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v.
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substituted for the old contract, would not supersede a registered mortgage deed by which an interest in the property has passed.

[The judgement then proceeded to deal with other pleas and concluded.]

Under these circumstances the appeal fails and it is hereby dismissed with costs.

Before Mr. Justice Ashworth and Mr. Justice Kendall.

ACHHAIBAR SINGH (PLAINTIFF) v. RAJMATI AND OTHERS
(DEFENDANTS.)*

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March, 5.

Act No. IV of 1882 (Transfer of Property Act), section 65(a)
—Transfer of equity of redemption—Covenant of title
binding upon transferee—Estoppel.

The implied covenant under section 65(a) of the Transfer of Property Act that the mortgagor has power to transfer the property is one that is binding upon a transferee of the equity of redemption, and the transferee is estopped from pleading that the mortgagor had no right to make the mortgage. *Renga Srinivasa Chari v. Gnanaprasada Mudaliar* (1), distinguished. *Debendra Nath Sen v. Mirza Abdul Samed* (2) and *Doe v. Stone* (3), referred to.

Mr. P. L. Banerji, for the appellant.

Mr. Haribans Sahai, for the respondents.

ASHWORTH and KENDALL, JJ. :—This second appeal arises out of a suit brought by the plaintiff appellant for sale of certain property on the basis of a mortgage. The property was mortgaged to him by one Behari Das Goshain. The mortgage was a simple mortgage. Subsequently Behari Das sold the equity of redemption to Musammat Rajmati who is the mother of the defendants respondents.

* Second Appeal No. 699 of 1927, from a decree of C. Deb Banerji, Additional Subordinate Judge of Jaunpur, dated the 11th of February, 1927, reversing a decree of Banwari Lal Mathur, Munsif of Shahganj, dated the 30th of April, 1926.

(1) (1906) I.L.R., 30 Mad., 67. (2) (1909) 10 C.L.J., 150.

(3) (1846) 3 C.B., 176.

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One plea taken in defence was that the property being *waqf* property, Behari Das, the mortgagor, was not entitled to mortgage it. This plea was repelled by the trial court on two findings. One finding was that the property was not *waqf* property, and the second was that in any case the defendants, having obtained possession of the property from their mother who got the equity of redemption from Behari Das, were estopped under section 65(a) of the Transfer of Property Act from denying the right of Behari Das to mortgage the property.

In first appeal the Subordinate Judge set aside the finding of the trial court as to the property being *waqf* property. Whether he considered the plea of estoppel is not clear. He has made some remarks which appear unintelligible and at any rate have not been relied upon by the respondents' counsel and with good reason.

In this second appeal the main point taken is that the respondents were in possession through their mother and any interest acquired by their mother was the interest of Behari Das as it existed subsequent to the mortgage. Therefore, neither their mother nor the defendants themselves can take up a position which it was not open to Behari Das as mortgagor to take. Now Behari Das either had or had not power to make the mortgage. Assuming that he had not power, still he could not, in a suit by the mortgagee, take up the position that he had no power to transfer the property by mortgage. That is clearly barred by section 65(a) of the Transfer of Property Act. His successors in interest are in no better a position.

Respondents' counsel has attempted to argue in two ways. [The first, not being material to this report, is omitted.]

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A second argument is that the estoppel referred to in section 65(a) of the Transfer of Property Act is an estoppel that will only operate personally against the mortgagor and not against a subsequent transferee of the mortgagor. In support of this contention we are referred to the case of *Renga Srinivasa Chari v. Gnanaprakasa Mudaliar* (1). It was there held that the implied contract mentioned in section 65(c) of the Transfer of Property Act that the mortgagor will pay all public charges accruing due in respect of the mortgaged property so long as the mortgagee is not in possession is an implied contract which will not be binding on a subsequent transferee of the equity of redemption. Whether that case was rightly decided on this point it is unnecessary to consider, because the liability to pay public charges would arise subsequent to the mortgage. The implied contract that the mortgagor has a right to sell the property that he mortgages is one that arises at the moment of the execution of the mortgage. It has been held in *Debendra Nath Sen v. Mirza Abdul Samed* (2), wherein reliance is placed on the English case of *Doe v. Stone* (3), that it is no more open to a person standing in the shoes of the mortgagor than to the mortgagor himself to set up as against the mortgagee any preceding estate which he himself had created. That is to say that a successor in interest of the mortgagor cannot deny that the estate which he mortgaged was vested in him. We would also refer to the last paragraph of section 65 of the Transfer of Property Act which mentions that the right of a mortgagee to take advantage of the implied contract stated in section 65 can be enforced by every successor in interest of the mortgagee. This provision would be of no effect if it was only the mortgagor personally against whom it could be invoked.

(1) (1906) I.L.R., 30 Mad., 67 (71). (2) (1909) 10 C.L.J., 150 (164).

(3) (1846) 3 C.B., 176.

For the above reasons we accept this appeal and restore the decree of the trial court with costs to the appellant.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.

1929
March, 6.

MAHADEO BHARTHI (PLAINTIFF) v. MAHADEO RAI
AND ANOTHER (DEFENDANTS).*

Act No. XIV of 1920 (Charitable and Religious Trusts Act), sections 5 and 6—Denial of trust—Order holding that trust exists and calling for accounts—Decision whether conclusive as to existence of trust—Subsequent suit for declaration that the property is not held in trust—Jurisdiction.

On an application under section 3 of the Charitable and Religious Trusts Act, 1920, the opposite party denied the existence of the alleged trust. He, however, did not give the undertaking, mentioned in section 5(3), to institute within three months a suit for declaration. The District Judge, after making an inquiry, passed an order holding that there was a trust to which the Act was applicable and directing the opposite party to render accounts. About a month later, the opposite party filed a regular suit for a declaration that the property was his personal property and not subject to any trust to which the Act could apply. On the question whether the suit was maintainable, held—

Per NIAMAT-ULLAH, J:—Act XIV of 1920 nowhere provides expressly or impliedly that the order of the District Judge passed under section 5 is conclusive as to the existence of a trust falling within the scope of the Act, and cannot be challenged in a regular suit before a court of competent jurisdiction; nor does the order fulfil all the requirements of the rule of *res judicata*, so as to be a bar to the subsequent suit.

If the alleged trustee fails to avail himself of the opportunity given by section 5(3) of the Act to bring a suit before the order is passed by the District Judge, he no doubt subjects himself to two disadvantages, namely (1) that a suit under section 92 of the Civil Procedure Code can be brought against him without the permission of the Advocate-General, and (2) that he becomes bound to submit accounts for the last three

*First Appeal No. 133 of 1926, from a decree of Raj Behari Lal, Subordinate Judge of Ghazipur, dated the 16th of January, 1926.