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**(1936) 05 PAT CK 0013**  
**In the Patna High Court**

Thakur Deyal Singh and Others

APPELLANT

Vs

Rai Promatha Nath Mitra and Others

RESPONDENT

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**Date of Decision :** 05-05-1936

**Acts Referred:**

Transfer of Property Act, 1882 — Section 114

**Citation :** AIR 1936 Patna 493 : 164 Ind. Cas. 811a

**Hon'ble Judges :** Dhavle, J;Agarwala, J

**Bench :** Division Bench

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**Judgement**

Agarwala, J.—Second Appeal No. 702 of 1932 arises out of a suit by the lessors for recovery of possession on breach of a covenant not to transfer the demised property. In 1863 the ancestors of the plaintiffs, who were the proprietors of an 8 annas share in Mauzas Pandepura and Dihri, granted a mukarrari lease of 7 1/2 annas to Gouri Singh and Gobind. The interest of each of the lessees in the mukarrari was specified to be one-half. The lease contained a covenant by the lessees not to alienate the demised property without the consent of the lessors. Gouri Singh sold a 1-anna share to three persons in 1814 without the consent of the lessors. In 1899, however, the sons of the purchasers executed a Jamognama in respect of this 1-anna share in favour of the lessors, containing all the terms of the original grant of 1863. It is not disputed that one result of this was that the rent of the 1-anna share was separated from the rent payable for the remainder of the mukarrari property. In 1906 the purchasers sold the 1-anna share to defendants Nos. 1-7 without the consent of the lessors. Thereafter the latter sued defendants Nos. 1-7 for rent and, in execution of the decree obtained in that suit the 1-anna share which was purchased by defendant No. 8. On February 23, 1925, defendant No. 8 re-sold his interest to defendants Nos. 1-7 by a sale-deed which was registered on May 25, 1925. Two years later defendants Nos. 1-7 instituted a suit for partition of the 1-anna share. This suit was decreed. Pending an appeal from the decree the lessors served on defendants Nos. 1-7 a notice alleging that their purchase was in contravention of the terms of the lease and demanding possession. The partition decree was

confirmed in appeal. In the meanwhile, on August 11. 1928, the lessors instituted the present suit for recovery of possession. Defendant No. 8 did not enter appearance. The suit was decreed in the trial Court and this decision was affirmed in appeal. Defendants Nos. 1-7 have preferred this second appeal.

2. The Courts below held that the covenant in restraint of alienation was a covenant running with the land, therefore, it was binding on defendant No. 8, the purchaser in execution of the rent decree, and on defendants Nos. 1-7 who had repurchased from him. In *Saradakripa Lala v. Bepin Chandra Pal* 37 CLJ 538 : 74 Ind. Cas. 555 : AIR 1923 Cal. 679, *Mukerjee and Chotzner JJ.*, following *Williams v. Earle* (1868) 3 QB 739 : 37 LJQB 231 : 9 B & S 740 : 19 LT 238 : 16 WR 1041, *McEacharn v. Colton* (1902) AC 104 : 71 LJPC 20 : 85 LT 594 and *West v. Dobb* (1869) 4 QB 634 : 38 LJQB 289 held that an express covenant not to transfer the demised property without the consent of the landlord is a covenant running with the land and, therefore, that it was enforceable against a person who purchased the lessee's interest in execution of a decree for rent obtained by the lessor against the lessee. In the per-sent case, therefore) the covenant in restraint of alienation was binding on defendant No. 8, the auction-purchaser. A. covenant running with the land binds not only the lessee but also assignees from him although they are not expressly mentioned: *Goldstein v. Sanders* (1915) 1 Ch. 549 : 84 LJCh. 386 : 112 LT 932.

3. It was, however, contended by the appellant that, in as much as the transfer to defendants Nos. 1-7 was a transfer to persons whom the lessors had previously accepted as tenants, it was not a transfer which brought the forfeiture clause into operation. This was negatived in *McEacharn v. Colton* (1902) AC 104 : 71 LJPC 20 : 85 LT 594, where it was held that a covenant by a lessee, not to assign without the lessor's consent, applies to a re-assignment to the original lessee. This case was followed by *Ross and Chatterji, JJ.* in S. A. No. 1468 of 1928 which was decided on June 13, 1930. It was not contended that a covenant by a lessee not to assign without the landlord's consent implies that the landlord's consent will not be unreasonably withheld. The answer to this is that the landlord's consent was never asked for, so that there is no question of it being unreasonably withheld : see *Barrow v. Isaes* (1891) 1 QB 417 : 60 LJQB 179 : 39 WR 338 : 64 LT 686 : 55 JP 517. It was suggested, however, that in such a case the Court should relieve against forfeiture if in fact the transferee is a person to whom the landlord could not reasonably object. The power of a Court of equity to relieve against forfeiture is reproduced in Section 114, Transfer of Property Act, 1882, and is confined to forfeiture for non-payment of money. *Krishna Shetti v. Pinto* 42 M 654 : 50 Ind. Cas. 898 : AIR 1919 Mad. 12 : 36 MLJ 367 : 9 LW 431, following *Bill v. Barclay* (1811) 18 Ves. 56 : 34 BR 238 : 11 RR 147, at p. 64, (1811) 18 Ves.--[Ed.] where, with regard to the right of re-entry on breach of a covenant in restraint of alienation Lord Eldon said: "It is sufficient that the lessor insists upon his covenant; and no one has a right to put him in a different situation" : see also *Vittappa Kudva v. Durgama* 55 Ind. Cas. 781 55 Ind. Cas. 781 : 38 MLJ 190 : AIR 1920 Mad. 312 : 11 LW 116 : (1920) MWN 183.

4. It was also argued that as the landlords had recognized Gouri Singh's transferees on payment of a nazrana by them, it should be held that the object of the proviso for re-entry on breach of the covenant in restraint of alienation was merely to secure payment of a sum of money and, therefore, that the Court has power to relieve against the forfeiture. There is nothing in the terms of the lease to indicate that this was the intention of the parties, and it cannot be inferred that this was the intention from the fact that on a previous occasion the landlords condoned a breach of the covenant on receipt of consideration for so doing. It was suggested, however, that by this conduct "the landlords" had waived the right to insist upon re-entering on breach of the covenant or were estopped from asserting their right. No question of estoppel can possibly arise and the mere fact that the landlords refrained from enforcing their right on one or more previous occasions, whether for consideration or not, does not amount to a surrender of their right to enforce it when a subsequent occasion arises.

5. The next point raised was with respect to the Bengal Tenancy Act, 1885. Section 155 of that Act enables the Court to relieve against forfeiture in a suit for the ejectment of a tenant on the ground inter alia that he has broken a condition on the breach of which he is, under the terms of a contract between him and the landlord, liable to ejectment. Even assuming that the lease in the present case is governed by the Act, Section 155 is of no assistance to the appellants unless he can show that he is a tenant of the respondents. A transferee from a lessee who is bound by a covenant not to alienate is not a tenant and, therefore, is not entitled to the benefit of the section, see *Dwarika Nath v. Mathura Nath* 21 CWN 117 : 34 Ind. Cas. 833 : AIR 1917 Cal. 236 : 24 CLJ 40 , where it was held that a purchaser in execution of a decree obtained against the lessee, the landlord" not having recognized him as a tenant is a trespasser, and, therefore, that Section 155 does not apply to a suit to eject him. Lastly, it was argued that unless the landlord proves his right to immediate possession he is not entitled to succeed in a suit for ejectment even against a trespasser. Reliance is placed upon the judgment of Suhrawardy, J. in *Ataharuddin Taluqdar and Another Vs. Murari Mohun Dutt and Others*, . The reasoning of the learned Advocate for the appellants is that the landlords not having instituted within one year of the transfer a suit to eject the transferor, their right to re-enter is barred by Article 1, of Schedule III, Bengal Tenancy Act, and, therefore, they have no right to immediate possession. In the case last referred to a similar contention was upheld. This decision was approved by Guha and Ghose, JJ., in *Swarnamoyee Debya Vs. Aferaddi and Others*, . In the first of these two cases the original tenant contested the suit and the second case was a suit for ejectment against the original tenant only. In the present case defendant No. 8 (the transferor) did not enter appearance in the suit and a decree for ejectment has been passed against him against which he has not appealed. In this respect the facts of the present case are similar to those in *Budhimanta Paramanik v. Sarat Chandra Banerjee* 13 CLJ 672 : 6 Ind. Cas. 147, where the landlord was held entitled to eject the transferees, and which was approved by Sanderson, C.J. and Mookerji,

J. in Dwarika Nath v. Mathura Nath 21 CWN 117 : 34 Ind. Cas. 833 : AIR 1917 Cal. 236 : 24 CLJ 40. I would accordingly dismiss this appeal with costs. The facts of Second Appeals No. 1761 of 1932 are similar to those of Second Appeal No. 702 of 1932, and the questions of law which arise there are the same. This appeal must also be dismissed with costs.

Dhavle, J.

6. I agree. The learned Advocate for the appellants has laid much stress inter alia on the recital in the Jamognama of 1899 that the Rai Sahibs passed orders for the payment of nazrana hash sharah wo riwaj ke. But though this may point to a scale of nazrana, it does not by any means imply that the landlords were bound to accept nazrana in lieu of enforcing the forfeiture. We have to read the document as a whole and construe it fairly; and when this is done, the meaning is perfectly clear and free from any reasonable doubt not with standing the criticism which has been levelled before us against particular words or expressions.