

(1911) 03 CAL CK 0013**Calcutta High Court****Case No:** Appeal from Appellate Decree No. 2444 of 1908

Shyama Charan Bhattacharya

APPELLANT

Vs

Mokhuda Sundari Debi

RESPONDENT

Date of Decision: March 2, 1911**Final Decision:** Dismissed**Judgement**

1. This is an appeal on behalf of the first Defendant in a suit for recovery of possession of a holding which admittedly belonged at one time to a man named Kudutulla. On the 22nd May 1893, Kudutulla mortgaged the holding to one Uma Sundari Dasi. The mortgagee sued, in 1897, to enforce the security, and obtained a decree on the 7th July 1897. The decree was subsequently transferred to the Plaintiff, who took out execution thereof as assignee. The holding was purchased by the Plaintiff at the execution sale on the 22nd December 1904, and possession was delivered by Court on the 1st June 1905. Meanwhile the first Defendant had purchased the holding from the mortgagor Kudutulla on the 31st August 1904; he resisted the Plaintiff who was unable to obtain actual possession of the holding from him. The result was that, on the 10th May 1907, the Plaintiff commenced this action for recovery of possession. The first Defendant alone appeared and contested the claim substantially on the ground that the mortgage, the decree thereon and the subsequent sale were collusive and fraudulent. As regards his own purchase, he added that he had not been able to secure recognition from the landlord. The Court of first instance held upon the evidence that as the mortgage represented a genuine transaction, there was practically no defense to the suit. The Court further held that the Defendant was not entitled to show that he had subsequently obtained recognition from the landlord and thus to raise the question of the transferability of the holding. The result was that a decree for possession was made in favor of the Plaintiff. The Defendant then appealed to the Subordinate Judge, and argued that an issue ought to have been raised upon the question of transferability of the holding. This contention was overruled, and the decree of the Court of first instance was affirmed on the 4th August 1908. The first Defendant has now appealed to this

Court, and on his behalf the objection taken in the Courts below has been reiterated. The substantial question in controversy, therefore, between the parties to this appeal is, whether or not, in the events which have happened, the first Defendant is entitled to raise the question of transferability. Now, in the first place, it is well settled that when a non-transferable holding has been sold by a tenant under a conveyance he is, as between himself and the transferee, stopped from setting up the invalidity of the sale by him [Bhagirath Changa v. Hafizuddin 4 C. W. N. 679 (1900).]. The same doctrine applies as between mortgagor and mortgagee [Krishna Lal v. Bhoirab Chandra 2 C. L. J. 19n (1905)]. This position may be supported on the principle explained in the case of Debendra Nath v. Mirza Abdul 10 C. L. J. 150 (1909), that a mortgagor is stopped from denying the mortgagee's title and the existence of the lien which he has created, or from defeating its en-for cement against the property upon which it was placed. Consequently, in the case before us, neither the mortgagor nor the first Defendant, as his representative in interest, can challenge the validity of the title of the Plaintiff as based on the mortgage. The position of the 1st Defendant is further affected by the circumstance that he purchased pendente lite, because as explained in the case of Surjiram v. Berhamdeo 2 C. L. J. 288 (1906) in the case of a mortgage suit, the lis continues after the decree nisi, and the doctrine of lis pendens is applicable to proceedings to realize the mortgage after the decree for sale. *Prima facie*, therefore, the Defendant is not entitled to question the validity of the mortgage, and this view is supported by the case of Ayenuddin v. Srish Chander 11 C. W. N. 76 (1906) which is not distinguishable from the case before us. That case again is in accordance with the earlier decision in Ambika v. Aditya 6 C. W. N. 624 (1905), and was accepted as good law in Hari Das v. Udo Chandra 12 C. W. N. 1086: s. c. 8 C. L. J. 261 (1908) though the decision in this latter case was subsequently set aside upon a different point [Udai Chandra v. Hari Das 10 C. L. J. 608: s. c. 13 C. W. N. 937 (1907)]. We are not prepared to dissent from the decision in Ayenuddin v. Srish Chander 11 C. W. N. 76 (1906) which completely covers the case before us, and has been recently followed in Samiruddin v. Benga 13 C. W. N. 630 (1909), though it may be difficult to reconcile it with Achanulla v. Salemonnessa 9 C. W. N. 24n (1904) where the decision was based on the doubtful ground that the execution purchaser of the interest of the tenant was not bound by the same estoppels as the tenant himself. It has been suggested, however, that when during the pendency of this suit, the Defendant alleged that he had obtained recognition from the landlord he ought to have been allowed to prove it and thus to place himself in the position of the landlord who, it cannot be disputed, is entitled to raise the question of transferability. In support of this view reference has been made to r. 5 of or 8 of the CPC of 1908, which provides that any ground of defense which has arisen after the institution of the suit may be raised by the Defendant in his written statement. This rule is of no assistance to the Appellant. In the first place, it was not in force when this case was tried in the original Court or in the Court of Appeal below. In the second place, even if it had been in force, it would be of no avail, because the circumstance alleged by the Defendant happened after he had filed his

written statement in which he stated explicitly that his purchase had not been up to that time recognized by the landlord. Consequently there is no occasion for any application of the principle recognized in *Rupchand v. Sarveswur I. L. R. 33 Cal. 915: s. c. 3 C. L. J. 629* (1906) and *Bepin Behary v. Tin Cowrie* 13 C. L. J. 271 (1911). On the other hand, the principle applicable to this case is laid down in *Radheay Koer v. Ajodhya Das* 7 C. L. J. 262 (1907), where it is pointed out that, although, in some instances, a Court will take notice of events which have happened subsequent to the institution of the suit [*Ramratan v. Mohant* 6 C. L. J. 74 (1907), *Hazari v. Janaki* 6 C. L. J. 92 (1907), *Ramyad v. Bindeshwari* 6 C. L. J. 102 (1907) *Udit v. Rashika* (17)], it will not dismiss a claim for recovery of possession on the ground that the right set up by the Plaintiff is alleged to have been subsequently nullified by the Defendant during the pendency of the suit. On a review, then, of the authorities, it is clear that the preponderance of judicial opinion is in favors of the view that the question of transferability does not arise in the present suit between the Plaintiff as the mortgagee purchaser of the interest of the tenant and the first Defendant as private purchaser from the same person.

2. The result, therefore, is that the decree made by the Court below is affirmed, and this appeal dismissed with costs.