

**(Meer) Qurban Ali Vs. Shaikh Majid HussaIn and ors.**

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**Court :** Allahabad

**Decided On :** Jul-09-1924

**Reported in :** AIR1925All63

**Appellant :** (Meer) Qurban Ali

**Respondent :** Shaikh Majid HussaIn and ors.

**Judgement :**

Kanhaiya Lal, J.

1. Mt. Naurasi was the tenant of a certain holding from which the Zemindars sought to eject her. A settlement was subsequently arrived at between her and her husband Mata Badal on the one hand and the Zamindars on the other, whereby the latter granted a lease in perpetuity to Matab Badal of the same holding, giving, the lessee heritable and transferable rights. Sometime after this lease was executed Mata Badal and Mt. Naurasi made a possessory mortgage of the holding in favour of the predecessor-in-title of the present plaintiffs for a sum of Rs. 200, out of which Rs. 12 were taken for the payment of certain arrears of rent due to the Zamindars. The validity of the mortgage forms the subject matter of contention in this appeal.

2. The Court of first instance found that the mortgage was invalid inasmuch as it offended against the provisions of Section 20 of the Agra Tenancy Act (II of 1901). The lower Appellate Court however came to the conclusion that the mortgage was valid under Section 20, Clause 3 of the said Act. Section 20 provides that the interest of an occupancy tenant, or a non-occupancy tenant, other than a thekedar, shall not be transferable in execution of a decree of a Civil or Revenue Court, or otherwise than by a voluntary transfer between persons in favour of whom, as co-sharers in the tenancy, such a right originally arose, or who have become by succession co-sharers therein but the interest of a thekedar shall subject to the terms of his lease be heritable but not transferable. Both Mata Badal and Mt. Naurasi are dead. They left two sons who were impleaded as defendants to the present suit, but both of them died during the pendency of the suit leaving no issue. The Zamindars thereupon took possession of the tenancy and they resisted the claim of the plaintiffs to enforce their mortgage.

3. In the plaint the tenancy mortgaged was described as a tenancy at a fixed rate, but the Trial Court has found that the mortgagors were not tenants at fixed rates within the meaning of Section 8 of the U.P. Tenancy Act. It is immaterial whether Mt. Naurasi and her husband were non-occupancy tenants or occupancy tenants before they took a permanent lease of the holding from the Zamindars. As observed in *Bachchi v. Bachchi* (1906) 28. All. 747 a fixed rate tenancy cannot be created by a contract with the Zemindar; and any rights which can be granted by the Zamindars,

must be consistent with the provisions of Section 20 of the U.P. Tenancy Act, which forbid the sale of a holding in execution of a decree of a Civil or Revenue Court, and also a voluntary transfer, except in favour of persons, who are co-sharers in the tenancy.

4. It might be said that Mata Badal was a thekedar of transferable right under the lease granted to him by the Zamindars, but the interest of a thekedar is not permitted by law to be transferable. The Zamindars took no step to avoid the mortgage within the time allowed by law, but all the same the holding cannot be sold in execution of a decree, and as pointed out in *Ram Sarup v. Keshab* (1907) 29 All. 327, the mortgage cannot, despite the contract contained in the lease, be enforced. The Zamindars claim the holding by right of escheat and despite the covenant entered in the original lease, if the mortgage was void and unenforceable as against the mortgagors it cannot be enforced against the Zamindars after the escheat nor can the holding be put up to sale in enforcement of the mortgage. The mortgagees can only get a simple money decree against the assets of their mortgagors in the hands of the defendants, if any.

5. The appeal is therefore allowed and in lieu of the decree passed by the lower Appellate Court a simple decree for money will be prepared with costs incurred by the mortgagees in the Courts below and future interest from the date of the suit till payment at 6 per cent, per annum against the assets of the deceased.

6. Considering the peculiar circumstances of the case and the conduct of the Zamindars who are seeking to deprive the mortgagees of their money after they had given the lessee transferable rights, I make no order as to the costs incurred by the defendants-appellants here or any of the Courts below.