

**(1917) 02 CAL CK 0034**

**Calcutta High Court**

**Case No:** None

Ram Kumar Chowdhury

APPELLANT

Vs

Rameshwar Saha and Others

<BR> Rameshwar Saha and

Others Vs Ram Kumar

Chowdhury and Others

RESPONDENT

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**Date of Decision:** Feb. 8, 1917

**Citation:** 38 Ind. Cas. 523

**Hon'ble Judges:** Richardson, J; Fletcher, J

**Bench:** Division Bench

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### **Judgement**

Fletcher, J.

These are two appeals, one by the defendant No 14 and the other by the plaintiffs.

2. The point that arises is as follows:--Three brothers and one Seni Bibi mortgaged to the plaintiffs the land in the schedule to the plaint for Rs. 400. The mortgagees subsequently obtained a decree on their mortgage and brought the property to sale in execution and purchased themselves. Prior to this the defendant No. 14 purchased in execution of a money-decree against the three brothers a portion of the property and obtained the landlord's consent to the transfer to him, as the property consists of a non-transferable occupancy holding. It is said that the plaintiffs cannot recover against the defendant No 14, as the interest he holds is not derived from the three brothers but is a new interest created by the landlord. This clearly is not so. At the time that the landlord gave his consent, it was wholly unnecessary and that consent unnecessarily taken cannot deprive the plaintiffs of a portion of the property comprised in the mortgage.

3. The appeal of the defendant No. 14 is, therefore, dismissed.

4. The appeal by the plaintiffs is also equally ill-founded. As regards the partial redemption allowed by the learned Judges, this is clearly correct having regard to

the terms of Section 60 of the Transfer of Property Act.

5. The other point is that the learned Judges in the lower Courts were wrong in their methods of apportionment and redemption should not have been allowed to the defendant No. 14 on payment of the amount fixed by the Courts below. I see no reason to suppose that the apportionment has been made on a wrong principle as suggested.

6. Both the appeals accordingly fail and must be dismissed with costs.

Richardson, J.

7. As to the appeal of the defendant No. 14, the question raised appears to me to turn on the true nature of the transaction to which he was a party. The holding is a non transferable occupancy holding. The defendant No. 14 purchased a portion of it in execution of a decree for money against the original tenants. On the part of the latter this transfer was an involuntary transfer, but as they took no steps to have the sale set aside the transfer was binding as against them [Dayamoyi v. Ananda Mohan Roy Chowdhuri 27 Ind. Cas. 61 : 42 C. 172pc : 18 C.W.N. 971 : 20 C.L.J. 52 J. Nevertheless as they remained in possession of the remainder of the holding, there was no abandonment on their part and as between them and the landlord, the original tenancy subsisted. The landlord, therefore, was not in a position without their concurrence to create in favour of the defendant No 14 a new holding consisting of the part of the original holding which he had purchased. Their consent to such an arrangement would be tantamount to a surrender of the holding to the landlord, in order that it might be re-granted in part to themselves and in part to the defendant No. 14. But at the date of the latter's purchase, the entire holding was mortgaged to the plaintiffs and the incumbrance was secured by a registered instrument, That being so, the surrender of the holding or any part of it to the landlord without the consent of the plaintiffs was invalid under Clause (6) of Section 86. That clause was clearly introduced for the purpose of invalidating surrenders made so as to defeat the claims of incumbrancers. It follows that the interest in the holding acquired by the defendant No. 14 is subject to the plaintiffs' mortgage and his appeal fails, if the reasoning is not quite the same, in so far as it depends on the application of Clause (6), Section 86, the result at any rate is in accordance with that arrived at by the majority of the Judges in the case of Radha Kant Chakravarti v. Ramananda Shaha 13 Ind. Cas. 698 : 16 C.W.N. 475 : 15 C.L.J. 369 : 39 C. 513pc.

8. As to the appeal of the plaintiffs, I agree that it fails.