

**(1934) 12 CAL CK 0035**

**Calcutta High Court**

**Case No:** None

Jogendra Chandra Das and  
Others

APPELLANT

Vs

Debendra Nath Ghosh and  
Others

RESPONDENT

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**Date of Decision:** Dec. 4, 1934

**Citation:** 164 Ind. Cas. 640

**Hon'ble Judges:** R.C. Mitter, J

**Bench:** Single Bench

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### **Judgement**

R.C. Mitter, J.

The plaintiff is the" appellant. He brought this suit for khas- possession. Tie material facts alleged and proved are the following;--Surendra Nath Roy Choudhury and others have a howla which covers the land in suit. One Abdul held a karsha under them. On the death of Abdul his heirs, defendant No. 1 and four daughters inherited his jote. In 1921 an, usufructuray mortgage in respect of the entire jute was executed in favour of defendant No. 3 who is the only contesting defendant. The plaintiff alleged that defendants Nos. 5 and 6 are khas possession as burgadars, but the Court has found that defendant No. 5 is the burgadar of defendant No. 3 and is alone in possession. Surendra Nath Roy Choudhury and his co-sharers brought a suit for recovery of rent against the heirs of Abdul and on November 6, 1922, they purchased the holding in execution of their decree for rent. They took symbolical possession on January 20, 1923, and on January 16, 1924, settled the land in suit in osat nimhowla right with Rajani Nath Dass, the father of the plaintiffs. The plaintiffs who succeeded to their father, brought the suit for khas possession alleging that their predecessor had served a notice u/s 167 of the Bengal Tenancy Act on defendant No. 3. They, however, failed to prove service of such a notice on the said defendant. The learned Munsif held that the interest of defendant No. 3 is an encumbrance and as no notice had been served on his annulling it, the plaintiffs were not entitled to khas possession, and that they could disturb the possession of

defendant No. 3. The learned Munsif dismissed the suit also on another ground which it is not necessary to state, for if the Munsif's judgment is correct on the point I have stated above, which in my judgment is, the plaintiffs' suit must fail. The plaintiffs preferred an appeal to the learned District Judge, which was heard by the Additional Subordinate Judge. The only point pressed before him was that the landlords themselves being purchasers at the rent sale, no notice u/s 167 of the Bengal Tenancy Act is necessary. The learned Additional Subordinate Judge overruled the said contention and affirmed the decree made by the Munsif. Before me also the point has been pressed by the plaintiffs-appellants in the same form in which it was put before the learned Additional Subordinate Judge. Before dealing with this point it is necessary to notice a preliminary objection raised by the respondents. Defendant No. 6 died during the pendency of the appeal in this Court and his legal representatives have not been brought on the record. It is on this fact that the preliminary objection has been taken. This objection is without substance, as it has been, found by the Court below that defendant No. 6 was not but defendant No. 5 only was the burgadar of defendant No. 3. I accordingly overrule it.

2. With regard to the merits of the appeal, it has been urged that as the tenancy of Abdul is a non-transferable occupancy holding, its transfer is not binding on the landlord, and as the usufructuary mortgage is in respect of the entire holding, it is not an encumbrance as against the landlord. A distinction is sought to be drawn between the case where the landlord himself purchases the holding at a rent rule and where the purchase is by a stranger. In support of the said contention some decisions of the Patna High Court have been cited before me [Surat Lal Chowdhery Vs. Lala Murlidhar and Others](#), , [Hargobind Das and Others Vs. Ramchandra Jha and Others](#), , [Badlu Pathak and Others Vs. Sibram Singh and Others](#), , [Sourendra Mohan Singh and Others Vs. Kunjibihari Lal Mander and Others](#), . I do not quite follow the distinction. If a mortgage is an encumbrance within the meaning of Section 161 of the Bengal Tenancy Act, it has to be avoided, whether the purchaser at the rent sale is the landlord or any other person; if it is not an encumbrance, no notice u/s 167 of the Bengal Tenancy Act is necessary in either case. The decisions of the Patna High Court proceed upon the footing that the landlord purchaser qua, landlord and not as purchaser at the rent sale has the right to refuse recognition of a tenant not of his choosing. Sir Dawson Miller puts it thus in [Badlu Pathak and Others Vs. Sibram Singh and Others](#), . Regarded merely as a purchaser he would be barred by the existing encumbrances unless they are annulled. But regarded as a landlord, he has the right to refuse to recognise a transferee of the original occupier as his tenant. The plaintiffs are the none the less transferees though they acquired under a mortgage lien granted by the original tenants.

His encumbrances; although never formally annulled and although still subsisting for what it is worth is a barren right against the landlord, when he seeks to enforce it by taking possession of the property.

3. The case where the mortgage is not enforced or enforced and the mortgage property is brought to sale by the mortgagee after the rent sale, "and the case where the mortgage sale takes place before the rent sale or during the pendency of the rent suit stand on different footing. In the latter class of cases the purchase is a destruction of the recorded tenant's interest in the holding and not a limitation there on. *Bidhumukhi V. Bhaba Sundari* AIR 1920 Cal. 870 : 59 Ind. Cas. 868 : 24 CWN 961 [Sabjan Manual Vs. Haripado Saha and Others](#), Section 167 of the Bengal Tenancy Act includes within encumbrances liens and interests created by the ryot on his holding in limitation of his own interest thereon. The section does not limit the definition to transferable occupancy holdings which are seldom to be found, the custom of transferability being very rarely proved. The view of the Patna High Court in my judgment- militates against the decision of the Full Bench in *Dayamoyi v. Annada Mohan* 42 C 172 : 27 Ind. Cas. 61 : AIR 1915 Cal. 242: 18 CWN 971 : 20 CLJ 52 and the decisions of this Court which are binding on- me. Whether the transfer is of a part of the holding or not by way of sale, the landlord is not admittedly entitled to recover possession. The sale of a part of the holding and the transfer of a entire holding, but not by way of sale, have been put, so far as the landlord's rights are concerned, on the same footing by the Full Bench. In *Pran Krishna Pal v. Atul Krishna* 22 CWN 662 : 46 Ind. Cas. 176 : AIR 1918 where the landlord himself and purchased the holding at a rent-Sale, it was held that a notice under a. 167 of the Bengal Tenancy Act was necessary to annul the rights of a mortgage of a portion of a non-transferable occupancy holding. The case of *Abdul Gaffur v. Golam Rahman* 39 Ind. Cas. 460 : AIR 1918 Cal. 402 is in conflict with the decision in *Pran Krishna Pal v. Atul Krishna* 22 CWN 662 : 46 Ind. Cas. 176 : AIR 1918 which I prefer to follow, as the former case has over looked the judgment of the Full Bench in *Dayamoyi's* case 42 C. 172 : 27 Ind. Cas. 61 : AIR 1915 Cal. 242: 18 CWN 971 : 20 CriLJ 52 and has moreover, gone beyond the Patna cases by holding that a mortgagor of a non-transferable holding is not an encumbrance at all. I hold accordingly that the plaintiffs were bound to serve on defendant No. 3 a notice u/s 167 of the Bengal Tenancy Act, and the non-service thereof is fatal to their claim for khas possession. The plaintiffs are at liberty to obtain khas possession on redeeming the mortgage of defendant No. 3, and if their right of redemption is not barred, that course is still open to them.

4. The appeal is accordingly dismissed but without costs.