# Sm. Latika Rani Basu and Others Vs State of West Bengal and Others

**Court:** Calcutta High Court

**Date of Decision:** April 11, 1989

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€" Section 80
Transfer of Property Act, 1882 â€" Section 10, 105, 108, 111

**Citation:** (1989) 2 CALLT 333

**Hon'ble Judges:** S.K. Guin, J; L.M. Ghosh, J

**Bench:** Division Bench

**Advocate:** S.P. Roy Chowdhury, Mr. N.R. Chatterjee, Mr. Kashinath De and Mr. H. Ghosh, for the Appellant;Bimal Kumar Chatterjee for Respondent/Opp. Party No. 2 and Mr. Bhabesh Chandra Ghosh Roy and Miss. Sharada Parmar for Respondent/Opp. Party No. 3, for the Respondent

**Final Decision:** Allowed

## Judgement

L.M. Ghosh, J.
The plaintiffs filed Title Suit No. 37 of 1972 in the 8th Court of the Subordinate Judge, Alipore for certain reliefs. The

defendants 1 and 2 contested the claim of the plaintiffs. On hearing the parties and after examining the evidence on record, the learned Subordinate

Judge dismissed the suit.

2. The aggrieved plaintiffs have preferred this appeal. It is not disputed that the defendant No. 3 became a lessee under the Khasmal Department

in respect of the "A" schedule property. On the basis of a contract, the plaintiffs got a decree against the defendant No. 3 in respect of the "B"

Schedule property, forming part of the "A" Schedule property, and also had a deed executed in their favour on 8-10-62. The plaintiffs claimed that

in execution, they got possession of the properties and then exercised acts of possession by putting up sign board and fencing up the land. The

plaintiffs stated that they were next taking steps for mutation of their names and at that juncture came to know that the entire property was intended

to be acquired by the C.I.T. The plaintiffs made representation for exemption of the plot of the CIT authorities. As per statement of the plaintiffs,

the CIT authorities gave out that the scheme was sent to the Government for sanction and though after approval, they would consider the case of

the plaintiffs for a reinstatement plot. While the plaintiffs were so making representation, they got information that land acquisition proceedings were

commenced and they were advised to appear before the Land Acquisition Collector. The plaintiffs thereupon sent several letters by registered post

on diverse dates, but no reply was received. Ultimately, the Land Acquisition Collector communicated to the plaintiffs that an award was already

made on 30-6-69. The plaintiffs then asked for further particulars, but the same were not furnished. Ultimately, on inspection through lawyer, the

plaintiffs came to know that an area of 3 bighas, 5 cottahs, 3 chittacks and 25 sq. ft., including the plaintiffs'' ''B'' Schedule property was acquired.

The plaintiffs also came to know that compensation Rs. 6,900 per cottah was allowed and the entire compensation money was paid to the

defendant No. 3 on 14-8-69 and 10-10-69 respectively. The plaintiffs made grievance that no S.A. was allowed by the Land Acquisition

Collector. The plaintiffs'' stand was that they became owners of the ''B'' Schedule property and that the defendants 1 and 2 were aware of the

same. On that basis, the plaintiffs described the Land Acquisition case proceedings without notice upon them as irregular, etc., and as collusive.

The defendant No. 3 had withdrawn the price of the ''B'' Schedule property also, without having any right. Describing the entire proceedings for

acquisition of the ''B'' Schedule property as illegal, mala fide, collusive, etc., the plaintiffs claimed an amount of Rs. 1,58,000, including S.A., on

account of the land acquired besides interest @ 6% from June, 1969, that is the date of delivery of possession, to the date of filing of suit was

claimed. The plaintiffs made reference to the service of notice u/s 80 of the Code of Civil Procedure.

3. The defendant No. 1, the State of West Bengal, filed a written statement and contested the suit. The defendant No. 1 submitted that the

plaintiffs filed application before the Land Acquisition Authorities after the filing of the award. The defendant No. 1 also pointed out that the

application, dated 30 12-70 was not a reference petition. Then the defendant No. 1 pleaded that notices were served upon all persons known or

believed to be interested. And, it was submitted, the defendant No. 1 had no personal knowledge regarding the plaintiffs'' position. Allegation as to

collusion etc. was repudiated. The service of notice u/s 80 of the CPC was also not admitted. The defendant No. 1 urged that the plaintiffs were

not entitled to any compensation.

4. The defendant No. 2, the Board of Trustees of the Calcutta Improvement, also filed a written statement. The stand of the defendant No. 2 was

simple and it was that as the requiring body, it observed all the formalities and. the scheme of the CIT was submitted to the Government for

sanction in due course. The defendant No. 2, it was stated, had nothing to do with the Land Acquisition proceedings. As to the plaintiff''s title in the

"B" Schedule property, the defendant No. 2 pleaded that it had no knowledge about the right, title and interest of the plaintiffs in the suit property.

Allegations of collusion etc. were also refuted. Assessment at Rs. 6,900 per cottah was described fair.

5. The defendants 3 and 4 did not file any written statement.

6. As noted before, the learned Subordinate Judge dismissed the suit. His main ground for dismissing the suit was that the plaintiffs by their

purchase acquired no title, as in the lease deed of his vendor there was a definite prohibition against transfer.

7. Mr. Roy Chowdhury, the learned Advocate appearing for the appellants/plaintiffs, has first argued that the observation of the learned court

below that the plaintiffs acquired no title in the "B" Schedule property was completely erroneous. Mr. Roy Chowdhury has next argued that the

land acquisition proceedings were irregular and void. At the same time, Mr. Roy Chowdhury claimed that the plaintiffs were entitled to get the

award money in relation to their "B" Schedule property. Last of all, Mr. Roy Chowdhury has argued that even if all the reliefs claimed by the

plaintiffs fail, they are entitled to an alternative relief against the defendant No. 3 by way of refund of the purchase money.

8. Mr. Ghosh Roy, the learned Advocate for the respondent No. 3, has strenuously sought to show that the plaintiffs could not have acquired any

title in the "B" Schedule property. He has pointed out that in the lease deed, there was an absolute ban against the transfer of any portion or part of

that property and therefore, the transfer in favour of the plaintiffs was void. In that connection, he has made reference to Sections 108 and 111 of

the Transfer of Property Act.

9. Mr. Chatterjee, the learned Advocate appearing for the respondent No. 2, has argued that in any case, the question of liability of the CIT

cannot come in, as it was only the requiring body, interested only in getting the scheme implemented. Mr. Chatterjee has also submitted that the

plaintiffs got the notices.

10. It seems, the very first basic question is whether the plaintiffs acquired any title by virtue of the transfer by the defendant No. 3 to them. Ext. 2

is the decree in their favour, directing specific performance. Ext. 1 is the kobala in favour of the plaintiffs, by the defendant No. 3 but executed by

the court on his behalf. That kobala is dated the 8th October, 1963. Mr. Ghosh Roy has pointed out that there are incorrect recitals in the kobala.

Undoubtedly, the recitals in the kobala that the permission from the Alipore Collectorate was obtained must be described as wrong. But merely

because there is a wrong recital, that cannot vitiate the document and undoubtedly that is not a sufficient consideration for declaring it void. The

main question is whether by the kobala the interest in land could be transferred and was transferred. By Ext. A the Khasmahal Department had

leased out the property to the defendant No. 3 for a certain term. Out of the property demised in favour of the defendant No. 3, the "B" Schedule

property was being transferred by Ext. 1, the kobala in the plaintiffs" favour, Normally, such a transfer would be quite valid. It is the general law

that anybody having interest in the land has the right to transfer that land. Section 105 of the Transfer of Property Act defines lease as a transfer of

a right to enjoy such property, made for a certain time, expressed or imbed, or in perpetuity, for consideration. Therefore, the lease itself is a

transfer of a right in property. The person acquiring that right will, in the ordinary course, have a right to further transfer the property. That is the

ordinary incident of one"s proprietary right. And, normally, a clog upon that right is not countenanced. That will be evident from Section 10 of the

Transfer of Property Act itself. Section 10 sets out that where a property is transferred subject to a condition or limitation absolutely restraining the

transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void. An

exception is made in the case of a lease where the condition is for the benefit of the lessor. Thus, but for any special condition stipulated in a deed

of lease, the lessee would have right to transfer the property. In this case, there is a prohibition contained in Ext. A against transfer. Clause (6) of

the lease deed makes it clear that the lessee was not entitled to transfer by sale or sublease or otherwise the leasehold property or any portion

thereof. Then it is mentioned the failure to comply with the conditions set forth in Clauses (5) and (6) will render the lessee or its assignee liable to

ejectment. Thus, the prohibition against transfer is set out in Clause (6) and the consequence of violation of that condition is also clarified the

consequence, as per the lease deed itself, would be that the lessee would be liable to be ejected. That is a question as to whether the landlord

could re-enter, but the transfer itself was not rendered void. It has been pointed out before that the right to transfer is an ordinary incident of the

right to property and if there is a condition against transfer, the consequence of the breach of that condition must be considered on a plain reading

of the language. Even the deed of lease does not contemplate that the transfer itself would become void if the condition regarding ban of transfer

was violated. We do not see how for breach of a condition or covenant, the transfer itself, acknowledged by the general law, would be void. If

there is a breach of any condition, the ordinary consequence should be that the landlord would have right of re-entry. To demonstrate that, Mr.

Roy Chowdhury has referred to several decision. First, he has referred to the decision reported in Sreedhar Chandra Roy and Others Vs. Sm.

Kusum Kumari Roy and Another, There, a distinction between a condition for transfer and a covenant was made. It was held that where there was

a breach of the condition for transfer itself, the transfer became void. In the same decision it was pointed out that where a breach of covenant was

committed, the assignment would not be void, though the landlord could put an end to it as soon as the assignment came to his knowledge. In this

case, the condition or covenant, whatever may be the term applied, was not a condition or covenant for the grant of the lease itself. That is to say,

essentially it was a condition or covenant to be observed after the grant. Therefore, on the basis of the observation in the case cited just now, the

transfer in favour of the plaintiffs cannot be described as void. The next case cited by Dattatraya Mahadeo Virnodkar and Others Vs. Shripad Hari

Walke and Others, That again clarifies the position that even if the condition in the lease makes the same void on its breach, the same is voidable

and not void. That case was in connection with the right of the lessor to re-enter. In connection with that aspect, it was observed by His Lordship

that even if there was a provision for re-entry, it only gave the lessor the option to determine the lease. In this case we are not concerned with the

question of re-entry, but the decision highlights the point that even if a condition is violated, there is no ipso facto determination of the case. The

case reported in Talbot and Co. Vs. Haricharan Halwasiya and Others, also cited by Mr. Roy Chowdhury is again relating to forfeiture of a lease.

It was pointed out that the forfeiture of a lease required the operation of two factors, one a breach by the lessee of an express condition of the

lease and the other a notice by the lessor expressing his intention to determine the lease. As noticed before, the case in hand is not regarding the

right of the landlord to re-enter, but the case cited elucidates that even re-entry would not follow automatically without determination of the lease,

When such was the position with regard to forfeiture of a lease, the case here is much stronger in that the deed of transfer itself cannot be void for

the breach of any condition. The case reported in 86 CLJ 198 lays down the similar principle breach of condition makes the lease voidable at the

option of the lessor but if he does not avoid the lease the lease continues to exist. Then again, the case reported in Keshab Chandra Sarkar and

Others Vs. Gopal Chandra Chanda, cited by Mr. Roy Chowdhury lays down a similar principle. It is observed that a restrictive covenant or a

covenant entailing forfeiture of a tenancy in a case of alienation contained in a lease must be strictly construed against the lessor. In the case

reported in 10 CLJ 49, the principle was laid down that in the absence of any right of re-entry reserved in a lease, an assignment by a lessee was

operative against the lessor, notwithstanding a covenant restraining the lessee from transferring without the written permission of the lessor, Thus

the assignment was held to be operative, notwithstanding the covenant. If there was any right of re-entry reserved in lease, different consideration

would arise as between the lessor and the lessee, but, under any circumstances, the assignment must be valid as against the transferor.

11. We do not find any reach for coming to the conclusion that the deed in favour of the plaintiffs, Ext. 1 dated 8-10-63, was void from the very

inception. There is no statute rendering the transfer void. There was a condition in the agreement and that was merely concerning the right of the

lessor to re-enter. No statute or no condition in the agreement makes the transfer void. Thus, the conclusion must be reached that the plaintiffs

acquired valid title on the basis of Ext. 1, though that title could not ensure beyond the life of the lease itself, as evidenced by Ext. A. On the date of

acquisition of the plaintiffs'' ''B'' Schedule property, the plaintiffs'' valid title subsisted. That right of the plaintiffs in the property could not be

defeated.

12. Mr. Ghosh Roy, the learned Advocate for the respondent No. 3 has argued that all the decisions cited on behalf of the appellants are regarding

forfeiture, but we are not concerned here with the case of forfeiture. No doubt the question of forfeiture is not the direct question here, but the

decisions cited make it clear that even forfeiture would not be automatic consequent upon the violation of a term. If such be the position with

regard to forfeiture, the position of the plaintiffs as to whether they had initially title on the basis of the transfer, is even stronger. Mr. Ghosh Roy

has also relied upon the provision of Section 108 of the Transfer of Property Act. We do not see how Section 108 of the Transfer of Property Act

is of any assistance to, the respondent No. 3. Section 108 of the Transfer of property Act starts with in the ""absence of a contract or local usage-

to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the

liabilities mentioned in the Rules following.....''''. No doubt, these rights and liabilities of the lessor and lessee can be regulated by contract, but that

is not to say'' that any such contract would render the transfer itself invalid. It has been noticed that in the case of Dattatraya Mahadeo Virnodkar

and Others Vs. Shripad Hari Walke and Others, already referred to, it is settled that even if the condition makes the lease void on its breach, it is

voidable and not void. Such would also be the position with regard to the transfer after the lease even if it is expressed that the transfer would be

void, that would not ipso facto be void, as there is no statute declaring so. Moreover, in the case in hand, it is not even set out that in case of

transfer,, the lease or the transfer itself would become ipso facto.

13. Undoubtedly Ext. 1, the kobala in favour of the plaintiffs, could not be void, notwithstanding some wrong statements and inept handling, the

plaintiffs" title is founded on that and the same cannot be defeated.

14. Mr. Roy Chowdhury has argued that if the plaintiffs have title they are entitled to a declaration that the proceedings before the Land

Acquisition Authorities were void. That would be a too sweeping conclusion, not clearly supported by the pleadings and the documents on record.

In the plaint itself, the plaintiffs pray for a decree for a certain amount against the defendants. That is prayer (b). If a decree is sought for, that

would be on the basis of acceptance of the award and the proceedings. Prayer (a), however, seeks a declaration that the plaintiffs are entitled to

the requisite notices of the acquisition proceedings and to get the legal compensation money with statutory allowances. Even there, the proceedings

as such have not been impeached. And the plaintiffs seek to get the relief of legal compensation money with S.A. That again demonstrates that the

plaintiffs are not challenging the acquisition proceedings directly and, in fact, are claiming under the award. When the plaintiffs themselves accept

the award, it would be a rash conclusion to reach that the entire proceedings are void. It is to be found that the plaintiffs themselves did not

observe the formalities required by law. If is admitted that there was no mutation as yet in their names. Then the plaintiffs filed application before

Land Acquisition Collector after the filing of the award. It was not the proper way for making appearance. Application, dated 30-12-70 was not a

reference petition. In paragraph 5 of the plaint, it is set out that Sri P. R. Das, the representative of the plaintiffs, called on the Chief Valuer, who in

course of conversation for the first time disclosed that sanction to the said scheme had been accorded by the Government of West Bengal and that

proceedings for acquisition of the land had been started by the First Land Acquisition Collector, Calcutta. Further, as per paragraph 5 of the plaint,

the plaintiffs were asked to appear before, the First Land Acquisition Collector and to the necessary steps there. The plaintiffs did not appear in

that case. And, even now the plaintiffs claim under the award and do not in so many words pray that the proceedings and the award are void.

Such being the state of records, there cannot be any declaration that the proceedings and the award are void. Even so, the plaintiffs would not be

without any relief. The plaintiffs had subsisting title. That title could not be destroyed or could not perish in the usual course, without the intervention

of any factor. The plaintiffs'' title in the ''B'' Schedule property remained and it remains even now. The only change is that the property has by now

been acquired and a money compensation has been paid. The property, as if, has been transformed and has become money compensation by a

process of metamorphosis and that property is in the hands of the defendant No. 3. The plaintiffs must get their compensation in respect of the ''B''

Schedule property, now with the defendant No. 3. There will be a decree for that amount of compensation, calculated at the rate allowed by the

award, as against the defendant No. 3. There will be no decree against the rest of the defendants, or the defendant, State of West Bengal, acted

under the award and the defendant No. 2, a requiring body, had nothing to do with the setting of claims of this party or that party. And the

defendant No. 4 is merely a Government functionary. So the plaintiffs will get a decree against the defendant No. 3 only. It is stated that the

plaintiffs'' property acquired measures about one bigha and there is no dispute. There is also no dispute that compensation was determined Rs.

6,900 per cottah. That means, the plaintiffs are entitled to an amount of Rs. 1,38,000, minus Rs. 550 on account of proportionate shares of the

municipal tax. Thus we reach a net figure of Rs. 1,37,450. The plaintiffs have also claimed S.A. and interest at statutory rate. The plaintiffs are not

entitled to get S.A. or interest at statutory rate, because the Land Acquisition Proceedings cannot be impeached in this collateral way. The plaintiffs

have accepted the award and cannot go behind it. The plaintiffs cannot also get any further interest against any party, because they were also not

diligent enough and nobody can be blamed particularly for this state of things. So the plaintiffs can get a decree for Rs. 1,37, 450 only against the

defendant No. 3. The rest of the claims of the plaintiffs are to be dismissed.

15. The appeal, therefore, succeeds. The judgment and decree of the learned Subordinate Judge, dismissing the suit, are hereby set aside and

instead a decree against the defendant No. 3 for an amount of Rs. 1,37,450 is passed. The plaintiff''s suit against the rest of the defendants is

dismissed and their other prayers are also disallowed. We make no order for costs of this suit or this appeal. On the prayer of the learned

Advocate for the respondent No. 3, the operation of the order will remain stay for a period of three months after which this order will take effect

automatically.

Sunil Kumar Guin, J.

16. I agree.