
(1923) 07 PAT CK 0037
In the Patna High Court

Mt. Sheoraji Kuer

APPELLANT

Vs

Dhani Mian and Maharani Janki Kuer

RESPONDENT

Date of Decision : 13-07-1923

Acts Referred:

Bengal Tenancy Act, 1885 — Section 86(6), 87

Citation : AIR 1924 Patna 1

Hon'ble Judges : Dawson Miller, C.J.; Mullick, J.; Macpherson, J.; Jwala Prasad, J.; Foster, J

Bench : Full Bench

Judgement

Dawson Miller, C.J.—The plaintiff in the year 1913 took settlement from the landlord of a holding measuring about 214 bighas of land.

2. The holding in question had previously been in the occupation of Badar Ahir but had been surrendered by him to the landlord in the year 1911. Some 7 years before the surrender, namely, in the year 1904 Badar Ahir had by a registered sale-deed transferred a portion of the holding measuring 9 Coltahs 11 Dhurs to Musammat Sheoraji Kuer, the defendant No. 1. The holding was not transferable by custom and the transfer created no privity between the transferee and the landlord. The defendant No. 1 refused to give up possession to the plaintiff of the part transferred to her by Badar Ahir in 1904. The present suit is brought by the plaintiff to eject her. The landlord is also impleaded as defendant No. 2 in the suit.

3. The defendant No. 1 challenges Badar Ahir's right to surrender the portion of the holding transferred to her and disputes the landlord's right to settle it with the plaintiff after surrender. The plaintiff has paid rent for the whole holding to the landlord since he took settlement in 1913. The revisional settlement record shows the entire holding entered in the plaintiff's name, but the defendant No 1 is entered in the remarks column as in possession of the portion transferred by virtue of purchase. The defendant No. 1 was never recognised by the landlord as a tenant and her name is not entered in the landlord's sherishta, which records the plaintiff as the tenant of the whole holding. There is no suggestion of any

collusion between the landlord and Badar Ahir when the latter surrendered his holding in 1911, nor is it shown that at that time the landlord was even aware of the transfer.

4. The Munsif before whom the case came for trial found in favour of the plaintiff and gave the plaintiff a decree for possession after ejectment of the defendant.

5. The defendant appealed to the Subordinate Judge who affirmed the Munsif's decision and dismissed the appeal.

6. The defendant then preferred a second appeal to the High Court. In view of the recent Full Bench decision of the High Court at Calcutta *Syed Mohsenuidin v. Bhagoban Chandra Sutradhar* [1920] 48 Cal. 605 which is in conflict with certain earlier decisions of the same Court, and having regard to the general importance of the question involved, the case was referred to a Full Bench for determination.

7. The question for determination is whether in the circumstances above mentioned a surrender of a non-transferable holding by an occupancy raiyat to his landlord, where the raiyat has previously transferred a portion of the holding to another person, entitles the landlord to enter upon the whole holding and eject the transferee or to settle it with another tenant.

8. In approaching this question it is necessary to bear in mind the peculiar features of occupancy rights in land and the extent to which protection is given by legislation to those deriving title from the occupancy raiyat. Occupancy rights in land have long been sanctioned by custom in this part of India but it was not until 1859 that any attempt was made by the legislature to define the rights of an occupancy raiyat. Act X of 1859 by Section 6 gave every raiyat, who has cultivated or held land, not being the landlord's *zera* or private land, a right of occupancy in the land so cultivated or held by him, whether held under a *patta* or not, as long as he pays rent payable on account of the same. The section, however, did not apply to sub-lessees from raiyat holding on lease from him for a term or year by year. The 7th Section provided that nothing contained in the last preceding Section should affect the terms of any written contract for the cultivation of land entered into between a landholder and a raiyat when it contained any express stipulation contrary thereto. The raiyat was liable to ejectment for non-payment of arrears of rent, but a raiyat having rights of occupancy, could only be ejected in execution of a decree or order under the provisions of the Act. Section 19 gave the raiyat the unfettered right to relinquish his holding, after notice to the landlord, and no provision is made in the Act protecting the interest of sub-lessees or other incumbrancers deriving title from the raiyat. No mention is made in the Act of the rights of transfer. This was left then as now, entirely to custom. Apart from custom a transfer without the consent of the landlord was tantamount to abandonment entitling the landlord to re-enter and eject the transferee as a trespasser. The question in all such cases was whether there was or was not a custom of transferability. See *Ajodhya Persad v. Mt. Imam Bandi Begum* [1867] 7 W.R. 528; *Palakdhari Rai v. Manners*

[1895] 23 Cal. 179. Although no restriction was placed by the Act upon the raiyat's right of surrender, it was held by the Calcutta High Court in 1866 in *Kashi Singh v. Onraet* [1866] 5 W.R. 81 Act. X. Rul. that a raiyat holding under a lease for a fixed term did not come u/s 19 and could not without his landlord's consent relinquish the tenancy during the term. It was also held in *Hiramoni v. Ganqa Narayan Roy* [1868] 10 W.R. 384 that where a tenant who held land for a fixed term under-lets the land, he parts with his interest ("herein to the extent of the interest created by the under-lease and cannot" therefore, determine the interest of his sub lessee by surrendering his own term to the landlord. These cases, however, impose no obligation upon the landlord to recognise any incumbrance or transfer created by an occupancy raiyat who by the Act has a right of surrender. The acquisition of occupancy rights by a raiyat gave him a permanent interest in the holding which was recognised and protected by the Act, but the right of the landlord to ignore alienations made by the raiyat?, in cases where there was no custom of transfer, was always jealously maintained. Although the occupancy raiyat acquired for himself and his heirs a permanent interest, he could not, by transfer, impose upon the landlord a tenant not of his own choosing unless there existed by custom a right of transfer. The raiyat might surrender but, if he did so, the surrender was complete and the landlord could re-enter and take free of alienations or incumbrances created by the raiyat. In the case of tenure-holders as in the case of raiyats holding for a term, the law was different. They could not surrender without the landlord's consent. See *Heera Lal Pal v. Neel Monse Pal* [1873] 20 W.R. 383; *Jadunath Ghosh v. Schoene Kilburn & Co.* [1883] 9 Cal. 671. But if the landlord in such a case accepted the surrender he was in no better position than an assignee of the tenure-holder and presumably would be bound by incumbrances effected before the surrender.

9. The Act of 1859 was repealed by Act VIII (B.C.) of 1869 but no substantial improvement was made in favour of incumbrances created by the raiyat until the Bengal Tenancy Act of 1885 was passed. That Act recognised and confirmed the right of the raiyat to surrender, notwithstanding any contract between him and his landlord to the contrary, but it also conferred upon the landlord, who could not object to the surrender, certain reciprocal rights, including the right to re-enter upon the holding and either let it to another tenant or take it into cultivation himself. The tenant's right to surrender was, therefore, firmly established and he could not contract himself out of the right even by a written agreement with his landlord. But if he did surrender, then the landlord's right to re-enter and take possession was also confirmed by the Act. At the same time some protection, limited in extent, was given to sub-lessees and other incumbrancers deriving title from the raiyat. The framers of the Act would appear to have striven to give a measure of protection to sub-leases and other incumbrances whilst avoiding the risk of converting such interests into permanent transfers which would defeat the landlord's rights in cases where no transfer was permissible by custom. Section 178(3) provides as follows:

Nothing in any contract made between a landlord and a tenant after the passing

of the Act shall--(c) take away the right of a raiyat to surrender his holding in accordance with Section 86.

10. Section 86 provides by Clause 1 as follows:

A raiyat not bound by lease or other agreement for a fixed period may at the end of any agricultural year surrender his holding.

11. Clause 2 makes the raiyal liable to indemnify his landlord for the loss of rent for the next agricultural year unless three months' notice of the intention to surrender is given. Clause 5 provides that when a raiyat has surrendered his holding the landlord may enter on the holding and either let it to another or take it into cultivation himself. Clauses 6 and 7 are the only Clauses which protect incumbrancers in the case of surrender. They are as follows:

6. When a holding is subject to incumbrance secured by a registered instrument a surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer.

7. Save as provided in the last foregoing Sub-section nothing in this Section shall affect any arrangement by which a raiyat and his landlord may arrange for a surrender of the whole or a part of the holding.

12. It seems to me that the result of these provisions of the Act is that the raiyat has an absolute right of surrender subject to Clause 6 of Section 86. By that clause, where there is an incumbrance secured by a registered instrument, either the landlord or the incumbrancer can defeat the raiyat's right to surrender, but in other cases it would seem clear that neither the landlord nor the incumbrancer can object to the surrender, and the only ground upon which either of them could object is the ground mentioned in Clause 6. Nor will it avail the landlord that the raiyat had expressly agreed with him in writing not to exercise his right of surrender. I apprehend that under Clause 7 the landlord and the raiyat might enter into a valid arrangement for surrender as between themselves, but this would not affect the rights of a registered incumbrancer whose interest the landlord would be bound to recognise. Under Clause 7 the consent of the landlord is necessary and he would, therefore, be in no better position than an assignee of the tenancy who could claim no greater rights than those of his assignor. In all cases, however, not governed by Clause 6 the landlord would be bound to accept the surrender. But where he is bound his rights are clearly stated in Clause 5. He may enter on the holding and either let it to another tenant or take it into cultivation himself. Section 87 provides for cases of a voluntary abandonment by the raiyat. By that section, if the raiyat voluntarily abandons his residence, without notice to his landlord and without arranging for payment of his rent as it falls due, and ceases to cultivate his holding either by himself or by some other person, the landlord may, at the end of the agricultural year, enter on the holding and let it to another tenant or take it into cultivation himself. Provision is also made for recovery by the raiyat of possession of the land within a limited period when he can show that the abandonment was not

voluntary; and by Clause 4 where the whole or part of a holding has been sublet by registered instrument the landlord, before entering, must offer the whole holding to the sub-lessee for the remainder of the term of the sub-lease at the rent paid by the raiyat who has abandoned.

13. The sub-lessee must also, if he accepts the offer, pay up all arrears due from the raiyat. If he refuse to accept the offer, the landlord may avoid the sub-lease and enter on the holding. No provision is made in the Act protecting the interest of the transferee of a part or the whole of a non-transferable holding in cases either of surrender or abandonment. It must be conceded, I think, that the transfer of a non-transferable holding is not binding upon the landlord in the sense that it imposes upon him any obligation to recognise the transferee as his tenant. The transfer of a portion of the holding does not confer upon the landlord any right of re-entry as long as the tenant continues in possession of the remainder and pays the rent. The question was considered by a Full Bench of the Calcutta High Court in 1914 in the case of *Dayamayi v. Ananda Mohan Roy Chowdhury* [1914] 42 Cal. 172 where it was laid down as follows:

The transfer is operative against the landlord in all cases in which it is operative against the raiyat provided the landlord has given his previous or subsequent consent. Where the transfer is a sale of the whole holding the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding, but where the transfer is of a part only of the holding, or not by way of sale the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been (a) abandonment within the meaning of Section 87 of the Bengal Tenancy Act or, (b) a relinquishment of the holding, or (c) a repudiation of the tenancy.

14. According to that decision where there has been a transfer of a portion of the holding and a subsequent relinquishment by the raiyat, the landlord is entitled to enter and this appears to me to be in accordance with the provisions of the Bengal Tenancy Act, and but for the later decision of the same High Court in the case of *Syed Mohsenuddin v. Bhagaban Chandra Sutradhar* [1920] 48 Cal. 605, I should have had no hesitation in holding that the plaintiff was entitled to eject the defendant in the present case. In that case the Full Bench, without reviewing the previous decisions on the subject, decided that an occupancy raiyat, who has transferred part of his non-transferable holding, is not competent to surrender to his landlord the portion so transferred either by surrender of that portion alone or by surrender of the whole inclusive of such portion. The Court considered that this follows from the principle that no one is permitted to defeat or derogate from his own grant. The Court also considered that the raiyat's power of surrender had been extinguished by his own previous dealings with the property in transferring a portion of his holding to another person, and they applied the doctrine of the English authorities applicable to powers, which provides that where the donee of a power deals with the estate so as to create an interest inconsistent with the exercise of the power his option of exercising it becomes

extinguished.

15. The English Rule appears to be based either upon the doctrine that a person cannot derogate from his own grant or upon the principle that the power having been in fact exercised there is no property left upon which it can operate. The principles relied on are undoubtedly sound and salutary principles of law, but, in applying them, one must be certain that the circumstances are such as attract their operation. It is necessary to consider in the first place what was transferred in the present case. The transfer was certainly not an assignment of the whole interest of the raiyat even in the portion transferred. It created no privity between the landlord and the transferee, the holding being of the description known as non-transferable." The right of surrender, one of the incidents of a raiyati interest, was not transferred. The landlord would not have been bound to accept a surrender from the transferee. That right remained with the transferor. The short question is, can the raiyat by a contract with a third party defeat the landlord's statutory rights in the event of a surrender. Both parties to the transfer knew the limitation of the raiyat's power of transfer. Both parties knew the landlord's rights in the event of a surrender or abandonment. No express covenant was made agreeing not to surrender, although in the present case it would make no difference, in my opinion, whether the covenant were expressed or merely implied. The result of enforcing such a covenant so as to bind the landlord would be, as it seems to me, to permit the raiyat by a contract with a third party, in effect, to bring about that which by law he can only do with his landlord's consent, and the transferee must be taken to have known that without the landlord's consent he could acquire no interest in the property which would be in derogation of the landlord's right. The Act limits the raiyat's powers of surrender only in a certain specified case, namely, that mentioned in Clause 6 of Section 86, and by implication affirms it in all other cases. It seems to me to follow from this that unless the case falls within Clause 6, the landlord is bound to accept the surrender and cannot object on the ground that the raiyat has created incumbrances or otherwise dealt with the land in a manner not contemplated by Clause 6. But if the landlord is bound by the surrender his rights under Clause 5 come into operation and entitle him to enter on the land and eject any one not protected under Clause 6. To hold otherwise would, in my opinion, place the landlord entirely at the mercy of the raiyat in compelling him to recognise a transfer where by custom no transfer is permissible. If the surrender is not valid the landlord can only look to the raiyat, unwilling any longer to remain on the land, for his rent. He cannot eject the transferee or even claim rent from him as he is not his tenant. He may even have strong objections to recognise him as a tenant. But to accept rent from him is to recognise him as a tenant. It may be argued that if the rent is not paid a rent suit can be brought and the property can be sold with power to annul incumbrances or other unprotected dealings with the land, but it would appear to follow as a corollary of the appellant's argument that there is also an implied covenant by the transferor to pay the rent and perform all acts necessary to keep alive the tenancy and that

the occupancy raiyat, who has transferred a portion of his non-transferable holding, is no longer entitled in law either to surrender or abandon or to fail to pay his rent or perform any of the other obligations, the failure to perform which would entitle the landlord to re-enter or, after decree, to sell the property with power to annul incumbrances. If the argument is pushed to its logical conclusion, I doubt very much if a raiyat, being the last of his line with no one to succeed him, would even be entitled to die. Certainly, the question would arise if he voluntarily put an end to his own life. There is, in my opinion, no good ground for applying the doctrine applicable to assignees in the case of English lease to a case of surrender under the Bengal Tenancy Act. In England the law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment, *Walter v. Yalden* [1902] L.R. 2. If he has created under-leases or incumbrances upon his own interest, they remain notwithstanding the surrender, the reason being that he cannot convey to his landlord, any more than to any one else, that which he had already parted with to another. In England the landlord is in no different position from a third party in this respect. The incidents of an English lease are the creation of contract between the landlord and his tenant and the landlord's consent is necessary to a surrender. The incidents of an occupancy holding in this country are the creation of statute based on custom, and the consent of the landlord is not necessary to validate a surrender. In England a landlord may or may not accept a surrender, but, if he does, he take an assignment only of that which the tenant has not already parted with. An occupancy raiyat in India can create no incumbrances which a landlord entitled to re-enter is bound to recognise, except as provided by the statute. He cannot legally transfer at all so as to compel the landlord to recognise the transferee unless the landlord consents or unless the transfer is sanctioned by custom. Even in the case of sub-leases protection is only given to those created by registered instrument and by Section 85 of the Act sub-leases for a term of more than 9 years cannot be admitted to registration. It would be a strange result if a transfer which is not recognised by the statute at all, and which the raiyat cannot bind his landlord to recognise, conferred a permanent interest upon the transferee and gave him rights even greater than those of incumbrancers protected by the statute. There is obviously a difference! between the effect of a surrender within Clause 1 of Section 86 and the arrangement contemplated in Clause 7 of that section. The latter requires the consent of both landlord and raiyat and is a mutual arrangement in their general interest upon terms agreed between them. It cannot affect the rights of third parties. It is analogous to a surrender in English law which is really an assignment to the landlord of the rights remaining in the tenant and the English doctrine may well apply to such a case. The former depends solely on the will of the raiyat. The landlord has no say in the matter, and the tenant's motives are, apart from fraud or collusion, immaterial. But once it is conceded that the tenant cannot legally transfer that which by custom is not transferable so as to bind his landlord and, in effect, limit the rights given to the latter by statute, the Court, should, in my opinion, be slow in such cases to give binding effect to such

transfers by applying doctrines which, although applicable to surrender in favour of a landlord whose consent is a necessary condition of the surrender, appear to have no application in the case of a landlord who is bound. If it is a question of which of two innocent parties must suffer, I think, the equities are all in favour of the landlord, who is bound by the surrender, rather than of the transferee, who takes what he knows must be a precarious interest depending largely upon future circumstances or even upon the good will of his transferor. In such a case I consider that the transferee's remedy should be confined to such compensation as he may be able to obtain from his transferor.

16. Moreover if a transfer of a portion of non-transferable holding by the raiyat prevents him and his heirs ever afterwards from making a valid surrender, it must be conceded, I think, that a sub-lease or a mortgage or any other dealing with the property creating an incumbrance, even by an unregistered instrument, would have the same effect. If that be so it was quite unnecessary for the legislature to enact Clause 6 of Section 86 of the Bengal Tenancy Act as, even without legislation, no surrender would be valid, so as to entitle the landlord to re-enter without the consent of the incumbrancer in the case contemplated in the clause: nor indeed in any case where an incumbrance, registered or unregistered, existed.

17. It must be remembered that in the present case no question arises of collusion between the landlord and the raiyat with a view to defeating the rights of the transferee. The surrender was made 7 years after the transfer and it may be presumed that the tenant had good reasons for wishing to surrender. It was made after due notice within the meaning of Section 86(2). The landlord is not shown to have been aware even of the transfer and no objection could be made by him entitling him to refuse to accept it. There was no question of an arrangement under the provisions of Clause 7 of Section 86. The facts were not exactly similar to those in the case of *Syed Mohsenuddin v. Bhagaban Chandra Sutradhar* [1920] 48 Cal. 605. In that case the tenants transferred a portion of their holding and shortly afterwards when sued by the landlord for arrears of rent refused to pay the rent of the entire holding on the ground that they had transferred a portion.

18. This was no defence to the suit but the parties came to an arrangement whereby the tenants surrendered to their landlord the land they had sold and took a fresh settlement of the remainder at a lower rent than that which was payable for the whole holding and a decree in the rent suit was passed for a smaller sum than that which had been claimed. The landlord then instituted a suit to eject the transferee from the plots in his possession. It was in that suit that the Court refused to give the landlord a decree ejecting the transferee. Whether, in the circumstances of that case, the Court was justified in dismissing the landlord's suit for the reason given, it is unnecessary for the purpose of the case to determine. The case was very like one of an arrangement under Clause 7 of Section 86, but if the Court meant to lay down that in no case could the raiyat

surrender where he had transferred a portion of his non-transferable holding, I find myself, with great respect to the learned Judges who decided that case, unable to follow their decision.

19. The only other point was whether the transfer in the present case was an incumbrance within the meaning of Section 86 of the Bengal Tenancy Act. If the sale was not an incumbrance it can make no difference that it was effected by registered instrument.

20. The term "incumbrance" is denned in Section 161 of the Act but the definition there given is declared to be for the purposes of Chapter XIV only, which does not include Section 86. The definition therefore is not applicable to the word "incumbrance" as used in Section 86. At the same time the meaning attributed to the word in Section 161 is of wide import and includes, in addition to any lien, sub-tenancy or easement, any 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 Section 160.

21. A Full Bench of this Court in *Mahadeo Lal v. Langat Singh* [1917] 1 P.L.W. 504 unanimously decided that a purchaser from a raiyat of a portion of a nontransferable occupancy holding without the landlord's consent is not an incumbrancer and the majority of the Bench considered that he had not an interest within the meaning of that section. In so far as this Court is concerned, I think we are bound by that decision.

22. The question has also been considered by the Calcutta High Court on more than one occasion. It is sufficient to refer to the decision of Sir. L. Jenkins, C.J. in *Abdul Rahman Chowdhuri v. Ahmadar Rahman* [1915] 43 Cal. 558. The question there related to a sale of a portion of a tenure but the grounds of the decision apply with equal force to a holding. The learned Chief Justice there points out that an incumbrance would not ordinarily mean or include an absolute assignment nor would an assignment be a right or interest created in the tenure. He then considered whether the transferee's interest would fall within the definition in Section 161 and held that it would not.

23. In my opinion a sale of the whole or a portion of an occupancy raiyati interest creates no incumbrance upon that interest. The interest remains unimpaired; the ownership alone has changed. No sub-tenancy is created between the vendor and vendee. Both the part transferred and the part retained remain whole and unincumbered. The word "incumbrance" implies a subsidiary interest charged upon or carved out of a parent estate, such as a lease, mortgage, charge, easement or other interest limiting the full rights of ownership in the estate to which it appertains. It is something which affects the quality of the parent estate making it something less than it was before the incumbrance was created. A division of the estate between two or more owners does not, in my opinion, impair its quality or incumber it in any way. I would dismiss the appeal with costs.

Mullick, J.

24. I am of the same opinion as learned Chief Justice, but I think it will be useful to examine the history of the legislation relating to the sale and surrender of occupancy rights and to the portection of derivative titles and also to refer to the case-law on the subject.

25. Although occupancy rights in land were sanctioned by custom long before the accession of the East India Company to the Dewani, the first legislative enactment, which affirmed and defined the right in respect of agricultural tenancies was Act X of 1859. The occupancy raiyat was thereby permitted to sub-let for a term or year by year and the determination of the tenancy by reason of forfeiture or any other cause carried with it the termination of the sub-tenancy also.

26. With regard to the transfer by sale or mortgage of an occupancy holding not transferable by custom without the consent of the landlord, the Act was silent; but it was then as now, settled law that such a transfer was an abandonment and that it entitled the landlord to eject the transferee as a trespasser.

27. As to surrender, Section 19 of the Act empowered a raiyat to relinquish the land after notice to the landlord, who was thereupon entitled to re-enter and to eject all sub-tenants, incumbrancers and other transferees. It was apparently not then thought necessary to protect persons who held under derivative titles from the raiyat and no, such transferees had any right to remain upon the land as against a landlord who had re-entered.

28. But although Act X of 1859 did not place any restriction upon the right of a raiyat to relinquish his lease, it was held in 1866 by a Division Bench of the Calcutta High Court in *Kashee Singh v. Onraet* [1866] 5 W.R. 81 Act. X Rul., that a raiyat who had taken a lease for a fixed term could not under 8. 19 of the Act throw it up during its currency.

29. Two years later it was held in *Hiramoni v. Gunga Narain Roy* [1868] 10 W.R. 384, that a tenant who holds land for a term and under-lets it, cannot determine the interest of his under-tenant by surrendering his own term to the landlord. It is necessary to observe that Sir Barnes Peacock in that case was careful to speak of a tenant and not a raiyat; a tenure-holder, according to the law as it then stood and as it stands now, could not surrender without the consent of his landlord nor could he in any event prejudice the rights of subordinate tenure-holders under him: See *Hira Lal Pal v. Nilmoni Pal* [1873] 20 W.R. 383. To the same effect is *Jadunath Ghosh v. Schoene Kilburn & Co.* [1883] 9 Cal. 671, where the law was stated as follows by Field, J:

Of course the Zamindar may, if he chooses, accept the relinquishment of the Patni but by doing so he is in no better position than an assignee of the patnidar.

30. And referring to *Kowla Kant Mukherjee v. Ram Mohan Goswami* 2 Sel. Rep. 325, the learned Judge further observed:

This case certainly does not show that either by the law or the custom of the country, a Patnidar has any right of his own motion to relinquish his tenure and thereby free himself from future liability for rent.

31. These last two cases were decided after Act X had been repealed by Act VIII (B. C.) of 1869 and no substantial improvement was made in the rights of transferees till enactment of Act VIII of 1885.

32. Section 85 of that Act made it competent to any raiyat to sublet either orally or by unregistered instrument with the consent of his landlord and to sub-let by registered instrument for a term not exceeding 9 years Without the consent of his landlord. Section 86, while re-affirming the provisions of the old law with regard to surrender by a raiyat not bound by a lease or other agreement for a fixed period, provided that when a holding is subject to an incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer. Clause (5) provided that when a raiyat surrenders his holding the landlord may enter upon the holding and either let it to another tenant or take it into cultivation himself: and Section 178 introduced a most important change, namely that a raiyat could not contract himself out of the right of surrender.

33. In my opinion the proper interpretation of Section 86 of the Act is that upon the surrender of an entire holding the landlord is entitled to eject every occupant on the land except those protected by Clause (6) of the section.

34. This view is supported by *Nilkanta Chaki v. Ghatoo Sheikh* 4 C.W.N. 667, where an occupancy raiyat sub-let without a registered lease and without the consent of his landlord and the Court held that upon the surrender of the whole holding the landlord was entitled to eject the under-raiyat without notice. So again in *Badan Chandra Das v. Rajeswari Debya* 2 Cri.L.J. 570, it was held that Section 22 of the Bengal Tenancy Act did not cover a case of surrender and that u/s 86 whether the surrender was of a whole or a part, the landlord's right of re-entry was undoubted and the learned Judges distinguished *Amirulla Mahomed v. Nazir Mahomed* [1904] 31 Cal. 932, on the ground that a landlord taking by assignment from the raiyat was bound by the contracts made by the raiyat but that he was not so bound after a surrender. To the same effect were *Rajendro Kishore Adhikari v. Chandra Nath Dutt* 12 C.W.N. 878, *Ganga Chandra Chowdhury v. Alak Chand Saha* 17 C.W.N. 698, and *Ramadar Singh v. William Cox* 19 C.W.N. 268. In this last mentioned case it was held that the landlord after surrender by the raiyat could not, by letting out the land to another raiyat, eject a registered mortgagee holding under the former raiyat; and although reference was made to *Walter v. Yalden* [1902] L.R. 2 K.B. 304, and to the doctrine in English law that a lessee cannot effect by surrender anything that he cannot do by assignment to a third person, the learned Judges certainly did not say that the protection could in the face of the provisions of Section 86, be applied to any but registered incumbrancers.

35. What then is the position of the purchaser of a portion of an occupancy holding?

36. If he is not an incumbrancer within the meaning of Section 86 then Section 86 does not protect him. It was held in *Tamizuddin Khan v. Khoda Nawaz* 14 C.W.N. 229, that such a purchaser was not an incumbrancer and that upon the raiyat's surrendering the transferred portion the landlord was entitled to re-enter. That case was followed in *Ramani Mohan Roy v. Sheikh Kalimuddi* 17 C.W.N. 1101, but a note of warning was sounded for the first time in *Assar Ali v. Gowri Mohan* 18 C.W.N. 601. There although the transferee was maintained in possession because the surrender to the landlord was collusive, the correctness of the decision in *Tamizuddin's* case 14 C.W.N. 229 was questioned but on grounds other than the ground that a grantor could not derogate from his grant.

37. In the following year came the Full Bench decision in *Dayamayi v. Anand Mohan Ray* [1914] 42 Cal. 172, where it was laid down in clear and unmistakable language that upon a transfer of a part of an untransferable occupancy holding the landlord is not ordinarily entitled to re-enter unless there has been (a) abandonment u/s 87, or (b) relinquishment of the holding, or (c) repudiation of the tenancy.

38. Next on the footing that the Full Bench had re-affirmed the old law, it was held in *Kunj Kishore Lal v. Bama Sundari Dassee* [1915] 43 Cal. 878 that where a tenant declined to pay rent for the whole holding after transferring a portion thereof, the landlord was entitled to re-enter and take possession of the holding.

39. But shortly before this a precisely opposite view had been taken in *Ananda Mohan Chowdhury v. Gurudayal Saha* 22 C.W.N. 965. In that case D. Chatterji, J. held that as the Full Bench had decided that a transfer of a portion was binding between the transferee and the transferor and that the landlord could not sue to eject the transferee so long as the contract between him and the raiyat subsisted and also as Clauses (5), (6) and (7) of Section 86 were not applicable to the surrender only of a part of the holding, there was no provision of law under which the landlord could eject the transferee. The learned Judge further held that the raiyat could not derogate from his grant and that the surrender was in fact an assignment. In 1917, that decision was affirmed in a Letters Patent Appeal, the judgment in which runs as follows:

We think this case was rightly decided by Mr. Justice D. Chatterji. The appeal must, therefore, be dismissed with costs.

40. In the following year the question again came up for decision in *Tamiz Munshi v. Bisweswari Debya* 22 C.W.N. 967. In that case there was a sale of the holding, then a surrender by raiyat of that part and then the taking of a new settlement of the balance of the holding; and it was contended that these operations had resulted in a surrender of the whole and that the landlord was entitled to eject the transferee from the portion which he had purchased. Mr. Justice D. Chatterji again adhered to his former view while Mr. Justice Newbould

was of opinion that *Tamizuddin Khan v. Khoda Nawaz Khan* 14 C.W.N. 229 and *Ramani Mohan Hay v. Sheikh Kalimuddin* 17 C.W.N. 1101 were correctly decided. The case finally went in appeal before a Bench of three Judges and Mr. Justice Newbould's view was affirmed, it being held that the relinquishment of a part of a holding and the taking of a new settlement of the remainder operates as a surrender of the whole, expressly as to the former and impliedly as to the latter.

41. The controversy, however, was not ended and shortly afterwards in *Sheikh Dastoor Ali v. Ram Kumar Gope* 22 C.W.N. 972 there was a difference of opinion between Teunon and Richardson, JJ., the former relying upon *Ananda Mohan v. Gurudayal* 22 C.W.N. 965 and being also of opinion that the sale of a part of a holding was an incumbrance within the meaning of Section 86, and the latter relying upon *Sheikh Tamiz Munshi v. Bisweswari Debya* 22 C.W.N. 967. The latter learned Judge's opinion prevailed as it agreed with that of the lower Court.

42. Two years later the question again came up for consideration in *Syed Mohsenwldin v. Bhagaban Chandra Sutradhar* [1920] 48 Cal. 605 and was referred to a Full Bench of 5 Judges who held that a raiyal who had transferred a part of his holding was not competent to surrender either the whole or a part. The learned Judges in arriving at the result did not consider it necessary to refer to the previous case-law on the subject and decided the case on the sole ground that a grantor cannot be permitted to derogate from his grant.

43. Now in the case before us there is no dispute as to the facts and unless the transferee, who is the purchaser of a part of an untransferable occupancy holding and who holds under a registered deed of sale can be considered to be an incumbrancer within the meaning of Section 86, B.T. Act, or unless we can apply the Rule of equity upon which the learned Judges of the Calcutta High Court have proceeded, his appeal must fail and the plaintiff must succeed.

44. Assuming for a moment that the decision of the Full Bench of this Court in *Mahadeo Lal v. Langat Singh* [1917] 1 P.L.W. 504 as to the meaning of the word "incumbrance" in Chapter XIV of the Bengal Tenancy Act applies also to Section 86, it seems to me that we ought not to disregard the whole course of previous legislation and the decided cases simply because they appear to conflict with an established Rule of equity.

45. It may be asked at the outset, does Section 86 admit of the application of the Rule at all or has it by expressly including incumbrances in Clause (6) by implication excluded all other forms of transfer. I think an examination of the previous legislation and case-law leads to the conclusion that the answer is in the affirmative.

46. It is, however, said that the ordinary Rule of construction does not apply to Section 86, that the Bengal Tenancy Act is not exhaustive and that in the absence of any special provisions regarding a purchaser of a portion of an occupancy holding the general principles of contract which are of universal application must prevail.

47. Even if we assume that the maxim *expressio unius est exclusio alterius* is not intended to be applied to Section 86, I do not think the equities here are in the transferee's favour.

48. In the first place the Section itself forbids the application of the Rule to incumbrances which are not registered and to that extent modifies it; and if the law is not disposed to regard unregistered incumbrancers with any great tenderness, why then is it necessary to credit it with a more benevolent disposition towards transferees by sale.

49. In the next place both the occupancy right and the right to surrender are creatures of statute. Ordinarily the landlord here has no opportunity of protecting himself against assignments and in the circumstances it would be unfair to strengthen the position of the assignee.

50. In the third place unless there is the strongest necessity the equitable doctrine that a grantor cannot derogate from his grant ought not to be applied here against an innocent third party. The transferee can compensate himself by an action for damages against his transferor and to hold that the surrender is invalid is to go even further than is contemplated by the analogous provision of Section 115 of the Transfer of Property Act.

51. In the fourth place the transferee was fully aware of the title he was buying.

52. It is true that the doctrine was applied by Sir Barnes Peacock in *Hiramon v. Gunga Narain* [1868] 10 W.R. 384 in the case of a tenant holding for a term, but it has, so far as I am aware, never been applied to the case of an occupancy raiyat.

53. A reference to Section 115 of the Transfer of Property Act also clearly shows the deliberate intention of the legislature to discriminate between agricultural and non-agricultural tenancies. That Section provides not that the surrender shall be invalid but that it shall not prejudice the rights of an under-lessee who, unless the surrender is made for the purpose of obtaining a new lease, shall hold the land under the contracts which were binding upon his lessor. It expressly makes a difference between surrender and forfeiture and directs that upon forfeiture, unless the forfeiture has been procured by the lessor in fraud of the under-lessees, the under-lease shall be annulled with regard to agricultural lands, the law has already gone as far as it can; it has affirmed the Rule that tenures affected by the Bengal Tenancy Act cannot be surrendered except by agreement with the landlord and apart from Section 86 it has provided for the protection of under-raiyats against abandonment and distraint. Having regard to the jealousy with which the law has looked upon the sale of occupancy holdings, I do not think we should extend the protection given to vendees without a clear and unequivocal expression of its intention-

54. To test the applicability of the Rule it is only necessary to inquire what will be the position of the landlord if the Rule is so enforced. In the absence of any fraud

or collusion (of which there is no question in the present case) it may be presumed that the raiyat has surrendered because he finds himself unable to cultivate the remaining portion of the holding. If the law declines to allow him to surrender he will leave that part of the holding uncultivated and the landlord's only remedy will be to sue him for the rent of the whole holding and to take possession in execution of his decree. It may be wrong to allow the transferor to derogate from his grant but it is no less inequitable that the landlord should be put to the harassment of a civil suit instead of being able to avail himself of the more summary process of Section 86. It must also be remembered that since the days of the Permanent Settlement the object of tenancy legislation has been to promote the cultivation of waste land so that landlords might be enabled to realize to the fullest extent the income of the lands settled with them and might meet with punctuality their engagements with Government; no; should it be forgotten that the Rules regarding transfer, surrender and abandonment which have their origin in special local and financial conditions can ever be expected to correspond closely with those applicable to English tenures. It was never intended that simply because he has sold a portion of his land the landlord must be forced to keep an unwilling raiyat upon his holding; nothing could be more detrimental to good husbandry.

55. Applying yet another test we may ask what is to be the position of the landlord, if the tenant wilfully defaults payment of rent or incurs forfeiture by a breach of covenant or abandons the land. If the Rule is to be applied logically the landlord would have no right even in those cases to re-enter so as to destroy the right of the transferee, a result which apart from fraud would be in the highest degree inequitable.

56. Or, to take an extreme case, suppose again that the tenant dies intestate and without heirs and by his own hand. Is the landlord to be deprived of his right of reversion in that case also?

57. The truth is that like all equitable maxims the Rule has its limitations and to apply it in the present connection would be to produce evils far greater than those it is sought to remedy.

58. The result then is that when a raiyat of an occupancy holding surrenders the entire holding after having sold a part of it the landlord is entitled to re-enter and eject the transferee for the following among other reasons

(1) The transferee does not acquire the status of a tenant and the landlord is not bound to recognize him.

(2) The transferor continues to be the sole tenant of the landlord for the purpose of ejectment u/s 84 of the Bengal Tenancy Act, enhancement u/s 30, suits for rent under S, 65, acquisition of land u/s 84, abandonment u/s 87, distraint under Chapter XII and sale proceedings under Chapter XIV.

(3) To deny the landlord the right to re-enter is tantamount to compelling him to

recognize the transfer of a part.

(4) The provisions of Clauses (6) and (7) of Section 86 of the Act make it clear that the purchaser of a holding is not protected and that the raiyat may come to any arrangement he likes with his landlord even though it be to the purchaser's detriment.

59. With regard to the surrender of a part of the holding, Section 86 shows that the right of surrender in this case is conditional on the landlord's consent; but once the landlord does consent the position is the same as in the case of the surrender of the entire holding. In effect the surrender of a portion of the holding, whether it be of the portion already transferred or of the other portion, entails a surrender of the entire holding and the creation of a new holding and therefore, the landlord's right to eject the transferee remains unaffected. The position is very similar to that where an occupancy raiyat sells a part of his holding to one man and the rest to another. The landlord's right of re-entry is based upon the view that the transfer of the entire holding by sale constitutes abandonment. I take it that the sale of a portion and the surrender of the rest has the same result.

60. In this view of the matter it is not necessary to devote much discussion to the English cases on the subject of powers.

61. It is an established Rule that where a person is possessed of a power (other than a power coupled with a trust) to dispose of property, he will not be permitted to exercise that power, if he has by his own act disentitled himself from such exercise. But the Rule has special reference to powers created by deed or will; it is not based on estoppel but on the principle that the power having been in fact exercised there is no property left upon which it can operate and in *Foakes v. Jackson* [1900] 1 Ch. 807, approving in *re Hancock* [1896] 2 Ch. 173, the Rule is stated by Farwell, J. as follows:

Any dealing with the estate by the donee of a power inconsistent with the exercise of the power, must put an end to it.

62. On the other hand in *Nottidge v. Bering* [1910] 1 Ch. 297, it was held that in the circumstances of that case the donee's power to a point persons had not been released by his concurrence in a disentailing deed. In this connection the question also frequently arises whether the power of a tenant for life to consent to a sale is affected by the alienation of or incumbrances upon his life-estate. It has been held that ordinarily the power cannot be exercised so as to prejudice the rights of the donee but that, where the deed contains an actual or implied recognition of the liability of the property to conversion, the power of the tenant for life is unaffected in cases of mere equitable powers: *Hurst v. Hurst* [1852] 16 Beav. 372. In my opinion, it is not possible to apply these technical Rules relating to settlements to tenants' rights created by statute.

63. Moreover I think that in the present case the raiyat has done nothing

inconsistent with or in derogation of his grant. The alienee knew that the law gave the raiyat the power of surrender by which his own interest was liable to be determined. In truth there is here no derogation at all from the grant and if it were necessary to refer to any legal maxim, I would be inclined to say that the more appropriate Rule is "Cessaide statu primitivo raiyat derivativus" That Rule applies not only to remainder-men and reversioners of estates defeasible on the death of the life-tenant (unless confirmed by the remainder-men or reversioners) but also to titles derived from estates which are limited by conditions and which are liable to be defeated by the acts of their owners, as by the marriage of a "tenant durante viduitate" or by the resignation of the person who has leased the glebe lands or tithes belonging to the living. The principle is not different from that applicable to service tenures in India and I can see no reason why the result which follows when a service tenure-holder relinquishes his service after alienating a part of the tenure should not follow when an occupancy raiyat surrenders after selling a portion of his holding.

64. I think, therefore, that it would be inequitable to apply the English Law in a country where the law of agricultural tenancies has been evolved of conditions peculiar to itself, where free transfer is not ordinarily permitted and where statutory rights unknown in England are conferred on the landlord; and I take it that this aspect of the matter could not have been overlooked by the learned C. J., Sir Lawrence Jenkins and his colleagues in Dayamoye's case [1914] 42 Cal. 172 when they laid down the Rule that the landlord is ordinarily entitled to reenter if the occupancy raiyat relinquishes his holding after transferring a part of it. It may be said that the learned Chief Justice was perhaps not considering the case of surrender and that the decision does not show whether this was the precise question referred to the Full Bench, and that rather than weaken its authority in any way by further discussion it would be wiser to accept the English rule. Apart from the general consideration that the English Rule cannot be applied here, I think that "the language of the learned Chief Justice was guarded and deliberate and that it was intended to cover the case of surrenders.

65. In so far as the transferor has by his surrender damnified the transferee by committing a breach of any implied covenant the obligation may be viewed as one personal to the transferor and capable of being discharged by payment of damages. It is not necessary for the protection of the transferee to declare that the surrender itself shall be inoperative.

66. There remains the question whether the transferee in the present case can be considered to be an incumbrancer within the meaning of S 86 of the Bengal Tenancy Act. It may be contended that for the purposes of Section 86 the term "incumbrance" has a wider meaning than that given to it by definition in Chapter XIV. The contention is arguable, but I doubt whether in view of the Full Bench decision of this Court in Mahadeo Lal v. Langat Singh [1917] 1 P.L.W. 504, which followed the decision of Jenkins C. J., Abdul Rahman Chaudhry v. Ahmadar Rahman [1915] 43 Cal. 558, it will serve any useful purpose to re-open

controversy. The majority of the Judges in both the above cases held that with reference to a tenancy the term "incumbrance, connotes an interest subordinate to and different in quality from the parent interest and does not connote merely a difference in quantity. For the sake of finality I would be inclined to accept this view.

67. It follows, therefore, that the transferee in the present case has no right to remain in possession as against the landlord and the landlord's lessee; therefore, the appeal should be dismissed.

Jwala Prasad, J.

68. The facts upon which this reference has been made are as follows:

One Badar Ahir had a holding of 2 bighas 11 kathas in mama Pursot-tarapur belonging to defendant No. 2 as the proprietor thereof. Badar sold 9 kathas 7 dhurs of it to defendant No. 1 by a registered kabala, dated the 11th June 1904. In 1911 (1318) he surrendered, through Civil Court, his entire holding in favour of the Thikaia of the proprietor, the then landlord. The landlord settled the entire holding with the plaintiff whose land was recorded in the revisional settlement. The plot in dispute, Survey No. 486 (9 kathas, 7 dhurs) which was purchased by defendant No. 1 was recorded as being in his possession. The plaintiff therefore could not get possession of this disputed plot and accordingly he commenced an action in the Court of the Munsif of Champaran for ejecting the defendant No. 1 and succeeded in both the Courts below in obtaining a decree in his favour for khas possession with mesne profits. The defendant No. 1. came to this Court in second appeal. The appeal was heard by a Division Bench of the Court which by an order of 12th February 1923 referred the case for decision by a Full Bench inasmuch as the decision of the appeal depended upon a question of law of general importance and upon which there was no previous decision of this Court.

69. The holding in question is a non-transferable one. The tenant of the holding first transferred a part of it to defendant No. 1 and subsequently surrendered the entire holding in favour of the landlord. The question therefore raised in the order of reference is: where an occupancy raiyat has transferred a part of his non-transferable holding, is he competent afterwards to surrender to his landlord the whole holding so as to entitle the landlord under Clause (5) of Section 86 of the Bengal Tenancy Act to enter on the holding inclusive of the portion previously transferred by the tenant and either to let it to another tenant or take it into cultivation himself, to use the words of the clause?

70. The Calcutta High Court after a good deal of conflict of decision has recently in the Full Bench case of Syed Mohsenuidin v. Bhagaban Chandra Sutradhar [1920] 48 Cal. 605 answered the question in the negative. The decision of the case has been based upon the well-known principle that no one can be permitted to derogate from his own grant and that a person vested with a power must extinguish that power if he has dealt with his estate and created interest inconsistent with the exercise of that power. Applying these principles the learned

Chief Justice, (Mookerjee, A.C.J.) held that an occupancy raiyat by transferring a part of his non-transferable holding renders himself incompetent to exercise his right of surrender u/s 86 of the Bengal Tenancy Act with respect to the portion so transferred either by surrender of that portion alone or by surrender of the whole inclusive of such portion.

71. My Lord the Chief Justice has shown in his judgment that the doctrine applicable to assignees in the case of English leases does not apply to a case of surrender under the Bengal Tenancy Act, and my learned brother Mullick, J. has come to the same conclusion by going into the history of the Legislation and the growth of the law regulating the agricultural tenancies in this country. I shall, therefore, briefly discuss the question with reference to the Bengal Tenancy Act by which the holding in question is governed.

72. The learned Vakil on behalf of the appellant relies upon the aforesaid decision of the Calcutta High Court and upon Clause (6) of Section 86 of the Bengal Tenancy Act which runs as follows:

Where a holding is subject to incumbrance secured by registered instrument, the surrender of the holding shall not be valid, unless it is made with the consent of the landlord and the incumbrancer.

72. His contention is that the sale to his client of a part of the holding was an incumbrance within the meaning of the word used in the Clause and it having been secured by a registered instrument the subsequent surrender of the holding not having been made with his consent was wholly invalid. This contention would be unanswerable if the sale of a part of a holding were an incumbrance within the meaning of the term used in the clause.

73. The term "incumbrance" has been defined in Section 161 of the Act for the purpose of Chapter XIV only and that definition therefore is limited in its application to that chapter only. It says:

The term "incumbrance" used with respect to a tenancy means any lien, sub-tenancy, easement or other rights or interest created by the tenant on his tenure or holding or in limitation of his own interest therein and is not a protected interest as defined in the foregoing section.

74. The Special Bench of this Court in the case of Mahadeo Lal v. Langat Singh [1917] 1 P.L.W. 504 held that the words. " Any other right or interest created by the tenant on his holding or any limitation on his own interest therein" refer to some right which is ejusdem generis with the words "lien" "sub-tenancy" "easement" in the same section. This interpretation saves, to my mind, a sale either of a portion or of an entire holding from being an incumbrance so far as Chapter XIV is concerned. It is not a lien, it is not an easement, it is not a sub-tenancy, for the vendee does not hold the land under the vendor, tenant of the land, nor is he liable to pay rent to the vendor for the portion sold to him. The vendor has not reserved to himself any right in the land and there is no reversion

to him in any case. The vendee may pay rent through the vendor but that will not make him a tenant under the landlord unless his purchase is recognised. The original tenant when compelled by the landlord to pay rent for the entire holding may realise his quota of the rent payable by the transferee as a co-owner of the holding under the general law of contribution, but a co-owner is not a tenant.

75. "Tenant" under the Bengal Tenancy Act, Section 3, Clause 3, means "a person who holds land under another person and is, or but for special contract would be, liable to pay rent for that land to that person." A vendee of a portion of a holding is not a tenant of the vendor under this definition.

76. Therefore the sale of a portion of a holding does not create a sub-tenancy and is not an incumbrance within the meaning of Section 161 of the Act, and as held in the Patna case it need not be annulled u/s 167 of the Act, before a purchaser in execution of a rent decree is entitled to take possession of the property: vide *Abdul Rahman v. Ahmadur Rahman* [1915] 43 Cal. 558 and *Fazarali Mohaldar v. Poroo Mian* [1918] Cri.L.J. 266. In the former case it was contended before Sir Lawrence Jenkins at page 19 C.W.N. 1225 that the language used in Section 161 extends the meaning of the term "incumbrance" beyond its ordinary significance so as to include any disposition of the tenancy even of absolute assignment or sale of the entirety or a portion thereof. In overruling this contention, his Lordship observed as follows:

It is difficult to understand why the inferior interest of a lien-sub tenancy and easement alone should have been mentioned if the intention was that the superior interest involved in an assignment was to be included in the general words. It runs counter to the first principle of construction. An incumbrance would not ordinarily mean or include an absolute assignment nor would it be a right or interest created on the tenure. Can it be said to be any limitation of a tenant's interest? I think not. These words appear to me to refer not to the area but to the quality of the tenant's interest. This view preserves the essential characteristic of a lien, sub-tenancy or an easement, for, the idea inherent in these leading words is that of a graft on a subject matter which is not destroyed but still continues though in a modified form. The more general words that follow are at least as susceptible of an ordinary meaning which would give effect to that idea as the wider but less appropriate one for which the respondents contend.

77. According to Sir Lawrence Jenkins, therefore, an absolute assignment, of a whole or a part of a holding is not an incumbrance within the ordinary significance of the term. If the sale or assignment of a part of a nontransferable holding does not come within the definition of the term used in Section 161 of the Act, far less will it be covered by the ordinary significance of the term used in Clause (6) of Section 86 of the Bengal Tenancy Act.

78. An incumbrance in law is a "liability resting on an estate, a legal claim or a lien on an estate for the discharge of which the estate is liable, any right to or an interest in an estate to the diminution of its value but not impeding the passing

of the fee by conveyance, as a mortgage, a lien for taxes, a judgment, a right of way; synonyms; load, burden, clog, impediment, check, hindrance". The sale of a part of a holding extinguishes the right of the vendor to pass the fee by conveyance or in any other way and is, therefore, not an incumbrance but is a total extinction of his rights. He cannot in any circumstances claim the land back by discharging the burden of the sale upon it. In the absence of any statutory definition of the word in the Act, the word must be taken to have been used in its etymological meaning and in the sense it may have acquired as a term of art, in law. Therefore, the word "incumbrance" in Section 86 of the Bengal Tenancy Act does not embrace a sale of a part of a non-transferable holding. This was the view taken in the case of *Tamizuddin Khan v. Khoda Newaz* [1909] 14 C.W.N. 229. That decision was based upon the ground that an incumbrance implies a limitation of the rights of the tenant and not a total extinction of them as in the case of an out and out sale whether of a portion or of an entire holding. This principle was accepted in the following cases: *Mahanti Lal Sahu v. Harkisen Jha* 19 C.W.N. 176., *Abdul Rahman v. Ahmadar Rahman* [1915] 43 Cal. 558 and *Fazarali Mahaldar v. Poroo Mian* [1918] Cri.L.J. 266. The decision in the case of *Tamizuddin Khan* 14 C.W.N. 268 was commented upon, though not expressly dissented from, in the case of *Askar Alt v. Goupee Mohan Chowdhury* [1913] 18 C.W.N. 601. The decision of that case, however, turned upon the surrender having been found to be collusive. Undoubtedly if the surrender be collusive the tenancy will subsist and so long as the tenancy subsists, the landlord is not entitled to eject the transferee of a portion of the holding. This is not the case here.

79. The case of *Chundra Sahai v. Kalli Prosanno Chukerbutty* [1895] 23 Cal. 254 impliedly took a contrary view when it held that an exchange of land is an incumbrance, within the meaning of Section 161, but this view was practically dissented from by N. Chatterji, J. at page 1220 of the case [1915] 43 Cal. 558 referred to above 19 C.W.N. 12L7. While doubting the correctness of the decision in [1895] 23 Cal. 254, N. Chatterji J. said that in any case it ought not to be extended further. Sir Lawrence Jenkins commenting upon this case in [1915] 43 Cal. 558 observes:

The ratio decidendi is to be found in these words: "The exchange by which the land was acquired by the defendant was in limitation, if not in fact in destruction, of the original tenant's right in the holding." A distinction was thus recognised between limitation and destruction and presumably it was considered an exchange was a limitation, for Section 161 does not extend to that which is a destruction of a tenant's right. Whether this be a true view of the effect of an exchange may have to be reconsidered in the future; it does not arise now. I am concerned only with an absolute sale and that in my opinion is not in limitation but in destruction of the interest to which it relates. On the question referred] therefore I hold that the interest of an unregistered purchaser of a portion of a patni tenure is not an incumbrance within the meaning of Section 161 of the Bengal Tenancy Act.

80. In my opinion the definition of the word as given in the case of Tamizuddin and the view taken therein that the word "incumbrance" in Clause 6 of Section 86 does not embrace the sale of a part of a non-transferable holding remain unshaken. I, therefore, hold that the sale of the part of the holding in question in favour of the appellant was not an incumbrance within the meaning of Clause 6 of Section 86.

81. The question then remains as to whether the surrender of the entire holding in the present case u/s 86 of the Bengal Tenancy Act is valid so as to give the landlord the right of re-entry on the portion of the holding sold to the appellant prior to the surrender and to let it to the respondent or to take it into cultivation himself under Clause (5) of the section. In the Full Bench case of the Calcutta High Court the surrender was with respect to a part of the holding under an arrangement between the landlord and the original tenant and it was held that the surrender was invalid with respect to the portion of the holding previously sold. Surrender consists in the yielding of the term to him who has the immediate estate in reversion in order that the term may merge in the reversion. After the surrender of the holding the liability of the tenant towards the landlord to pay rent, etc., ceases. This may be by mutual agreement or by operation of law. Section 86 of the Bengal Tenancy Act codifies the principles of surrender and prescribes Rules for effecting the same. Clauses (1) to (4) deal with surrender by operation of law. The first Clause confers upon a raiyat not bound by a lease or other agreement for a fixed term, a right to surrender his holding at the end of any agricultural year. Clauses (2) to (4) prescribe the way in which this right is to be exercised, that is, by causing a notice to be served upon the landlord. Clause (7) recognizes a surrender by mutual agreement between a landlord and a tenant with respect to the whole or a part of the holding. In the Full Bench case of the Calcutta High Court the surrender was with respect to a part of the holding under a mutual agreement between the landlord and the original tenant. Therefore, it was a surrender under Clause (7) of the section. The surrender in such a case is in the nature of an assignment by the tenant to his landlord of the whole or a part of the holding. The tenant is required to disclose to the landlord the condition of the tenancy and his previous dealings thereof such as transfer of a part of the holding. The landlord also is required to acquaint himself with the condition of the tenancy and the previous transfers, if any, of a portion of the holding. The change of possession which is essential to a valid surrender must in such a case take place by mutual agreement, and the tenant must be in a position to transfer immediate possession of the property. The dealings between the parties must be fair and the transaction must be bona fide, and if the mutual dealing between the parties by way of surrender has the effect of destroying the rights of third parties, the transaction may be tainted with fraud or dishonesty and it is possible then to apply the principle upon which the decision of the Full Bench case has proceeded, namely, that a person cannot derogate from his own grant. It must be remembered that a surrender by mutual arrangement may be for consideration and that neither the tenant nor the landlord is exercising his

rights which would arise under the earlier Clause of Section 86 when a tenant as a matter of right surrenders his holding by a notice to the landlord. By mutual agreement the landlord can accept the surrender with respect to the part of the holding when the other part has already been sold to a third person. In that case he will have to recognise the transfer of a part of a non-transferable holding which he can very well agree to do and for which he can take proper compensation while entering into the mutual agreement with the tenant. Clause (7) has simply recognised the principle of the English Law that a surrender implies a mutual agreement between the landlord and the tenant and can be with respect to the whole or part of a holding: *Oastler v. Henderson* [1877] 2 Q.B.D. 5.

82. The Bengal Tenancy Act does not restrict a surrender to a mutual agreement between the parties but confers upon the tenant a statutory right to yield up the term of his tenancy and to put an end to his liabilities to the landlord for holding the land under him, whether the landlord does or does not like it. In other words, the tenant has a right to surrender his holding against the will of his landlord. Therefore, the landlord must have the right to take the land free from any incumbrance which under the law he is not bound to recognise. In a non-transferable holding the tenant has no right to transfer without the consent of the landlord and the transfer therefore of the whole or a part of it is invalid so far as the landlord is concerned. Where the transfer is of the whole of the holding the landlord has the remedy provided for by the law u/s 87 of the Act and to treat the holding as abandoned. "Where the tenant transfers a part of the holding, the landlord is not bound to recognise the transfer and has a right still to hold the tenant liable to him for the rent of the entire holding and such other rights that he may have against the tenant.

83. Now the surrender in the present case is through the Court by means of Istifa (Exhibit 2) under Clause (4) of the Section. The tenant here has, therefore, exercised his right conferred by Clause (1) of the Section to surrender the - holding. This is the statutory right conferred upon the tenant and there is nothing to prevent his surrendering the holding on account of his having previously transferred a portion thereof. The Section does not curtail his right of surrender of the whole holding on account of the previous transfer of a portion thereof. If the surrender were tainted with fraud or dishonesty, Section 53 of the Transfer of Property Act may perhaps invalidate the surrender, but in this case no fraud or dishonesty has been imputed to the surrender. It is conceivable that a tenant may after transfer of a part of a holding find himself by change of circumstances independent of the transfer, such as, his change of profession and inability to carry on the cultivation of the land, unable to continue to hold the land without serious inconvenience to himself. The surrender in such a case may be a bona fide one. His Lordship Mookerjee A.C.J. in the Full Bench case of the Calcutta High Court says that by transferring a part of a holding the tenant has dealt with his property in such a manner as to render himself incompetent to exercise the power or right of surrender which he had and hence he cannot be permitted to

derogate from his own grant. That the aforesaid principles are not of universal application, particularly in the case of a tenant under the Bengal Tenancy Act, is obvious from the fact that the tenant by transferring the remaining portion of his holding to a third person can by his act cause an abandonment of the holding u/s 87 and thereby confer an immediate right in the landlord to enter upon the holding and to avoid both the transfers including the previous one. Thus a tenant can by his act destroy the right previously created by him in the transferee of a part of the holding. It has never been suggested that by transferring a portion of a holding the tenant is debarred from transferring the remaining portion inasmuch as that has the effect of extinguishing the right acquired by the previous transferee and thus has the effect of a derogation from his previous grant. The principles upon which the decision of the Full Bench case of the Calcutta High Court is founded cannot affect the rights of the landlord to re-enter on the holding acquired under the statutory provisions contained in Clause (5) of Section 86 of the Act for he was not a party to the transfer of the portion of the holding by the tenant. The cases relied upon in the Full Bench case of the Calcutta High Court as laying down the principle that a person cannot be permitted to derogate from his own grant, do not seem to go so far as to affect the right acquired under the statute on account of exercise of a right of surrender, conferred upon the tenant by the statute. The tenant's right to surrender given by Section 86 of the Act is not to my mind affected in any way by his previous transfer of a part of a holding. This was recognized in *Dayamayi v. Ananda Mohan Roy Choudhury* [1914] 42 Cal. 172. If a tenant is not allowed to surrender his entire holding after transfer of a portion of the same he will be deprived of a right which the Bengal Tenancy Act vests in him. The landlord will go on suing for arrears of rent and get decrees against him which may be executed against his person and other properties. Therefore, even when the surrender is bona fide, the tenant will be harassed by his not being allowed to surrender the holding on account of the previous transfer of a portion thereof when he might not have anticipated the change in the circumstances beyond his control which compelled him to surrender the entire holding. The transferee of a portion of a holding takes the transfer with his eyes open. He fully knows that his transfer might be avoided in case the original tenant transfers the remaining portion of the holding or abandons it. He also knows that his interest is liable to be extinguished in case the landlord sells the holding in execution of a rent decree obtained against the original tenant. He must also know that by surrender the same consequence would happen.

84. Therefore, a person who takes a transfer from a person who labours under such limitation takes upon himself the inconvenience and the loss that might accrue to him on account of his transfer having become inoperative by the act either of the transferor or the landlord who is not bound by the transfer. On the other hand, to take away the right of the landlord to re-enter on account of the surrender of the holding is to compel him under certain circumstances to recognize the transfer of a part of a holding and the splitting up of the holding.

Therefore, with great respect to their Lordships of the Calcutta High Court, I am unable to subscribe to the view expressed in the Full Bench case of Syed Mohsewuddin [1920] 48 Cal. 605.

85. In the result I hold that the transfer of a part of a holding is not an incumbrance, as already observed, under Clause (6) of Section 86 and that it cannot stand in the way of the landlord entering upon the holding and either letting it to another tenant or taking it into cultivation himself under Clause (5) of Section 86. I also hold that the tenant is not deprived of his right to surrender the entire holding under Clause (1) of the Section on account of his having previously transferred a portion thereof.

86. Recently I decided this point in the case of Ram Oraon v. Doman Kalal [1923] 4 P.L.T. 562 in connection with a case arising under the Orissa Tenancy Act, the provisions whereof relating to a surrender, are similar to those in the Bengal Tenancy Act, with this exception that there is no provision corresponding to Clause (6) of Section 86 of the Bengal Tenancy Act in the Orissa Tenancy Act. I adhere to the views expressed by me in the aforesaid case.

87. Therefore in concurrence with my Lord the Chief Justice, I answer the question referred to in the affirmative and would dismiss the appeal with costs.

Foster, J.

88. I agree with the judgment which has been delivered by my Lord the Chief Justice.

Macpherson, J.

89. Having had an opportunity of reading and considering the judgment which has just been delivered by my Lord the Chief Justice, I find myself in complete concurrence with the views expressed therein.

That the appeal be dismissed with costs.