

irregularity in the registration of the bond of the 9th of February, 1918, in view of the provisions of section 3 of the Transfer of Property Act as amended by section 4 of Act XX of 1929; and in the absence of such evidence the appellants must be deemed to have had notice of the existence of a previous mortgage. Neither of the appellants can claim to be in the position of a transferee without notice.

The appeal accordingly fails and I would dismiss it with costs.

COURTNEY TERRELL, C.J.—I agree.

Appeal dismissed.

J. K.

APPELLATE CIVIL.

Before Fazl Ali and Madan, JJ.

HARGOURI PRASAD

v.

RAGHUNATH SINGH.*

Bihar Tenancy Act, 1885 (Act V of 1885), section 26(O) —whether applies to transfers of transferable occupancy holdings transferred before the commencement of the Act.

Held, on a construction of the various sections of the Bihar Tenancy Act, that section 26(O) applies only to those cases where the title of the transferee has not been perfected, or in other words to those transfers only which relate to non-transferable holdings.

Section 26(B) to 26(M) have no application where the holdings are transferable by custom and have been transferred before the commencement of the Act. In such cases the title of the transferee will be deemed to be perfect even though the landlord may not have consented to the transfer.

K. C. Mukherjee v. Musammat Ram Ratan Kuer(1), explained.

*Appeal from Appellate Decree no. 249 of 1934, from a decision of Rai Sahib Bhuneshwar Prasad Pande, Subordinate Judge of Monghyr, dated the 18th September, 1933, reversing a decision of Babu Ram Anugrah Narain, Munsif of Jamui, dated the 23rd May, 1932.

(1) (1935) I. L. R. 15 Pat. 268, P. C.

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RAI
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Appeal by the defendant no. 1.

HARGOCH
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The facts of the case material to this report are set out in judgment of Fazl Ali, J.

Nawal Kishore Prasad II, (with him *Mehdi Imam* and *Sarjoo Prasad*), for the appellant.

S. M. Mullick and *Ishwari Nandan Prasad*, for the respondents.

FAZL ALI, J.—This appeal arises out of a suit instituted by the plaintiff who is the transferee of a portion of a holding situated in village Matwalwa in the district of Monghyr, to recover possession of the lands sold to him from defendant no. 1 who is admittedly the landlord of the village. The lands in question were sold to the plaintiff by two sale deeds dated the 29th of February, 1928, and 19th of September, 1929. The plaintiff's allegation was that he got possession of the lands upon the execution of the sale deeds, but he was dispossessed by the landlord some time about the 30th of May, 1930. The suit was contested by the defendant no. 1 on the allegation that the holding was not transferable, that as a matter of fact the original tenants had made a gift of the entire holding in favour of his sons and the latter had surrendered it to the landlord and that the suit was barred by limitation. It was further pointed out on behalf of defendant no. 1 that at the date of the institution of the suit the entire holding had passed out of the possession of the original tenant, a portion of the holding having been sold to one Lakhi Singh on the 15th of October, 1928.

The principal point which appears to have been in dispute in the courts below was whether the holding was by custom transferable or not and on this point the courts below came to two different conclusions. The first court held that the holding was not transferable and accordingly dismissed the plaintiff's suit. The lower appellate court, on the other hand,

has held that the holding was transferable and passed a decree in favour of the plaintiff.

The first point which has been raised on behalf of the appellant (defendant no. 1) in this second appeal is that the finding of the lower appellate court that the holding is transferable is not conclusive because the court has, in coming to this conclusion, taken into consideration evidence which was not relevant to the point in issue. It appears that the learned Subordinate Judge in coming to the conclusion that the holding was transferable relied upon the village note which contained a definite entry to that effect and upon certain sale deeds coupled with the evidence of the fact that the sales had been recognised by the landlord without any salami having been paid to him. The point which has now been raised is that these sale deeds relate only to portions of holdings and therefore have no bearing on the question in issue. It has, however, been pointed out by the learned advocate appearing for the respondents that there is nothing in the judgments of either of the courts below to show that these sale deeds related only to portions of holdings and in fact no such contention was raised even in the memorandum of appeal filed in this Court. It is, therefore, clear that the finding of the learned Subordinate Judge cannot be challenged in second appeal.

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The next contention put forward on behalf of the appellant is that this case is governed by section 26 (O) of the Bihar Tenancy Act of 1885 and that the title of the plaintiff is not perfected until he pays to the landlord, or deposits with the Collector, a certain percentage of the consideration paid for the transfer, as specified in that section. The learned advocate for the appellant tried to support this contention by relying on certain observations made by their Lordships of the Judicial Committee in *K. C. Mukherjee v. Ramratan Kuer*(1). That was a case in which a

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question arose whether the transfer of an occupancy holding made before 1923 would be affected by the provisions of section 26(N) of the Act. Section 26(N) provides that every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion thereof by sale, exchange, gift or will, made before the 1st day of January, 1923. Accordingly it was held in that case that as the transfer in question had been made before 1923 the landlord must be deemed under this provision to have given his consent to it. Their Lordships also incidentally referred to section 26(O) and observed as follows:—

“ Again, if section 26(O) is looked at, it will be seen that in the case of a transfer made after the 1st of January, 1923, but before 10th June, 1935, the provision is that the transferee may pay or deposit the landlord's transfer fee and thus perfect his title. There is no suggestion that a transferee shall be incompetent to make the payment or that the Collector shall refuse to receive the money in any case in which the transfer is impugned in a pending suit.”

The inference which is sought to be drawn from this observation is that section 26(O) applies to every pending suit and whether the holding transferred is transferable by custom or not the title of the transferee is not perfected until the transfer fee prescribed in this section is paid. It appears to me, however, that the argument involves a confusion of thought. Section 26(A) clearly states that the provisions of sections 26(B) to 26(M) shall apply to all transfers of occupancy holdings or portions thereof made after the date of the Bihar Tenancy (Amendment) Act of 1934. For the present purpose it will be sufficient to refer to section 26(B) and section 26(F). Section 26(B) provides that an occupancy raiyat shall have power to transfer his occupancy holding or any portion thereof

but except in certain cases no such transfer shall be valid against the landlord unless he has given or is deemed under section 26(F) to have given his consent thereto. Section 26(F) provides that if the landlord's transfer fee is paid in accordance with the provisions made in the Act, the landlord shall be deemed to have given his consent to the transfer. Now, as I have already stated, both these provisions apply to transfers made after the passing of the Bihar Tenancy (Amendment) Act. These sections have obviously no application where the holdings are transferable by custom and have been transferred before the commencement of the Act. In such cases the title of the transferee will be deemed to be perfect even though the landlord may not have consented to the transfer. If the title of the transferee is already perfect it is obvious that it will not be necessary to have recourse to the provisions made about the payment of transfer fee in section 26(O). These considerations make it clear that section 26(O) is intended to apply only to those cases where the title of the transferee has not been perfected, or in other words, to those transfers only which relate to non-transferable holdings.

The only other point which was raised in this appeal was that the suit was barred by limitation because it was not brought within two years of the date of the first sale deed executed in favour of the plaintiff. The answer to this contention is, however, provided in the written statement of the landlord who has stated that he entered into the possession of the disputed land on the 21st of June, 1929. The suit was brought within two years of this date and is clearly within time.

In these circumstances I would dismiss the appeal with costs.

MADAN, J.—I agree.

J. K.

Appeal dismissed.

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FAZL ALI, J.