

therefore be held that time began to run from the 14th July, 1919, and as the suit has been brought within six years from that date the suit is well within time

I would dismiss this appeal with costs

JAMES J.—I agree

Appeal dismissed

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LAKHPAT
KURP
S.
DURG
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LETTERS PATENT

Before Ferrell C.J. and Swala Prasad

SURENDRA MOHAN SINGH

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Bengal Tenancy Act, 1885 (Act VIII of 1885), sections 55, 167 and 171—occupancy holding—non-transferability presumption as to—decree for rent—landlord purchasing holding, whether bound to annul incumbrance—incumbrancer whether is subsequent mortgagee—landlord purchaser whether can be redeemed

Non-transferability being the ordinary incident of an occupancy holding, it will be presumed that the holding is not transferable until it is shown that it is transferable by custom or consent given by the landlord.

Bhiram Ali Shaik Shikdar v. Gop Kanth Shaha (1) followed.

A landlord who has purchased a non-transferable occupancy holding in execution of his decree for rent can, as a landlord, ignore a mortgage of the holding without formally annulling the incumbrance under section 167, Bengal Tenancy Act, 1885.

The holder of an incumbrance from the tenant of a non-transferable occupancy holding cannot, by reason of the

*Letters, Patent Appeal no. 3 of 1928, against a decision of Ross, J., dated the 22nd February, 1928, modifying a decision of W. H. Boyce, Esq., I.C.S., District Judge of Bhagalpur, dated the 4th June, 1924, which modified a decision of Babu Radha Krishna Prasad Munsif of Madhipura, dated the 27th September, 1928.

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Bedlu Pathak v. Shibram Singh(1), *Har Gobind Das v. Ramchander Jha*(2), *Surat Lal Chowdhry v. Lala Murlidhar*(3), *Lala Murlidhar v. Surat Lal Chowdhry*(4) and *A. B. Choudhri v. Quadress*(5), followed.

Chowdhry Mahadeo Prasad v. Shaikh Azmat(6) and *S. M. Meherunnissa v. Shyam Sunder Bhiwya*(7), distinguished.

Appeal by the defendants 2nd party.

This was an appeal by defendants 2nd party in mortgage suit no. 78 of 1923. These defendants were co-sharer landlords of all the lands in suit, except khata no. 86, cha, and the defendants 1st party was the tenant thereof. In 1913 the defendants 2nd party obtained rent decrees in respect of arrear of rent for 1316 to 1319 (1908 to 1912 September), and in execution of those decrees purchased the lands in dispute some time in 1916 and, after obtaining sale certificates, took delivery of possession in 1917 and settled the lands with defendants 3rd party. In April, 1923, the plaintiffs instituted the present suit no. 78 of 1923 out of which this appeal arose for recovery of the money due to them under a simple mortgage bond (Exhibit 1), dated the 6th May, 1910, executed by the defendant 1st party in their favour, praying that in default of payment the properties mortgaged might be sold. The mortgaged properties consisted of the lands already purchased by the defendants 2nd party as landlords in execution of their rent decrees, besides the lands in khata no. 86 cha which appertained to the patti of another landlord. This appeal was not concerned with khata no. 86 cha

(1) (1928) I. L. R. 7 Pat. 155.

(2) (1927) I. L. R. 6 Pat. 235.

(3) (1919) 4 Pat. L. J. 362.

(4) (1922) 9 Pat. L. T. 362.

(5) (1916) 1 Pat. L. J. 161.

(6) (1920) 1 Pat. L. T. 108.

(7) (1901-02) 6 Cal. W. N. 895.

but only with the properties of which the defendants 2nd party were co-sharer landlords, namely, the lands in khatas nos. 85 ka, 85 kha, 85 ga, 85 gha and 87 ka. The defendants 2nd party were impleaded in the suit upon the ground that they had purchased the aforesaid mortgaged properties subsequent to the mortgage at sales in execution of decrees for rent which amounted merely to money decrees and not rent decrees under the Bengal Tenancy Act, they being only co-sharer landlords and not the entire body of landlords and, therefore, they purchased the lands subject to the mortgage and were interested in its redemption. On the same ground their lessees the defendants 3rd party were impleaded. The defendant 1st party and the defendants 3rd party did not contest the suit, and the contest therefore was between the plaintiffs as mortgagees and the defendants 2nd party purchasers of the lands in question in execution of their decrees. These defendants contended that they had obtained the decrees under section 148A of the Bengal Tenancy Act by impleading the other co-sharers as defendants and in execution of those decrees they purchased the holdings under section 158B of the Bengal Tenancy Act and had actually annulled the plaintiffs' mortgage incumbrance under section 167 of the Bengal Tenancy Act and, therefore, the holdings in question could not be made liable for and sold in execution of the mortgage decree of the plaintiffs.

The Munsif held that the decrees obtained by the defendants 2nd party were merely money decrees and consequently they purchased the lands subject to the mortgage and directed the sale of all the mortgaged properties in default of payment of the mortgage decree unless the mortgage was redeemed by the defendants, and that the incumbrance was not annulled under section 167 of the Bengal Tenancy Act. He recognized the position that if the decrees in which the defendants 2nd party purchased the lands in dispute were rent decrees they were not liable to be ousted by the purchaser in execution of a mortgage

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decree whether the mortgage was annulled or not under section 167 of the Bengal Tenancy Act, and referred to *Surat Lal Chowdhry v Lala Murlidhar*(1)

On appeal by the defendants 2nd party, the District Judge, disagreeing with the Munsif, held that the rent decrees obtained by the defendants 2nd party were under section 148A of the Bengal Tenancy Act and the holdings were sold under section 158B of the Bengal Tenancy Act as if the decrees for rent were obtained by the entire body of landlords which under section 65 of the Bengal Tenancy Act were a first charge on the holdings. Accordingly, the learned District Judge held that the plaintiffs were not entitled to have the properties, which were purchased by the defendants 2nd party in execution of their rent decrees, brought to sale in execution of their mortgage decree and that only the holding covered by khata no 86 cha was liable for sale.

The plaintiffs then appealed to the Court (second appeal no. 68 of 1925) which was heard by Ross, J. and disposed of by his decision dated the 22nd of February, 1928.

The finding of the District Judge, that the decrees obtained by the defendants 2nd party in execution whereof they purchased the holdings in question were rent decrees, was not challenged and the appeal proceeded upon the assumption that the view taken by the District Judge was correct, and the only contention was that the defendants 2nd party landlords not having annulled the incumbrance under section 167 of the Bengal Tenancy Act the holdings were still subject to the plaintiffs mortgage incumbrance and were therefore liable to be sold in execution of the mortgage decrees and that they should be sold subject to the rent decrees of the defendants 2nd party. This contention was accepted by Ross, J. who directed that

the decree for sale will be subject to the prior charge of the defendants 2nd and 3rd parties.

The defendants 2nd party aggrieved by this decision
appealed under the Letters Patent

N. C. Sinha and J. C. Sinha, for the appellants

Murari Prasad, for the respondents

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JWALA PRASAD, J. (after stating the facts set out above, proceeded as follows) It is contended that the defendants having acquired a paramount title by reason of their purchase in execution of a prior charge are not necessary parties to the plaintiffs' mortgage suit and they should be discharged from it. This contention was also raised in the second appeal and was overruled. I agree with the learned Judge that the defendants having been impleaded the rights of the parties should be determined in this litigation. If it is not determined now, it is bound to arise soon inasmuch as if the defendants are now deleted from this litigation the mortgagees will sell the mortgaged properties in execution of their mortgage decree unless redeemed and will try by means of a writ of delivery of possession to oust the defendants from the possession of the holdings in dispute. Such a dispute has always given rise to proceedings under Order XXI, rule 100, and thereafter to a regular suit. It will save protracted dispute and litigation between the parties by determining their respective rights at this stage and this happened whenever a purchaser in execution of a rent decree has been made party in a mortgage suit. The contention is overruled, and the rights of the parties must now be determined.

Ross, J., has determined it by directing that the decree for sale of the mortgaged properties should be made

subject to the prior charge of the defendants 2nd and 3rd parties.

The learned Advocate on behalf of the defendants appellants contends that such a direction is wrong inasmuch as the holdings are non-transferable and the

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mortgage is not binding upon the landlords and the mortgagees can acquire no right against the defendants landlords who have purchased the holdings in question and are in possession thereof through their lessees defendants 3rd party and the mortgagees cannot force themselves upon the landlords as tenants thereof without their consent. This point was not dealt with by the learned Judge of this Court upon the ground that it was not open to the defendants to contend that the holdings were not transferable inasmuch as though

"It was pleaded that the holdings were not transferable but no issue was raised."

The learned Advocate on behalf of the defendants appellants contends that the holdings being qaimi or occupancy were presumably non-transferable until it was shown by the plaintiffs that they were transferable by custom or consent obtained from the landlords. He says that non-transferability is an ordinary incident of an occupancy holding and it will be presumed under the law to be so until the contrary is shown. The contention seems to be sound and is borne out by an analysis of the status and incidents of occupancy holdings under the Bengal Tenancy Act. Sections 23 to 26 deal with the incidents of occupancy right. Section 23 entitles the holder of such a right to use the land in any manner which does not materially impair the value of the land or render it unfit for the purpose of tenancy. Section 25 protects the holder of an occupancy right from an ejection by his landlord except in execution of a decree. Section 26 makes such a right descendable to heirs like any other immovable property. No right of transfer has been expressly conferred upon the holder of an occupancy right as in the case of a permanent tenure-holder and raiyats holding at fixed rates, respectively, by sections 11 and 18 of the Act. On the other hand, section 183, read with *Illustration 2* of that section, makes it clear that such a right can be acquired only by custom or

usage being not inconsistent with or expressly or by implication modified or abolished by the provisions of this Act and such a

" custom or usage accordingly whenever it exists will not be affected by the Act."

In consonance with the aforesaid provisions of the Act it was held in the case of *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha*(¹) that in the absence of custom or local usage to the contrary a raiyati holding in which the raiyat has only a right of occupancy is not saleable at the instance of the occupancy raiyat or any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent. The plaintiffs mortgagees did not base their claim in the plaint upon the ground that the mortgage was binding upon the landlords, on the ground that the holdings were transferable by custom or consent. The defendants landlords pleaded that the holdings were non-transferable. It was for the plaintiffs to show that they were transferable, and they have not done so. Consequently the presumption of law remains that the holdings were non-transferable. Upon this basis the rights of the parties should be determined.

Now, if the plaintiffs are allowed to sell the holdings in question in execution of their mortgage decrees, the purchaser will not be entitled to oust the landlords from their possession through their lessees of the holdings purchased by them in execution of their rent decrees in spite of the fact that they did not annul the incumbrance under section 167 of the Bengal Tenancy Act. This is concluded by the authorities of this Court. The last case is that of *Badlu Pathak v. Shibran Singh*(²) decided last year by Sir Dawson Miller, C.J. and Adami, J. There also the mortgage was not annulled under section 167 of the Bengal Tenancy Act. It was held that a landlord purchaser of a non-transferable occupancy holding in execution of his decree for rent can, qua

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(1) (1915) I. L. R. 42 Cal. 355.

(2) (1928) I. L. R. 7 Pat. 155.

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landlord, ignore the mortgage of such a holding without formally annulling the incumbrance under section 167 of the Bengal Tenancy Act, 1885. A mortgagee of a non-transferable occupancy holding, who has obtained a decree on the mortgage and purchased the property in execution, cannot claim possession from the landlord who has purchased the holding in execution of a decree for rent, or from the raiyat settled on the land by the landlord, although the landlord purchaser did not annul the mortgage under section 167 of the Bengal Tenancy Act. As to the mortgagee's right to redeem the landlord by payment of rent charge under section 83 of the Transfer of Property Act, or to share any surplus proceeds as a second mortgagee his Lordship the Chief Justice observed that " Even had proceedings been taken under section 83 (of the Transfer of Property Act), I apprehend that when the plaintiffs came to take possession they would still have been in difficulty unless the landlord consented to accept them as tenants ". Continuing his Lordship says, " The truth would appear to be that the transferee of a non-transferable occupancy holding, whether he takes by kabala from the original tenant, or whether he acquires the property by purchase under a mortgage decree, has a very precarious right, for he cannot force himself upon the landlord as a tenant without the latter's consent." The decision given in this case was in accordance with an earlier decision in the case of *Surat Lal Chowdhry v. Lala Murlidhar*(¹). Ross, J., himself, Courts, J., concurring, took a similar view in the case of *Lala Murlidhar v. Surat Lal Chowdhry*(²). His Lordship disallowed the plaintiff purchaser of a non-transferable holding in execution of a decree on a mortgage executed by the original tenant to redeem the defendant purchaser of the holding in execution of a rent decree. He held that the holding stood free of incumbrance and the plaintiff was not entitled to redeem. Mullick, J., took a similar

(1) (1919) 4 Pat. L. J. 362.

(2) (1922) 3 Pat. L. T. 362

view in the case of *Cheoditti v. Quadress*(1) where he held that the purchaser in execution of a decree for road cess, which is included in the definition of "rent" and consequently is a first charge on the property, obtains the tenure free from incumbrances and is not affected by the mortgage charge. This was upheld in Letters Patent Appeal by Sir Dawson Miller, C.J. and Coutts, J. In the case of *Har Gobind Das v. Ramchander Jha*(2), Adami J., Macpherson J., concurring, drew a distinction between the position of a landlord purchasing a non-transferable holding in a rent sale and that of an ordinary 3rd party purchaser who in fact steps into the shoes of the original tenant and becomes a tenant of the landlord, whereas the position of a landlord purchasing in execution of a rent decree is that of an ordinary purchaser plus his position as a landlord which "has to be considered separately" and the transfer by mortgage was not valid against the purchaser qua the landlord. That distinguishes the case of *Chowdhry Mahadeo Prasad v. Shaikh Azmat*(3) relied upon by the respondents, where the purchaser in execution of a rent decree was not the landlord but a third person. Adami, J., was a party to that decision also as well as to the recent decision of *Badlu Pathak v. Shibram Singh*(4) already referred to. On behalf of the respondents reliance is also placed on the case of *S. M. Meherunnisa v. Shyam Sunder Bhwiya*(5). That case laid down that a landlord purchasing a raiyati holding in execution of a rent decree takes it absolutely and is entitled to the property, but the learned Judges regarded the mortgagee as a second mortgagee, the landlord's charge for rent being a prior charge. But as pointed out by Adami, J., in the case of *Har Gobind Das v. Ramchander Jha*(2) already referred to, there was no actual decision in that case that the mortgagee could

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(1) (1916) 1 Pat. L. J. 161.

(3) (1920) 1 Pat. L. T. 108.

(2) (1927) I. L. R. 6 Pat. 235.

(4) (1928) I. L. R. 7 Pat. 155.

(5) (1901-02) 6 Cal. W. N. 835.

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have a right to redeem as against the auction purchaser. It is also not known whether the holding in that case was transferable or not, and this distinguishes that case from the present one. It has often been said that the position of a landlord having a rent decree is that of a holder of a prior mortgage in relation to a mortgage executed by the tenant, the mortgagee from the tenant being deemed to be a subsequent mortgagee and thus having a right to redeem the landlord's charge by paying up the decree and the arrears of rent. The position of a first or prior mortgagee to the landlord is assigned merely by reason of the rent having been declared by section 65 to be a first charge on the property. The Bengal Tenancy Act has laid down the procedure by which the first charge of a landlord is to be enforced and that is indicated by section 158B of the Bengal Tenancy Act, namely, that where a tenure or holding is sold in execution of a decree for arrears of rent thereof the tenure or holding shall, subject to the provisions of section 22, pass to the purchaser, and not merely the right, title and interest of the tenant. The purchaser acquires a tenure or holding with power to annul the interest defined as incumbrance by adopting the procedure laid down in section 167 of the Act. Nowhere in the Act has it been said that the holder of an incumbrance from the tenant has the position of a subsequent mortgagee in relation to the landlord obtaining a decree for arrears of rent as a first charge. Section 171 entitles a person having an interest, which would be voidable upon the sale, to pay into Court the amount requisite to prevent the sale of a holding advertised for sale in execution of a rent decree. If he does so pay into Court, the amount paid by him shall be deemed to be a debt "secured by a mortgage of the tenure or holding to him," and this mortgage of his shall take priority of every other charge on the tenure or holding other than a charge for arrears of rent; and then he shall be entitled to retain possession of the tenure or holding as a mortgagee of the tenant until his debt has been

discharged. This is the only way in which the relationship of a first and subsequent mortgagee is created by the express statutory provision under section 171 and that is only after the incumbrancer has paid into Court "the amount requisite to prevent the sale before the sale takes place in execution of a decree for rent obtained by the landlord". Thus, where a rent decree is not satisfied by payment into Court before the sale no such relationship of prior or subsequent mortgagee is created between the landlord holding a decree for rent and the incumbrancer. In the present case no such payment was made by the mortgagees, although they obtained the mortgage from the tenant subsequent to a large portion of the rent having accrued in respect of which the defendants landlords obtained rent decrees and sold the holdings and purchased the same themselves. To permit the mortgagees in the present case to sell the holdings in question subject to the prior charge of the defendants appellants, who have already purchased the holdings and are in possession thereof, would be to enable him to "force himself upon the landlords as a tenant without the latter's consent", a position which was deprecated by his Lordship Sir Dawson Miller, C.J., in the case of *Badlu Pathak v. Shibram Singh*(¹) already referred to.

Thus, following the trend of decisions in this Court and upon an appreciation of the various provisions in the Bengal Tenancy Act, I think that the only way in which the rights of the parties can be adjusted in this litigation is to hold that the plaintiffs are not entitled to sell the holdings already purchased by the defendants 2nd party appellants in execution of their rent decrees, possession whereof they have already obtained.

I would, therefore, set aside the order passed by the learned Judge of this Court in Second Appeal no. 68 of 1925, directing the sale of the properties in

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(1) (1928) I. L. R. 7 Pat. 155.

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execution of the mortgage decree of the plaintiffs subject to the prior charge of the defendants 2nd and 3rd parties, and in agreement with the view of the learned District Judge would hold that the plaintiffs are not entitled to sell the said properties.

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The result is that the order passed by this Court in Second Appeal no. 68 of 1925, dated the 22nd of February, 1928, is set aside and that of the District Judge is restored. The defendants 2nd party appellants are entitled to their costs of this litigation throughout.

COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Ross and Chatterji, JJ.

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THE KAYASTHA TRADING AND BANKING CORPORATION, LIMITED.*

Hindu law—karta, power of, to start new business—liability of minors—benefit to the joint family—test—legal necessity, recital as to, in the deed, whether evidence.

It is not within the authority of a karta of a Hindu joint family to bind the minor members by starting a new business, and so far as the power to bind the interests of the minor members is concerned, it makes no difference whether the transaction is entered into by the karta alone or by all the adult members of the family.

In all such cases the test is whether the transaction was one into which a prudent owner would enter, the question of benefit to be determined by reference to the nature of the transaction and not by reference to the result thereof.

*Appeal from Original Decree no. 163 of 1925, from a decision of Babu Shyam Narain Lal, Subordinate Judge of Saran, dated the 10th of August, 1925.