APPELLATE CIVIL.

Before Hon'ble Mr. R. E. Rampini, Acting Chief Justice, and Mr. Justice Ryves.

1908
May 27.

ASMATUNNESSA KHATÚN
v.
HARENDRA LAL BISWAS.*

Estoppel—Evidence Act (I of 1872), s. 115—Non-transferable occupancy jotes—Presumption of transferability without consent of landlord from purchase by him.

Where a landlord in execution of a money-decree causes the sale of an occupancy holding and purchases it himself, he is not estopped from pleading non-transferability without his consent in a subsequent suit brought by the mortgagee of the occupancy raiyat.

The English law of mortgage and a consequent estoppel is not applicable to such a case.

Section 115 of the Evidence Act is exhaustive and the law of estoppel in this country is contained in that section.

Ayenuddin Nasya v. *Srish Chandra Banerji* (1) distinguished.

SECOND APPEAL by defendants Nos. 6 to 11.

One Garibulla had an occupancy right in 4 *jotes*, three of which he held under the defendants Nos. 6 to 11 in the suit, out of which this appeal has arisen, and one under others. The defendants Nos. 6 to 11 obtained a money-decree against the four sons of Garibulla, who are defendants Nos. 2 to 5, and in execution of that decree, he got the four *jotes* and certain other property sold on the 21st June 1894.

The purchaser in execution was one Banwari Lal Ghosh, who, however, did not take possession of the four *jotes*, but left them in the possession of defendants Nos. 2 to 5. Banwari purchased for Rs. 387 or Rs. 388 and after he had purchased,

* Appeal from Appellate Decree, No. 1031 of 1906, against the decree of W. S. Coutts, District Judge of Faridpur, dated the 5th March 1906, confirming the decree of Poorna Chandra Chaudhuri, Additional Subordinate Judge of Faridpur, dated the 29th of August 1905.

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defendant No. 2 deposited with Banwari Rs. 300, as he wished to buy back the *jotes*. The sale was not made, however, until the 21st September 1898, on which date Banwari executed a *kobala*, selling the property to defendant No. 1, wife of defendant No. 2, for Rs. 800. On the same day, defendants Nos. 1 to 5 mortgaged the four *jotes* to the father of the present plaintiff for Rs. 800, and with the money they obtained on the mortgage they paid (so it is alleged) Banwari. Subsequent to the sale in execution of the decree and before the sale by Banwari and the mortgage, one Mahim obtained two decrees for money against the present defendants Nos. 2 to 5. This Mahim was also however indebted to the defendants Nos. 6 to 11, and they obtained a decree against Mahim and, in execution of this decree, they attached the two decrees, which Mahim had obtained against defendants Nos. 2 to 5. They executed these decrees and in execution, the four *jotes* were sold and purchased by the defendants Nos. 6 to 11. These sales took place in 1899. The date of repayment fixed in the mortgage bond in favour of the plaintiff's father was Agrahayan 1305 corresponding to 1898, November to December. The suit by the present plaintiff was for recovery of the mortgage-debt. Defendants Nos. 6 to 11 contested the suit, pleading *inter alia* that the mortgage was invalid, as the lands were not transferable without the consent of the landlord and that the purchase of Banwari was really on behalf of the heirs of Garibulla. The first Court found in favour of the plaintiff on the merits of the case and decreed the suit in full. There was an appeal and a cross-appeal. The District Judge went fully into the facts and the points of law raised in the case and dismissed both the appeal and the cross-appeal.

Babu Mahendra Nath Roy (*Babu Girija Prasanna Ray Chaudhuri* with him) for the appellants. The landlords (defendants 5 to 11) have the option to consent to a sale of a non-transferable holding, but that does not estop them from maintaining that the holding was not transferable. In the present case, however, the question of estoppel does not arise at all, as the purchase of the holding by defendants 5 to 11 was subsequent to the mortgage-bond executed by defendants 1 to 5 in favour of the

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plaintiff. Section 115 of the Evidence Act has no application to the present case.

Hon'ble Dr. Rash Behari Ghose, (*Babu Hari Charan Sarkel* with him) for the respondent. Section 115 of the Evidence Act is not exhaustive. There may be cases of estoppel independently of section 115. The present suit was one to enforce a mortgage-bond against the purchasers of the equity of redemption, who happened to be the landlords. They cannot plead their superior title as landlords.

Cur. adv. vult.

RAMPINI, A.C.J. AND RYVES J. This appeal arises out of a suit brought by a mortgagee to realize his debt by the sale of the mortgaged property. The mortgaged property, unfortunately for the mortgagee, consists of 4 non-transferable occupancy *jotes*.

The lower appellate Court has found that the defendants 6 to 11, who are the purchasers of the *jotes* at a sale held in execution of a money-decree and who are also the landlords of the *jotes*, are estopped from pleading that the *jotes* are not transferable. It has therefore given the plaintiff a decree.

The defendants 6 to 11 appeal. They contend that they never represented that the *jotes* were transferable without their consent and that their conduct in no way amounted to an estoppel.

The facts are that in 1894 the defendants 6 to 11 sold the 4 *jotes* in execution of a money-decree. The *jotes* were purchased by one Banwari Lal Ghose, who however, did not take possession. He re-sold the *jotes* to the former tenants, who apparently obtained the money to buy them back from the father of the plaintiff, to whom they mortgaged the *jotes* on the 21st September 1898. Subsequently, the defendants 6 to 11 again sold the *jotes*, in execution of a money-decree obtained by one Mahim Chandra Shaha, who had a money-decree against the tenants. The defendants 6 to 11 attached this decree, executed it and themselves became the purchasers.

The District Judge says: "In this case they were appearing not in the character of a landlord, but as ordinary purchasers and in order to realise their dues they sold up the *jotes*. By doing so, they raised the presumption that the holding was transferable. Having done so and got their relief, I do not think they can now come forward in another capacity and say that the holding is not transferable."

The learned pleader for the appellant contends that the defendants 6 to 11 never represented that the *jotes* were transferable without their consent. By selling them, they represented only that they were transferable with their consent.

He further urges that they bought the *jotes* in May and July 1899, and the plaintiff's mortgage was executed on the 21st September 1898; so there was no estoppel *in pais*.

We must admit the force of these arguments. Dr. Rash Behari Ghose for the respondents replies that the provisions of section 115 of the Evidence Act are not exhaustive, that according to English law, the defendants by their purchase in 1899 only purchased what the mortgagors had to sell, viz., the equity of redemption, and that they are therefore now in the place of the mortgagors and so cannot in equity resist the claim of the mortgagee, and finally on the strength of the ruling in *Ayenuddin Nasya* v. *Srish Chandra Banerji* (1), that the question of transferability does not arise in this case. He further urges as a cross objection that the plaintiff has a mortgage over the 16 annas of the *jotes* and not over only a 9 annas 4 pies share in them.

We are of opinion that the English law of mortgage is not applicable to this case. The law of estoppel in force in this country is contained in section 115 of the Evidence Act. The appellants are clearly not estopped from pleading and proving as they have done, that the *jotes* are not transferable without their consent. That being so, the plaintiff's mortgage is of no avail. The case of *Ayenuddin Nasya* v. *Srish Chandra Banerji*(1), on which the learned pleader for the respondent relies, has no application to this case. In that case, the contest was between a mortgagee and the purchasers of jotes sold at the instance of certain co-sharer landlords, who bought only the right, title and

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interest of the tenant. None of the landlords were parties to the suit. The facts of the present case are entirely different. But in that case it is said: "No doubt, if the question was between the assignee of the interest of Dharmas, the tenant," (as is the case in the present suit) "and the landlord, the plaintiff could not recover without proving that they were transferable according to custom and usage." So that according to this *dictum*, the question of the transferability of the *jotes* does arise in this case. We must therefore decree this appeal, which we accordingly do with costs. The cross appeal only arises, if the appeal is unsuccessful. When we hold that the plaintiff is not entitled to any thing, it is immaterial what share of the *jotes* he would have a right to, if his mortgage had been valid.

The cross appeal is therefore dismissed.

Appeal decreed.

S. M.