APPELLATE CIVIL.

Before Mr. Justice Chitty, Mr. Justice Coxe and Mr. Justice D. Chatterjee.

1912

Feb. 12.

RADHA KANTA CHAKRAVARTI

v.

RAMANANDA SHAHA.*

Estoppel—Non-transferable occupancy holding—Mortgage of the holding—Purchaser of the holding at private sale—Subsequent lease by landlord to purchaser—Evidence Act (I of 1872), s. 115.

A person, having a raiyati interest in certain lands, mortgaged the same to the plaintiff without the landlord's consent Subsequently, various transfers of portions of the lands mortgaged were effected to different persons by the widow of the mortgagor. Finally, the widow sold a portion of the mortgaged lands with the consent of the landlord to one Radha Kanta Chakravarti, who after his purchase took a fresh lease of the same from the landlord at an enhanced rent on payment of a premium. A suit having been instituted by the mortgagee for recovery of the mortgage money, the widow and all the subsequent transferees, including the purchaser, were made parties. The purchaser pleaded that he was not a necessary party to the suit, and that the mortgage was invalid on the ground that the raiyati right was not transferable. The District Judge having decided against him on these points, the purchaser appealed to the High Court :

Held (COXE J. dissenting), that the purchaser claiming under a title partly at least created by the mortgagor, was estopped from raising the plea of non-transferability of the holding.

Krishna Lal Saha v. *Bhairab Chandra Rahat* (1), *Asmatunnessa Khatun Saheba* v. *Harendra Lal Biswas* (2), *Doe* v. *Stone* (3), *Doe* v. *Vickers* (4),

*Appeal from Appellate Decree, No. 2457 of 1908, against the decree of A. H. Cuming, District Judge of Tipperah, dated July 28, 1908, reversing the decree of Lalit Mohan Bose, Munsif of Tipperah, dated June 17, 1907.

(1) (1905) 9 C. W. N. CXLVIII.
(2) (1908) I. L. R. 35 Calc. 904 ; 12 C. W. N. 721.
(3) (1846) 3 C. B. 176.
(4) (183) 4 Ad. & E. 782.

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Hughes v. *Howard* (1), *Deben lra Nath Sen* v. *Mirza Abdul Samed Seraji* (2) referred to.

ON the 13th October 1900, one Mani Ram Kaibarta mortgaged without the landlord's consent certain lands, in which he had raiyati rights, to Ramananda Shaha to secure Rs. 400 and interest at the rate of Re. 1-14 per cent. per mensem. Mani Ram died, leaving him surviving his widow as his sole heir. Subsequently, various transfers of portions of the lands mortgaged were effected to different persons. Thereafter, on the 11th January 1907, the widow with the consent of the landlord sold a part of the mortgaged lands to one Radha Kanta Chakravarti. The mortgage money not having been paid off, Ramananda Shaha, on the 12th January 1907, instituted a suit for recovery of the same against the widow and the transferees, other than Radha Kanta, who, on the 27th January 1907, took a fresh lease from the landlord of the lands he had purchased from the widow at an enhanced rent on payment of a premium. On the defendants' objection Radha Kanta was, on the 5th February 1907, made a party defendant No. 6 in the suit. The Court of first instance dismissed the suit as against defendants Nos. 3 and 6, and decreed it as against the other defendants. On appeal, the judgment of the lower Court was reversed, and the suit was decreed against defendant No. 6 also, while the appellant withdrew his appeal against defendant No. 3. Thereupon the defendant No. 6 appealed to the High Court on the ground that he was not a proper and necessary party to the suit, and that he was not estopped under section 115 of the Evidence Act from pleading that the plaintiff's mortgage was void, and inoperative as against him on the ground of non-transferability.

(1) (1858) 25 Beav. 575. (2) (1909) 10 C. L. J. 150.

The appeal came on for hearing before Chitty and Coxe JJ., and their Lordships having differed in opinion, passed the following judgments :—

CHITTY J. This is an appeal by Radha Kanta Chakravarti, defendant No. 6, in a mortgage suit against the decree of the District Judge of Tipperah, making him liable under the mortgage. One Maniram, or Manu, Kaibarta, husband of defendant No. 1, by a mortgage bond dated 27th *Assin* 1307 (13th October 1900), mortgaged 8 kanis 13 gundas 3 karas of land, in which he held raiyati rights, to the plaintiff to secure Rs 400 and interest at Re. 1-14 per mensem. Maniram died without having paid off the mortgage or any part of it. His widow, defendant No. 1, transferred some portion of the land to defendant No. 2, who again sold to defendant No. 3. Defendants Nos. 3 and 4 are puisne mortgagees of those portions. By a *kobala* dated and registered on 27th *Pous* 1313 (11th January 1907) defendant No. 1, with the consent of the landlord, sold plots 1, 2, 3, 5, 6 and 7 of the lands in suit, measuring between 4 and 5 kanis, to defendant No. 6. This suit was filed by plaintiff on 12th January 1907. Defendant No. 6 was not at first made a party. After the institution of the suit, namely, on the 13th *Magh* 1313 (27th January 1907), the defendant No. 6 took a fresh settlement from the landlord of the land which he had purchased from defendant No. 1, and a patta and kabuliyat at an enhanced rent were exchanged. Defendant No. 6 was added as a party defendant on 5th February 1907, and, with defendant No. 3, alone contested the suit.

The only points for our determination are (i) whether defendant No. 6 was a proper and necessary party to the suit, and (ii) whether he is estopped from pleading the invalidity of the mortgage on the ground that the raiyati right of Maniram was not transferable. The District Judge decided against him on both points, and defendant No. 6 has appealed. As to the first point, the appellant's Pleader relied on the case of *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1), but in my opinion this is a very different case. There, it was held, that a third party, who is in no way connected with the mortgage and who claims adversely to both mortgagor and mortgagee, cannot be made a party to a suit on the mortgage in order to try the question of his title. Here defendant No. 6 admittedly acquired a title to the land in question in the first instance from the mortgagor, but claims to have exchanged it for something better by subsequently taking a fresh settlement from the landlord. The question whether he can be allowed to do this is a question properly arising for determination in the mortgage suit, and he was, therefore, rightly made a party defendant.

(1) (1906) I. L. R. 33 Calc 425.

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The next question is whether he is estopped as a representative of the mortgagor from denying the validity of the mortgage, in other words, can he now be allowed as against the mortgagee to relinquish the title which he derived from the mortgagor, and set up the title subsequently acquired from the landlord? The learned pleader for the appellant cited the case of *Agarjan Bibi* v. *Panaulla* (1), but, in my opinion, that case has really no bearing on the present question. The question seems to me one to be decided on general principles of equity. Defendant No. 6 having previously obtained the landlord's consent, purchased a portion of this holding from defendant No. 1. He clearly derived his title to what he purchased from defendant No. 1 alone and not, as has been argued, from defendant No. 1 and the landlord together. The whole title to what defendant No. 6 purchased was in defendant No. 1, and the fact that the landlord's consent was necessary before she could part with it does not mean that the title was derived in part from the landlord.

Defendant No. 6, therefore, took what he purchased subject to the liabilities which defendant No. 1 or her husband had incurred, that is to say, he took subject to the mortgage. If the suit had then been brought against him, he could not have denied the validity of the mortgage. Can he subsequently throw off that title and acquire a new one for the obvious purpose of defeating the mortgagee's claim? I am of opinion that it would be inequitable to allow him to do so, and it would certainly open the door to fraud in a large number of cases.

The case of *Krishna Lal Saha* v. *Bhairab Chandra Rahat and another* (Second Appeal No. 35 of 1904) (2) was brought to our notice. The facts of that case appear to be very different from the present. There the contesting defendant had purchased the right, title and interest of the mortgagor at an execution sale. If the occupancy holding was not transferable by custom, he took no interest in it by his purchase. That appears to me very different from the present case of a voluntary transfer by the mortgagor made with the landlord's consent previously obtained. Here defendant No. 6 obtained a perfectly good title by his purchase from the mortgagor with the landlord's consent subject only to the mortgage. There could be no possible object in his obtaining a fresh settlement from the landlord at an enhanced rent, except to defeat or endeavour to defeat the claims of the mortgagee. This he ought not to be allowed to do. I would dismiss the appeal with costs.

As my learned colleague is of a different opinion, the case must be laid before the Chief Justice for reference to a third Judge.

(1) (1910) I. L. R. 37 Calc. 687; 14 C. W. N. 779.

(2) (1905) 9 C. W. N. CCXLVIII.

COXE J. I think that this appeal ought to be allowed. The land to which it relates was purchased by the appellant on the 11th January 1907 with the landlord's consent, and on the 27th January 1907 the appellant obtained a settlement from the landlord at an enhanced rent on payment of a premium. The land formed part of a holding which had been mortgaged to the plaintiff without the landlord's consent by the husband of the vendor of the appellant. The plaintiff sued upon the mortgage on the 12th January 1907, not making the appellant a party. But as the other defendants objected, the plaintiff made the appellant a party on the 6th February 1907. It is found that the holding was not transferable without the landlord's consent, and that the sale to the appellant was effected *bonâ fide* for consideration.

The question for decision is whether under these circumstances the appellant is estopped from pleading that the holding was not transferable without the landlord's consent. That it was not so transferable is laid down in numerous rulings, of which the last is *Agarjan Bibi* v. *Panaulla* (1). The mortgagee took nothing by his mortgage, and all that has to be decided is whether the appellant is entitled to say so. Now, if he had purchased the holding in execution of a money decree, at which no title whatever would have passed, and the judgment-debtor's interest would, in the eye of the law, have continued to subsist [*Bhiramali Sheikh Shikdar* v. *Gopikant Shaha* (2)] and had subsequently taken a settlement, he would have been entitled to raise the plea that the holding was not transferable by the judgment-debtor without the landlord's consent: *Krishna Lal Saha* v. *Bhairab Chandra Rahat* and another (Second Appeal No. 35 of 1904) (3). It seems anomalous that a person acquiring title in such a manner should practically get the property free of encumbrances, while one who regularly purchases according to the law with the landlord's consent should be bound by all that the original tenant debtor has unlawfully done.

Doubtless there is authority that a tenant who mortgages his property without the landlord's consent is estopped from afterwards pleading that it is not transferable. The learned Judges who decided the case of *Agarjan Bibi* v. *Panaulla* (1), guarded themselves from expressing an opinion on this point, and it has been strenuously argued in this case that there can be no estoppel against the law of the land. If it be assumed that the transferee knows the custom of the country that holdings are not transferable without consent, then, it is said, he cannot be misled by the

(1) (1910) I. L. R. 37 Calc. 687; 14 C. W. N. 779.

(2) (1897) I. L. R. 24 Calc. 355; 1 C. W. N. 386.

(3) (1905) 9 C. W. N. CCXLVIII.

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statement of the tenant that his holding is so transferable. But undoubtedly there is plenty of authority for the opposite view, and I am not prepared now to question that authority.

But I do not think that the principle of estoppel should be extended to purchasers with the landlord's consent. If a man wants land which he knows to be not transferable without the landlord's consent and buys it with the landlord's consent, I do not see why he should be bound by previous transfers without consent, which he had every reason at the time of his purchase for believing or indeed knowing to be invalid. He is not, I think, a mere representative of the tenant within the meaning of section 115 of the Evidence Act, but something more than that. Two persons, the landlord and the tenant, had to join in giving him his title, and he does not derive his title exclusively from either but from both. So far as he derives it from the landlord, he is not, in my opinion, the representative of the tenant, and is entitled to question the tenant's alienations.

Taking this view, I would allow the appeal and restore the Munsif's decision.

The case was thereupon referred to D. Chatterjee J. under s. 98 of the Code of Civil Procedure of 1908.

Babu Harendra Narain Mitra and *Babu Sasadhar Roy*, for the appellant.

Dr. Rashbehary Ghose, *Babu Dhirendra Lal Kastgir* and *Babu Gopal Chandra Das*, for the respondent.

Cur. adv. vult.

D. CHATTERJEE J. An occupancy holding, which has been found to be not transferable without the consent of the landlord, was mortgaged to the plaintiff. Defendant No. 1, who is the heir of the mortgagor, sold a part of this holding to defendant No. 6 with the consent of the landlord, who subsequently gave a fresh lease to defendant No. 6 at an enhanced rent. On a suit being brought on the mortgage, the defendant No. 6 pleaded that the mortgage was void, as the holding mortgaged was not transferable without the consent of the landlord, and no such consent had been

obtained. There being a difference of opinion as to whether defendant No. 6 was estopped from pleading the non-transferability of the holding, the question has been referred to me under section 98 of the Civil Procedure Code. I shall in this judgment call defendant No. 1 the mortgagor, and the defendant No. 6 the appellant.

It is contended by the learned vakil for the appellant that there can be no estoppel against a statute, and, as an occupancy holding is not transferable under the Bengal Tenancy Act, there can be no estoppel from pleading what the statute provides. The statute, however, does not provide either that these holdings are transferable or not transferable, but leaves the question to be decided by local usage or custom: *see* sections 178 and 183. The existence or otherwise of the custom or usage is a fact to be pleaded and proved, and I do not think that the principle relied on has any application to the present case. It is next contended that the purchaser is not a representative of the mortgagor within the meaning of section 115 of the Evidence Act, as he has derived his title practically from the landlord alone, without whose consent the sale would have passed nothing. The landlord alone could not, however, have given him a title. Any grant by the landlord alone during the subsistence of the tenancy of the mortgagor could not entitle him to the possession of the holding. There is some controversy in the books as to whether a sale of a portion of an occupancy holding confers any title on the purchaser, and the matter is under consideration by the Full Bench. I would, however, take it for granted that the mortgagor alone could not confer any title, and neither could the landlord by his own act and without the concurrence of the mortgagor. The two,

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therefore, joined to pass such title as the appellant has acquired. In this view the appellant has derived some title from the mortgagor, although he has acquired an additional title from the landlord, and to that extent at least he must be considered a representative of the mortgagor. The mortgagor was bound by his deed of mortgage not to assert against the mortgagee that he had no right to mortgage, and the appellant, who derived his title, at least in part, from the mortgagor, cannot be allowed to make a like assertion.

Against this view of the law the learned vakil for the appellant has relied on two cases—(*i*) an unreported decision of Ghose and Pratt JJ., in appeal from Appellate Decree No. 35 of 1904, *Krishna Lal Saha* v. *Bhairab Chandra Rahat* (1), and (*ii*) a decision of Rampini, Offg. C.J., and Ryves J., in *Asmatunnessa Khatun Saheba* v. *Harendra Lal Biswas* (2). In the first case an auction-purchaser of the interest of the mortgagor in an occupancy holding, who after his purchase obtained recognition from the landlord, was held to be not estopped from pleading the non-transferability of the holding to a suit by the mortgagee on his mortgage bond; the learned Judges said that the defendant No. 2 (the auction-purchaser of the holding) stood on a higher ground independent of the purchase, and could not, therefore, be estopped from raising the plea of non-transferability. In the second case the landlord himself purchased a mortgaged holding in execution of a money decree, and then took the plea in a suit by the mortgagee on his mortgage, and was held entitled to do so.

I do not think it would be right to distinguish these cases as cases of purchase by auction sale; for

(1) (1905) 9 C.W.N. CCXLVIII.

(2) (1908) I. L. R. 35 Calc. 904; 12 C.W.N. 721.

although there were some cases in the books [see *Lala Parbhu Lall* v. *Mylne* (1), *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury* (2), *Bashi Chunder Sen* v. *Enayet Ali* (3)], which held on the authority of certain dicta of the Judicial Committee [see *Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* (4), *Dinendronath Sannyal* v. *Ramcoomar Ghose* (5)], that estoppels binding upon the judgment-debtor were not binding upon the auction-purchaser, the matter has been finally set at rest by the Judicial Committee itself in the case of *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (6), in which their Lordships held that the auction-purchaser was bound by an estoppel which bound the person whose right, title and interest he purchased. There is, however, a material distinction, and that is that in neither of those cases the mortgagor co-operated with the purchaser for creating a title in derogation of the mortgage. This upon general principles of equity the mortgagor should not be allowed to do, and there is ample authority for this. I may refer in this connection to the case of *Doe* v. *Stone* (7), in which it was held that it was not open to a person who has derived title from a mortgagor, to set up against the claim of the mortgagee a title which the mortgagor himself could not set up. In the case of *Doe* v. *Vickers* (8), a mortgagor of a leasehold property suffered an ejectment and took a fresh lease; he was not allowed to set up this new lease against the claim of the mortgagee. In the case of *Hughes* v. *Howard* (9),

(1) (1887) I. L. R. 14 Calc. 401.
(2) (1889) I. L. R. 16 Calc. 355, 360.
(3) (1892) I. L. R. 20 Calc. 236.
(4) (1871) 14 Moo. I. A. 101, 111.
(5) (1881) L. R. 8 I. A. 65; I. L. R. 7 Calc. 107.
(6) (1895) I. L. R. 22 Calc. 909; L. R. 22 I. A. 129.
(7) (1846) 3 C. B. 176.
(8) (1836) 4 Ad. & E. 782.
(9) (1858) 25 Beav. 575.

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the mortgagor in collusion with the lessor and the second mortgagee incurred a forfeiture of the mortgaged leasehold and took a fresh lease from the landlord, but was not allowed to set up this lease in answer to the suit of the mortgagee. The case of *Debendra Nath Sen* v. *Mirza Abdul Samed Seraji* (1) may also be referred to as supporting this conclusion.

In the result, therefore, I agree with Mr. Justice Chitty and hold that the appellant, the defendant No. 6, is estopped from raising the plea of non-transferability.

O. M. *Appeal dismissed.*

(1) (1909) 10 C. L. J. 150.

APPELLATE CRIMINAL.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

1911

May 10.

SURENDRA NARAYAN ADHICARY

v.

EMPEROR.*

Sedition—Publication, proof of—Necessity of proving, posting, or printing and publishing under the directions of the accused, when it is shown that the handwriting is his, and that the seditious matter was actually printed and published—Seditious manuscript transmitted by post but intercepted before it reached addressee—Attempt to commit sedition—Penal Code (Act XLV of 1860) s. 124A.

It is not necessary, in order to establish the fact of publication of seditious matter transmitted through the post office, on a charge under s. 124A of the Penal Code, to prove the actual posting, nor that it was printed and published under the directions of the accused. If the seditious writing is shown to be in the handwriting of the accused, and it is further proved that the contents were in fact printed and published, there is sufficient evidence of publication by him.

Regina v. *Lovett* (1) followed.

* Criminal Appeal No. 277 of 1911, against the order and sentence passed by Umesh Chandra Sen, Deputy Magistrate of Malda, dated Dec. 5, 1910.

(1) (1839) 9 C. & P. 462.