversy and as a rule a person claiming paramount title should be discharged from a mortgage suit. But in this case the plaintiff alleged that the title acquired by the contesting defendants was subject to his mortgage and he fought out the case on the ground that the property in the hands of the contesting defendants was liable for the mortgage-debt. In such circumstances the Court could not discharge the contesting defendants from the suit. Having fought out the question whether the contesting defendants had a superior title to that of the plaintiff to the property purchased by them or not in two Courts, and having been defeated it does not lie in the mouth of the plaintiff to raise the objection in second appeal that the question in controversy between him and the contesting defendants should not have been decided in the suit. This ground urged by the appellant must therefore, fail.

4. The second ground taken is this: The lower Courts have decided the question as regards the right of defendants Nos. 2 to 5 as the sole landlords of the holding on the, basis of a previous suit brought by the plaintiff's benamidar against these defendants for possession of the property now in question. It is contended that that decision was treated as having the effect of *res judicata*. The lower Appellate Court does not seem to have dealt with the question as *res judicata*, although the first Court has treated it as such. The learned Subordinate Judge says that "this position was not, assailed in the argument (on behalf of the plaintiff before him) and it could not be in the face of the decision in the title suit with the plaintiff's benamidar." What he really means to say is that the decision gives the facts so clearly that the learned Pleader who appeared for the plaintiff considered it to be fruitless to urge that question of fact against the finding contained in that judgment. But even assuming that the lower Appellate Court held the question, to be *res judicata* it does

not appear that he was wrong in so doing. But it is again urged that if that judgment is res judicata then the question as regards the service of notice u/s 167 of the Bengal Tenancy Act which was found in favour of the plaintiff's benamdar in the previous suit ought to have been taken as res judicata in the present suit. This can hardly be contended now, because the decision in the previous suit was against the plaintiff's benamdar in spite of the finding in his favour as regards the question of service of notice. An authority for the proposition would be found in the case of Run Bahadur Singh v. Lucho Koer 11 C. 301 : 12 I.A. 23 : 4 Sar. P.C.J. 602 : 9 Ind Jur. 202 : 5 Ind. Dec. 960 (P.C.). In the present case the learned Subordinate Judge found upon the evidence that notice was served upon the plaintiff annulling his encumbrance after the rent sale. There is no substance in this point also.

5. It is next prayed that the plaintiff should be allowed to redeem the rent-charge of the landlord. The appellant in urging this, contention has lost sight of the fact that there is no rent-charge subsisting. The landlords whose rent-decree was a first charge enforced their charge against the property and had put it up to sale and realised their charge by the sale of the property in execution of a decree against all parties who should have been joined. Consequently the plaintiff has no interest as against the landlords-defendants entitling him to redeem the property. Further, whatever right he had has been annulled by the service of the notice u/s 167 of the Bengal Tenancy Act, and there is no subsisting right of the plaintiff. The plaintiff, therefore, can claim no relief as against the contesting defendants.

6. The appeal must, therefore, be dismissed with costs.

Cuming, J.

7. I agree.