

(1911) 12 CAL CK 0033**Calcutta High Court****Case No: None**

Tulsi Singh and Others

APPELLANT

Vs

Thakur Dayal Singh and Another

RESPONDENT

Date of Decision: Dec. 22, 1911**Citation:** 15 Ind. Cas. 718**Hon'ble Judges:** Mookerjee, J; Carnduff, J**Bench:** Division Bench

Judgement

1. This is an appeal on behalf of the plaintiffs in a suit for declaration of title to Immovable property and for recovery of possession thereof. The case for the plaintiffs is that on the 25th January 1905, they purchased this property in execution of a decree on a mortgage held by them against the admitted tenant and that although they obtained delivery of possession through Court, they were subsequently ousted by the defendants, The, case for the defendants is that they pup-chased the property in "-March 1906 in execution of a decree for rent held by a co-sharer landlord and are entitled to hold possession thereof. It is clear that the title of the plaintiffs is superior to that of the defendants, who, as purchaser at a sale in execution of a decree for rent by a co-sharer landlord, are in the same position as a purchaser at a sale held in execution of a decree for money. Bat the Courts below have dismissed the suit on the ground that the holding in question was not shown to be transferable either by custom or by local usage. It was contended in the Courts below, and the contention has been repeated in this Court on behalf of the appellant, that the question of transfer-ability could not be raised at the instance of the defendants. It has been pointed out, in the first place, that as between the tenant mortgagor and his mortgagees no question of transferability can arise. Bhagirath Changa v. Hafiz-ud-din 4 C.W.N. 679. This position has not been and cannot be disputed. It has next been argued that the defendants are the representatives in-interest of the tenant and are bound by the same estoppel as the judgment-debtor whose right, title and interest have been purchased by them. This position is supported by the decision of this Court in the cases of Ayen ud-din v.

Srish Chandra Banerjee 11 C.W.N. 76; Haro Chandra Poddar v. Umesh Chandra Bhattacharjee 5 Ind. Cas. 39 : 14 C.W.N. 71 : 11 C.L.J. 20 and Shyama Charan v. Mokhoda Sundari Debi 10 Ind. Cas. 49 : 13 C.L.J. 481 : 15 C.W.N. 703. The case of Asmatnunnessa Khatun v. Harendra Lal Biswas 12 C.W.N. 721 : 8 C.L.J. 29 : 35 C. 904, upon which the learned District Judge relied in support of his view, is clearly distinguishable. There the question of transferability was raised by the entire body of landlords, while in the case before us the question is sought to be raised by the purchasers at a sale held in execution of a decree of a co-sharer landlord. The decision in Achamulla v. Cholanunnessa Bibi 10 Ind. Cas. 928 : 13 C.L.J. 479 is also distinguishable. There no question was raised as to the estoppel which might bind the purchaser at a sale held in execution of a decree for arrears of rent obtained by a co-sharer landlord. What was argued was that as such purchaser had taken the property he had induced the plaintiff to believe that the property was transferable; for that contention, there was no foundation, because the purchase by the plaintiff had been made long before the purchase by the co-sharer landlord. Again, as pointed out in the case of Shyama Charan v. Mokhoda 10 Ind. Cas. 49 : 13 C.L.J. 481 : 15 C.W.N. 703, the decision in Achamulla v. Cholanunnessa 10 Ind. Cas. 928 : 13 C.L.J. 479 rests on the doubtful ground that the execution purchaser is not bound by the same estoppel as the judgment debtor. In our opinion, there is no room for controversy that the question of transferability cannot be raised at the instance of the defendants.

2. The result is that this appeal is allowed, the decree of the District Judge set aside and the suit decreed with costs throughout.