

Patna High Court

Mahadeo Lal vs Langat Singh And Ors. on 30 March, 1917

Equivalent citations: 40 Ind Cas 257

Author: E Chamier

Bench: E Chamier, Sharfuddin, Chapman, Mullick, Atkinson

JUDGMENT Edward Chamier, C.J.

1. The question for decision is whether the applicant, the purchaser without landlord's consent of a part of a nontransferable company holding, which has been proclaimed for sale under Section 163 of the Bengal Tenancy Act, is entitled to deposit the amount of the landlord's decree and costs under Section 170, sub Section 3 of the Act. That section provides inter alia that when an order for the sale of a holding in execution of a rent-decree has been made the holding shall not be released from attachment, unless before it is knocked down to the auction-purchaser the amount of the decree and certain costs are paid into Court, and that the judgment-debtor or any person having in the holding any interest "voidable on the sale" may pay money into Court under that section.

2. The case has been referred to this Bench partly on account of the importance of the question involved and partly because there has been a difference of opinion on the question in the Calcutta High Court, D. Chatterji and " Walmsley, JJ., having decided it in the affirmative in Sahdeo Singh v. Kuldip Singh (18) C.W.N. ccxix (219) and Jenkins C.J. and N.R. Chatterjea, J. having decided it in the negative in Mahanti Lal Sahu v. Harkissen Jha 19 C.W.N. clxxvi (176). These two oases are so far as I am aware the only oases in which the precise question has been decided. Our attention has been drawn to a large number of cases which bear more or less upon the question but they cannot be said to establish any settled *cursus curiae* on the subject which this Court ought to follow. Both sides have in this case admitted the correctness of the propositions laid down by the Full Bench in Dayamoyi v. Ananda Mohan Boy Chowdhuri 27 Ind. Cas. 61 : 42 C. 172 : 18 C.W.N. 971 : 20 C.L.J. 52 and it may be conceded that as held, in that case a purchaser with the landlord's consent of a part of a non-transferable occupancy holding has an interest in the holding sufficient to entitle him to apply after an execution sale, as a representative of the raiyat, to have the sale of the holding set aside on the ground of fraud, but the question which we have to decide is whether such a person has an interest in the holding "voidable on the sale" within the meaning of section 170 of the Act.

3. Section 159 lays down that when a holding is sold in execution of a decree of arrears due in respect thereof the purchaser shall take subject to the interest defined in Chapter XIV as "protected interests" but with power to annul the interests defined in that Chapter as incumbrances" provided that the power to annul shall be exercisable only in the manner' directed by that Chapter.

4. Section 160 shows what are protected interests." No one suggests that the applicant has a "protected interest."

5. Section 161 defines the term' incumbrance" used with reference to a tenancy as meaning any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section.

6. Section 163 provides inter alia that in the case of an occupancy holding the proclamation of sale shall announce that the holding will be sold with power to annul all incumbrances.

7. Section 166 provides that when an occupancy holding has been advertised for sale under Section 163 it shall be put to auction and sold with power to avoid all incumbrances and the purchaser at a sale under this section may in manner provided by the next following section and not otherwise annul any incumbrance on the holding.

8. Section 167 prescribes the procedure to be followed by a purchaser having power to annul encumbrances and desiring to annul the same.

9. It seems to me quite clear that the words "annul" and "avoid" as used in these sections are convertible terms, that the only interests which are "voidable on the sale" within the meaning of Section 170 are those interests which can be avoided by means of art; application under Section 167 and that the only interests which can be avoided by means of such an application are the interests defined in Section 161 as "incumbrances". The result, in my opinion, is that the answer to the question which we have to decide depends upon whether the applicant has an incumbrance as defined in Section 161. In my opinion he has not. He certainly has not either a lien, sub-tenancy, or easement." Has he "any other right or interest created by the tenant on his holding or in limitation of his own interest therein?" These words refer presumably to some right or interest which is ejusdem generis with the opening words of the definition and not to some much larger right or interest of a different description. Upon the construction of this definition I accept what was said by Jenkins, C.J. and N.R. Chatterjea, J. in *Abdul Bahtnan v. Ahatnadar Rahman* 31 Ind. Cas. 554 : C.L.J. 356 : 43 C. 558 : 19 C.W.N. 1217. That was the case of a tenure and not of a holding but the reasoning of the learned Judges applies as much to a holding as to a tenure.

10. A transferee without the landlord's Consent of a plot of land forming part of a non transferable holding may be entitled to retain possession of that plot while the tenant also retains possession of some portion of his holding, but, if an Execution sale of the holding takes place, the holding passes to the auction-purchaser and it seems to me that the previous transferee of a plot, forming part of that holding must give way to the auction-purchaser, in other words the interest of transferee of the plot, whatever it may be, is avoided by the sale and the holding passes to the auction-purchaser free from any claim on the part of the transferee.

11. Chapter XIV of the Bengal Tenancy Act appears to me to be self-contained so far as the present question is concerned and upon a construction of the various provisions contained in that Chapter, I am of opinion that the applicant is not a person who has in the holding now proclaimed for sale an interest which is "voidable on the sale" within the meaning of Section 170. I would, therefore, dismiss this application with costs. Hearing fee three gold mohurs.

Chapman, J.

12. I agree with the judgment delivered by the Chief Justice.

Atkinson, J.

13. I concur with the judgment delivered by the Chief Justice.

Sharkcddin, J.

14. The question referred to this Special Bench is one of very great importance. It is of importable to the landlords, to the occupancy ryots and to the transferees of a part of the holding. This question produced many conflicting rulings and for that reason this Special Bench was constituted in order to give a definite answer to the question put to this¹ Bench in the Letter of Reference. The question referred to this Bench is whether . a purchaser of a portion of an occupancy holding, not transferable without the consent of the landlord, can make a deposit as directed by Sub-section 3 of Section 170 of the Bengal Tenancy Act. The sub-section is to the following effect:-- "The judgment-debtor or any person having in the tenure or holding any interest voidable on the sale, may pay money into Court under this section." On the first reading of this sub-section it would no doubt appear that the wordings are most comprehensive but when we refer to other provisions of the Chapter wherein Section 170 takes its place it seems to me clear that the purchaser referred to ought not to be given a right to make the deposit.

15. In the present dispute both sides have admitted the correctness of the propositions laid down by the Full Bench in *Dayamoyi v. Ananda Mohan Roy Chowdhuri* 27 Ind. Cas. 61 : 42 C. 172 : 18 C.W.N. 971 : 20 C.L.J. 52. In this reported case it was held that after the execution sale a purchaser without the landlord's consent of a part of a nontransferable occupancy holding has an interest in that holding as a representative and has a right to apply for the setting aside of the sale on the ground of fraud but the question that we have to decide is as to whether such a person has an interest in the holding "voidable on the sale" within the meaning of Section 170 of the Act.

16. Section 171 provides that when a person having in a tenure or holding advertised for sale under this Chapter (Chapter XIV) or in execution of a certificate for arrears of rent due in respect thereof signed under the Bengal Public Demands Recovery Act of 1913 an interest which would be voidable by the sale pays into Court the amount requisite to prevent the sale:

(a) the amount so paid by him shall be deemed to be a debt at 12 per cent, per annum and secured by a mortgage of the tenure or holding to him;

(b) his mortgage shall take priority of every other charge on the tenure or holding other than a charge for arrears of rent; and

(c) he shall be entitled to possession of the tenure or holding as mortgage of the tenant and to retain possession of it as such until the date, when interest due thereon has been discharged.

17. It is clear, therefore, that in accordance with the provision of Section 171 of the Act, the purchaser of a part of a nontransferable occupancy holding, if allowed to make the deposit, becomes a mortgagee of the tenant, and as such he cannot be ousted by the landlord or by the purchaser of the

holding in execution sale and the result would, therefore, be that new purchaser would be thrust on the landlord which I think certainly cannot have been the intention of the Legislature. The Legislature in enacting the Bengal Tenancy Act had in its view the safe-guarding of the interests both of the landlords and the tenants and it seems to me from other provisions of the Act that the Legislature is against forcing a stranger on the landlord without his consent and it is on this account that it has been held that the landlord is not bound to recognise a transferee of a part of an occupancy holding not transferable by custom.

18. In the present case the purchaser is certainly not a judgment-debtor. The question is whether he is entitled to avail himself of the provision of Section 170 of the Act. Sub-section 3 of this section clearly provides that if a person has an interest voidable on the sale" he is entitled to make the deposit. The question, therefore, resolves itself into this, namely, whether a purchaser of a part of an occupancy holding not transferable by custom has an interest voidable on the sale. "In order to determine that question I think it is necessary to refer to some other sections of the Act. Section 159 of the Act refers to the general powers of a purchaser to avoid encumbrances. That section provides: "Where a tenure or holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined in this Chapter as 'protected interest' but with power to annul the interests defined in this Chapter as 'encumbrances'." As to what an encumbrance is we must refer to Section 161 of the Act and as to how an encumbrance is to be avoided we have to refer to Section 167 of the Act. On a perusal of these sections it is clear that under the provision of Section 159 a purchaser takes the tenure or holding free from encumbrances and encumbrance as defined in Section 161 can be voided or annulled under Section 167. It follows from the provisions of the sections quoted that the encumbrance holders whose interest are voidable on the sale are persons who are entitled to make the deposit. It is also to be determined whether he has any encumbrance within the meaning of the Section 161 of the Act under which section an encumbrance means a lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined by Section 160 of the Act. In order, therefore, to determine whether a purchaser of a portion of an occupancy holding not transferable by custom is entitled to make the deposit, it has to be found whether he has an encumbrance within the meaning of the Bengal Tenancy Act and if he has not such an encumbrance he has no right to make the deposit. In accordance with the definition of an encumbrance it seems to me clear that the purchaser of a part of an occupancy holding not transferable by custom is not an encumbrance holder. That being the view that I take, I hold that in the present case the purchaser had no right to make the deposit and I would, therefore, dismiss this application with costs Mullick, J.

19. I am of opinion that the petitioner is entitled to deposit the arrears under Section 170(3), Bengal Tenancy Act.

20. The matter turns upon the meaning of the words "interest voidable on the sale."

21. The learned Vakil for the opposite party contends that the words mean "incumbrance liable to annulment after the sale by the special procedure for annulment of incumbrances in Chapter XIV, Bengal Tenancy Act," and that no interest which does not fall within the definition of incumbrance

given in Section 161 can be saved by payment under Section 170.

22. To this the petitioner's first re-joinder is that he is in fact an incumbrancer. Now although there may have at one time been some foundation for the contention that the purchaser of a part of a tenure or holding is an incumbrancer the question is, I take it, now settled by the decision of Jenkins, C.J. in *Abdul Rahman v. Ahamadar Rahman* 31 Ind. Cas. 554 22 C.L.J. 356 : 43 C. 558 : 19 C.W.N. 1217 which went before him on a reference to which I was myself a party.

23. The petitioner's next contention is that even if he is not an incumbrancer the word interest in Section 170 is a wider term than incumbrance and includes rights other than those falling within the narrow limits of Section 161.

24. In my opinion this contention is well founded. Chapter IV does not in terms say that interest and incumbrance are synonymous, then why should we strain language and give the word interest a meaning it does not ordinarily possess.

25. Again if we rely on decisions in the Calcutta Court I have been able to find only one in support of this interpretation, namely *Behari Lal Pau v. Fakir Chandra Roy* 12 C.W.N. ccxxxi (231) decided by Dass, J., sitting alone.

26. On the other hand the weight of authority is wholly in favour of the view that the protection afforded by sections 170 and 173, Bengal Tenancy Act, is not limited to incumbrances.

27. In principle there is no difference in this connection between a tenure and a holding and I give below the cases which seems to me to support my view. In *Anund Lal Mookerjee v. Kalika Pershad Missr* 20 W.R. 59 : 12 B.L.R. 489 note it was held that the unregistered transferee of an under-tenure could stop a sale by payment of the arrears under Section 6, Act VIII (B.C.) 1865. That case was decided before the Tenancy Act of 1885 but it is useful as showing if the judgment of Dass, J , in 1908, is correct, then the law has materially altered the position of unregistered transferees by sale.

28. So in *Jotindra Mohan Tagore v. Durga Dale* 10 C.W.N. 438 on which case the learned Vakil for the opposite party himself relies the transferee of a whole tenure was allowed to deposit the arrears under Section 170 on the ground that he had been allowed to do so on, a previous occasion.

29. To the same effect is *Jugal Mohini Dasi v. Sri Nath Chatterjee* 7 Ind. Cas. 477 : 12 C.L.J. 609 at p. 611 where the purchase was in respect of a part of a tenure.

30. To like effect is *Radhika Nath Sarkar v. Rakhal Raj Gayen* 3 Ind. Cas 835 : 13 C.W.N. 1175 : 10 C.L.J. 473 where Jenkins, C.J. and Mookerjee, J., held that the unregistered purchaser of a share in a darpatni was entitled , to deposit under Section 171, Bengal Tenancy Act.

31. Again in *Brindarani Choudhrani v. Annoda Mohan Ray Choudry* 13 Ind. Cas. 328 : 16 C.W.N. 94 a person who had purchased a tenure long before the decree was allowed to deposit, it being held

that" although he was not strictly bound by the decree he would be allowed to deposit because he had been so allowed before.

32. In regard to occupancy holdings the purchaser of the whole or part has been allowed to deposit under sections 170 and 173, Bengal Tenancy Act in the following among other cases:

Asgar Ali v. Gouri Mohan Roy 21 Ind. Cas. 58 : 18 C.W.N. 601 : C.L.J. 257; Ahmadullah Chowdhury v. Harkaru Saha 27 Ind. Cas. 176 : 20 C.W.N. 39 : 18 C.W.N. ccxxxi (231) : 22 C.L.J. 106; Sahdeo Singh v. Kuldip Singh (18) C.W.N. ccxix (219) and Tarak Das v. Harish Chandra Banerjee 16 Ind. Cas. 977 : 17 C.W.N. 163 : 16 C.L.J. 548.

33. The last of these cases is particularly in point because there the learned Judges decided in clear terms that interest and incumbrance were not synonymous terms for the purposes of Chapter XIV.

34. The opposite party relies on Nalini Behary Roy v. Fulmani Dasi 13 Ind. Cas. 487 : 16 C.W.N. 421 : 15 C.L.J. 388. So far as I can see that is the only case in his favour, but even that decision was not based on the ground that the transferee had no incumbrance. In that case the purchaser of the whole of a non-transferable occupancy holding was held debarred from coming in under Section 170, not because he had no incumbrance but because he had no interest which was valid against the landlord.

35. The other case in which the opposite party seeks to rely is Mahanti Lal Sahu v. Harkissen Jha 19 C.W.N. clxxvi (176). In this case Jenkins, C.J. and Chatterjee, J. did not decide the point whether the purchaser of part of a non-transferable occupancy holding was entitled to deposit under Section 170. If their Lordships had thought incumbrance and interest were synonymous, they would have forthwith decided against the transferee, but they seemed to be of opinion that it was not necessary to adjudicate upon the rights of a transferee of part of a nontransferable occupancy holding if in fact the holding under consideration was a transferable one. They accordingly remanded the case.

36. In these circumstances, I am clearly of opinion that the weight of authority is against the view taken by Dass, J. in Behary Lal Pau v. Fakir Chandra Roy 12 C.W.N. ccxxxii (231).

37. The next question is whether the petitioner's interest is one voidable on the sale. The opposite party contends that it is void and not voidable. In my opinion, there is ample authority for the view that a transferee who is liable to be ejected by the auction purchaser after the sale has an interest voidable on the sale. And it will suffice to cite in support the judgment of Jenkins, C.J. and Mookerjee, J. in Radhika Nath Sarkar v. Bakhal Raj Gayen 3 Ind. Cas 835 : 13 C.W.N. 1175 : 10 C.L.J. 473. The principle is the same whether the subject-matter is a tenure or a holding, and I confess, I have some difficulty in appreciating the difference in this connection between a void and voidable interest.

38. What the Court sells is the tenure or the holding. Per se the sale cannot be said to avoid anything. By the operation of Sections 158(B) and 195, Bengal Tenancy Act, the sale gives the auction-purchaser the right to step into the shoes of the tenant subject to the limitations and the

procedure of Chapter XIV. Whether the person in possession is a transferee by purchase or an incumbrancer, the auction-purchaser cannot on being resisted re-enter without further recourse to law which in the one case is a suit and in the other the special procedure under Section 167. If as in *Brindarani Choudhrani v. Annoda Mohan Ray Choudry* 13 Ind. Cas. 328 : 16 C.W.N. 94 the person in possession is not affected by the decree then ex hypothesi his interest is not voidable on the sale. But where he is so affected the expression void on the sale" is meaningless. In fact " every interest is voidable where the decree and sale give the auction-purchaser the right to re-enter.

39. It is true that a contrary view was taken in *Jotindra Mohan Tagore v. Durga Dabe* 10 C.W.N. 438 but that case has been repeatedly dissented from (see the observations of Mookerjee, and Beachfront, JJ. in *Tarak Das Pal v. Harish Chandra Banerjee* 16 Ind. Cas. 977 : 17 C.W.N. 163 : 16 C.L.J. 548 and does not, in my opinion, correctly interpret the law.

40. And even there the Court although expressing the opinion that the transferee had no voidable interest granted his application to deposit because he had been allowed to deposit on previous occasions. In *Tarak Das Pal v. Harish Chandra Banerjee* 16 Ind. Cas. 977 : 17 C.W.N. 163 : 16 C.L.J. 548 the transferee had been in possession to the knowledge of the landlord for over 12 years, but nothing turned on this as the Court did not decide whether he had acquired a tenancy by adverse possession and held that possession qua the landlord was sufficient to give an interest voidable on sale.

41. Even in *Nalini Behari Roy v. Fulmani Dasi* 13 Ind. Cas. 487 : 16 C.W.N. 421 : 15 C.L.J. 388 which is the opposite party sheet anchor and in which the transferee of a nontransferable occupancy holding was held not entitled to deposit under Section 170, the decision was based not on the ground that the transferee did not possess a voidable interest but on the ground that his interest was not valid as against the landlord.

42. This brings me to the opposite party's third contention which is that interest in Section 170 means interest valid against the landlord at least as regards occupancy holdings.

43. In my opinion this contention must also fail.

44. It is necessary, however, to examine the decisions on the rights of the purchaser of an occupancy holding.

45. In *Gadadhar Ghose v. Midnapur Zemindari Company* 17 Ind. Cas. 126 : 16 C.L.J. 141 it was held that the purchaser of a non-transferable occupancy holding had a right to bring a suit to impeach a rent sale on the ground of fraud and in *Brahamdeo Narain Singh v. Ramdown Singh* 17 Ind. Cas. 125 : 16 C.L.J. 139 the same power was held to lie in a purchaser of a part of a non-transferable occupancy holding. In *Abdul Aziz v. Tatajuddin Sheikh* 18 C.W.N. lxxii (72) it was held that the transferee of a portion of an occupancy holding can come in under Order XXI, Rule 90 of the Civil Procedure Code of 1908, as he is a person, whose interests are affected by the sale, these words being wider than the corresponding word of Order XXI Rule 89, which corresponds to Section 310A of the Civil Procedure Code of 1882.

46. In *Azgar Ali v. Asaboddin Kazi* 9 C.W.N. 134 it was held that the transferee of a nontransferable occupancy holding is a person whose immovable property has been sold; that he is a representative of the judgment-debtor, and that he can apply under Section 173 of the Bengal Tenancy Act. In *Tarak Das Pal v. Harish Chandra Banerjee* 16 Ind. Cas. 977 : 17 C.W.N. 163 : 16 C.L.J. 548. the purchaser of a non-transferable occupancy holding was held entitled to deposit, apparently without any decision as to whether the transfer was binding upon the landlord or not. In *Bungshidhar Haldar v. Kedar Nath Mondal* 1 C.W.N. 114; *Benodini Dassi v. Peary Mohan Haldar* 8 C.W.N. 55; *Kunja Behari Mondal v. Shambhu Chandra Roy* 8 C.W.N. 232 and *Omar Ali Majhi v. Moonshi Basirudeen Ahmad* 7 C.L.J. 282 purchaser of a part of a non-transferable occupancy holding was held entitled to come in under Section 310A of the Civil Procedure Code of 1882.

47. On the other hand in *Srimati Nissa Bibi v. Radha Kishore Manikya* 11 C.W.N. 312 and *Prosunno Kumar Middar v. Rama Churn Mondal* 3 Ind Cas. 461 : 13 C.W.N.652 it was held that transferee of non-transferable occupancy holding could not come in under Section 244 or 311, Civil, Procedure Code of 1882. Again in *Nalini Behari Boy v. Fulmani Dasi* 13 Ind. Cas. 487 : 16 C.W.N. 421 : 15 C.L.J. 388 the purchaser of a nontransferable occupancy holding was held to be not entitled to come in either under Section 244 or 311, Civil Procedure Code or Section 170, Clause 3, Bengal Tenancy Act. In this case on which the opposite party places very great reliance, but the authority of which has been greatly weakened by the Full Bench decision to which I shall refer immediately the judgment proceeds On the basis that each of the above sections contemplates an interest of the same nature, namely, one which is not valid against the landlord.

48. All the above cases, however, were decided before the Full Bench decision in *Dayamoyi v. Ananda Mohan Roy Chowdhuri* 27 Ind. Cas. 61 : 42 C. 172 : 18 C.W.N. 971 : 20 C.L.J. 52. and it may be urged that in some respects the law has been altered by that decision.

49. It is necessary, therefore, to see the state of the authorities since the Full Bench decision, which both parties before us have accepted as a starting point. In *Sahdeo Singh v. Kuldeep Singh* (18) C.W.N. ccxix (219) the purchaser of part of a non-transferable holding was held entitled to deposit under Section 170, Bengal Tenancy Act. *Ahmadullah Chowdhury v. Harkaru Saha* 27 Ind. Cas. 176 : 20 C.W.N. 39 : 18 C.W.N. ccxxxi (231) : 22 C.L.J. 106 is to the same effect. In *Ahmadullah Chowdhury v. Harkaru Saha* 27 Ind. Cas. 176 : 20 C.W.N. 39 : 18 C.W.N. ccxxxi (231) : 22 C.L.J. 106 the purchaser of the whole of a nontransferable occupancy holding was held entitled to deposit under Section 170. On the other hand the opposite party relies on *Mahanti Lal Sahu v. Harkissen Jha* 19 C.W.N. clxxvi (176) but as I have already observed, that case was remanded for the trial of the question whether the land was transferable or not and the point whether the interest of the transferee was valid as against the landlord and what effect the question of the validity had on Section 170 was not gone into. In *Kali Charan Mahto v. Sheo Narain Singh* 18 C.W.N. ccxix (219) the Court held that the purchaser of a non-transferable occupancy holding cannot come in either under Section 170 of the Bengal Tenancy Act or under Section 310 A, Civil Procedure Code of 1882, but that he can come in as a representative of the judgment-debtor, under Section 244. This decision to some extent favours the petitioner, also as does *Abdul Rahman Sarkar v. Promode Behary Dutta* 28 Ind. Cas. 182 : 20 C.W.N. 40 : 2. C.L.J where the purchaser of a non-transferable occupancy holding was held not entitled to come in under Order XXI, Rule 89, of the present Civil Procedure Code. The

learned Judges in Abdul Bahman's case 28 Ind. Cas. 182 : 20 C.W.N. 40 : 2. C.L.J considered Ahmadullah Chowdhury v. Harkaru Saha 27 Ind. Cas. 176 : 20 C.W.N. 39 : 18 C.W.N. ccxxxi (231) : 22 C.L.J. 106 but they did not expressly dissent from it. In my opinion, this last case still stands good for the proposition that though the transfer of a non-transferable holding is not binding upon the landlord, it is not a bar to the transferee's paying in money under Section 170, Bengal Tenancy Act.

50. The effect of the Full Bench decision, therefore, is that so far as the transfer of a whole non-transferable holding is concerned the case of Nalini Behari Roy v. Fulmani Dasi 13 Ind. Cas. 487 : 16 C.W.N. 421 : 15 C.L.J. 388 has been overruled and Tarak Das Pal v. Harish Chandra Banerjee 16 Ind. Cas. 977 : 17 C.W.N. 163 : 16 C.L.J. 548. has been affirmed. The transferee has rights both before and after the sale in spite of the landlord's and the auction purchaser's right of re-entry.

51. In this Court the case of Rameshwar Singh v. Raghunandan Khawas 38 Ind. Cas. 337 : 1 P.L.J. 403 is in favour of the opposite party but my respectful opinion is that the correct rule has been laid down in the Calcutta High Court that the purchaser of a non-transferable occupancy is entitled to make a deposit under Section 170, Bengal Tenancy Act.

52. With regard to the transfer of a portion of a non-transferable occupancy holding the two authorities since the Full Bench decision are both in the transferee's favour in the matter of Section 170, Bengal Tenancy Act.

53. Indeed under the Full Bench decision, the transferee of a part is in much stronger position than the transferee of the whole. The Full Bench have decided that the landlord can re-enter at any moment as against the transferee of the whole, but that in respect of a part, he can only re-enter if the transfer effects a surrender or abandonment. If as generally happens in the case of a transferee of a part, there is no abandonment or surrender by the recorded tenant, the landlord's right of re-entry does not arise. The cases, therefore, which are in favour of the transferee of the whole, apply with stronger force to a transferee of a part. And the conclusion which I arrive at. is that in spite of some conflict of opinion before the Full Bench decision there is a very substantial preponderance of opinion in favour of the view that unless there is clear provision to the contrary as in Order XXI, Rule 89, of the Civil Procedure Code of 1908, the right of a transferee by sale particularly a transferee of part of a non-transferable occupancy holding to avoid the sale both before and after the sale has taken place is independent of the validity of his interest as against the landlord.

54. I am of opinion, therefore, on a consideration of the whole case that the petitioner is entitled to come in under sections 170 and 171, Bengal Tenancy Act.

55. Indeed on principle, I see no reason why the landlord should not be compelled to receive payment from a transferee in the petitioner's circumstances. A landlord is only interested in receiving his rent. If a transferee is allowed to acquire a mortgage lien under Section 171, the landlord's position is in no way worse than if the recorded tenant had mortgaged the holding himself

to the transferee, Why then if the landlord is bound to accept a deposit from a mortgagee by private contract should he be allowed to refuse payment from a mortgagee who acquires his lien by operation of law? In either case an outsider is thrust upon the landlord against his will.

56. Again the petitioner's position as defined by the Full Bench also contemplates that he should be allowed to come in under Section 170 of the Bengal Tenancy Act, Section 30A, Civil Procedure Code of 1882 was withdrawn from operation, in rent sales in Bengal and Bihar in 1907. Order XXI, Rule 89, which requires that the transferee should have an interest which gives him a title as against the landlord would also not protect him. The Full Bench, however, has held him to be competent on the ground of material irregularity and fraud to attack the sale under Order XXI, Rule 90, the terms of which are wider than those of Order XXI, Rule 89. If he is a person entitled to come in under Order XXI, Rule 90, why is he not entitled to pay up before the sale and thus to avoid the chance of further litigation. But then the opposite party says that by withdrawing the money, the landlord will be held to have accepted the petitioner as a tenant. I do not think there is any estoppel in this matter. Indeed Clause 4, Section 170 of the Eastern Bengal and Assam Tenancy Act was expressly added for the purpose of making this clear.

57. After all the object of giving the auction-purchaser the power to avoid encumbrance and other interests is not so much to facilitate his obtaining physical possession of the land as to improve his security for rent. So long as this security is not impaired there seems to be no reason why he should be permitted to interfere with the tenant's right of transfer, and if he gets his rent from the transferee he can, unless the land is being used for a purpose contrary to that of the original tenancy, have no ground of complaint. Generally speaking the right of transfer subject to the safe-guards against sub-division of the holding tends rather to enlarge than to cut down the landlord's security.

58. In this connection it is interesting to note how the Legislature in India has protected transferees from the earliest times. The first enactment with this object was Section 13, Regulation VIII of 1819, which directed that money paid by an under-raiyat to protect a superior putni taluk from sale should be considered as a loan made to the proprietor of the tenure preserved from sale by such means and the taluk so preserved should be the security of the person or persons making the advance, who were to be considered to have a lien in the same manner, as if a loan had been made upon a mortgage. The principle was apparently based upon salvage liens in England.

59. We next find that in the Sale Law of 1815, a personal remedy was given to persons other than recorded co-sharers who are interested to pay the revenue to protect their interest.

60. In the Revenue Sale Act of 1859 the same provision was made with the addition that if the depositor already holds a lien the amount paid by him shall be added to that lien.

61. Act X, 1859, which was the first Rent Code, contains no provision for payment of rent by transferees and encumbrancers, but the Rent Act of 1865 extended the provisions of Section 13 of Regulation VIII of 1819 to payments made by under-tenure-holders for the preservation of the superior tenure.

62. We finally come to Act VIII of 1885, when the elaborate provisions of Chapter XIV were enacted for further safe-guarding not only the interests of landlords but also of those claiming rights created by the tenant without the landlord's consent.

63. The Act, in my opinion, classified interests into protected interests, encumbrances, and interests other than those falling under the above two heads. It does not follow that because it prescribed a special procedure for annulling encumbrances it completely swept away the privilege conferred by Act VIII (B.C.), 1865, on persons "interested in protecting the under-tenures." In my opinion, Section 170, Act VIII, 1885, merely re-affirmed the provisions of Section 6 of the Act of 1865. We have seen that an unregistered transferee of a part of a tenure had up to 1885 been held to be entitled to acquire a mortgage lien in the under-tenure by payment of the arrears before sale. What reason is there for supposing that this privilege was taken away by the Act of 1885, and if the privilege still exists in respect of tenures then it must also exist in respect of holding for Section 170 makes no difference between the two classes of tenancy.

64. It may be that the landlord in the present case would have been entitled before suing the recorded tenant, to eject the petitioner from the land, and if so, the petitioner's interest would be capable of description as one voidable before the sale, but that is no reason why it should not also fall under the category of interests voidable on the sale. The landlord not having availed himself of his right of ejectment the petitioner is entitled to protect himself under Section 170 whether the landlord desires him to stay in the land or not.

63. The result is that I would make the rule absolute on the following grounds:

(1) The language of Section 170 of the Bengal Tenancy Act is perfectly clear and includes the interest of the petitioner, and if the Legislature had meant that interest means encumbrance it would have said so.

(2) For the same reason interest does not mean "interest valid against the landlord." Section 6, Act VIII (B.C), 1865, on which Section 170 appears to have been modelled makes no such limitation.

(3) The balance of authorities in the Calcutta High Court before the Full Bench decision is in the petitioner's favour and since the Full Bench decision while all in the Calcutta High Court are in his favour, there are none against him in this Court with the exception of *Sri Rameshwar Singh v. Raghunandan Khawas* 38 Ind. Cas. 337 : 1 P.L.J. 403 which might possibly be distinguished on the ground that it relates to the purchaser of a whole holding who is in a worse position with regard to the landlord than the purchaser of a part of a holding.

(4) The policy of the Legislature, has always been in ease of the transferee, so far as is consistent with the maintenance of the landlord's security for rent.

64. The order of the Court is that the application is dismissed with costs. Hearing fee three gold mohurs. Rule discharged.