

MANU/BH/0074/1934

Equivalent Citation: AIR1934Pat666, 153Ind. Cas.183

**IN THE HIGH COURT OF PATNA
FULL BENCH**

Decided On: 17.09.1934

Appellants:**Uchit Lal Misser and Ors.**
Vs.

Respondent:**Raghunandan Tewari and Ors.**

Hon'ble Judges/Coram:

Courtney Terrell, C.J., Wort and C.M. Agarwala, JJ.

JUDGMENT

Courtney Terrell, C.J.

1. This second appeal was in the first place heard by Macpherson and Dhavle, JJ., who considered that it raised a point of importance and they doubted the soundness of an earlier decision of this Court. They therefore referred it to a Full Bench. The facts are as follows: The respondents first party brought a suit at Bhagalpur on a simple mortgage bond, dated 13th October 1919, by which the defendants-appellants mortgaged to them two areas of land: the one in the Santal Parganas and another in the Bhagalpur District. We are concerned only with that portion of the mortgaged land which lies in the Santal Parganas. It was described in the mortgage-deed as lakhiraj and was so recorded in the Record-of-Rights at that time in force. In 1926 the new Record-of-Rights of the Santal Parganas was published and the entry relating to the land in question was altered. Under the column headed "Name of the tenant" are given the words as against one plot "Brahmottar raiyat Uchit Lal Misser and Dayanath Misser" and against the other plot "Brahmottar raiyat Kartik Misser, son of Gopal Misser, and Uchit Lal Misser and Dayanath Misser."

2. Although some argument appears to have taken place before the learned Judges, who first heard this case, the facts are not now in dispute and the land with respect to which these entries are made is identical with the land mortgaged. The mortgagees obtained an ex-parte mortgage decree in the Court of the Subordinate Judge of Bhagalpur and sought to put the land in dispute to sale. An objection was taken in the executing Court that by reason of Section 27 of the Santal Parganas Settlement Regulation of 1872, the executing Court had no power to put up the land for sale. The objection was overruled, and the question before us is whether the executing Court was precluded by the Regulation mentioned from selling the land and transferring it to an auction-purchaser.

3. The Regulation in question is as follows:

27(1) No transfer by a raiyat of his right in his holding or any portion thereof, by sale, gift, mortgage, lease or any other contract or agreement, shall be valid unless the right to transfer has been recorded in the Record-of-Rights, and then only to the extent to which such right is so recorded.

(2) No transfer in contravention of Sub-section (1) shall be registered, or shall be in any way recognized as valid by any Court, whether in the exercise

of civil, criminal or revenue jurisdiction.

(3) If at any time it comes to the notice of the Deputy Commissioner that a transfer in contravention of Sub-section (1) has taken place, he may, in his discretion, evict the transferee and either restore the transferred land to the raiyat or any heirs of the raiyat who has transferred it, or resettle the land with another raiyat according to the village custom for the disposal of an abandoned holding:

Provided:

(a) that the transferee whom it is proposed to evict has not been in continuous cultivating possession for 12 years, (b) that he is given an opportunity of showing cause against the order of eviction, and (c) that all proceedings of the Deputy Commissioner under this section shall be subject to control and revision by the Commissioner.

4. The executing Court held that it was bound by a decision of this Court in the case of *Amrit Lal v. Jagat Chandra* 1926 Pat 202, and we have further to decide whether the judgment in that case was right. It will be noticed that the mortgagors did not raise the question of the salability of the mortgaged property before the Court which had passed the mortgage decree. They did not attack the validity of the mortgage itself, and they did not raise the question that it was not competent for the Court itself to pass a decree for sale. It is argued therefore on behalf of the decree-holders that the judgment-debtors are estopped from raising that point before the executing Court and that the question must be treated as *res judicata*. It is further contended that the executing Court is not competent to go behind the decree itself.

5. They concede that in the case of a money decree the executing Court would have been competent to enter into the question of the salability of land attached in execution of that decree. As to the matter of the power of the executing Court to go behind the decree, I will first consider the case relied on by the Subordinate Judge. This also was one under Section 27 of the Regulation, and Mullick, J., delivering the judgment of the Court was of opinion that the words "any Court" in Sub-section (2), Section 27 mean a Court vested with jurisdiction to question the correctness of the decree and that the executing Court could not refuse to attach and sell the property even if satisfied that the decree was wrong. He also expressed disagreement with the case of *Raja of Vizianagaram v. Dantivada Chelliah* (1905) 28 Mad 84. In my opinion, with the greatest respect to the learned Judge, his decision was erroneous. The words of Sub-section (2), Section 27 are absolutely prohibitive and whether or not another Court has pronounced the decree and said that the property in question can be sold, the executing Court is prevented from implementing such decree and from granting a certificate of sale or delivering possession under such a sale.

6. As to the matter of estoppel as *res judicata* I agree with the observations of Kulwant Sahay, J., in the similar case of *Rup Nath v. Jagannath Mandal* 1928 Pat 227, at p. 182:

The fact that the judgment debtor did not raise the question in the mortgage suit which he might and ought to have raised does not, in my opinion, operate as an estoppel in the present case, inasmuch as there can be no estoppel against the statute. The law prohibits the sale of a raiyati holding and once it was found that the lands in dispute had formed the raiyati holding, whether the judgment-debtor took the objection or not, the sale of

such a holding cannot take place in face of the clear provisions of Section 47, Chota Nagpur Tenancy Act.

It is true that this case was under the Chota Nagpur Tenancy Act where the words, of the enactment are of more stringent kind than are to be found in the present Act. But before us it was not seriously contended that the words of the Regulation if properly interpreted have, not as much force as those in the Chota Nagpur Tenancy Act.

7. The principle applicable was clearly set forth in the case of Venkatalingama Nayanam Bahadur Varu v. Venkatadri Rao 1927 Mad 911. In that case the decree-holder obtained a decree directing the satisfaction of, his debt by the sale of certain property. The judgment-debtor in the executing Court raised the objection that the sale of this class of property was prohibited by Section 6, Madras Impartible Estate Act (2 of 1904). The Court held that even if a decree had been passed without objection for the sale of an impartible estate, the objection that the section prohibits the sale can be taken in execution, and the case of Raja of Vizianagaram v. Dantivada Chelliah (1905) 28 Mad 84, doubted by Mullick, J., in Amrit Lal v. Jagat Chandra 1926 Pat 202, was followed. Delivering the judgment of the Court both of the learned Judges said that if a statute is passed in the interest of public policy and not merely to benefit a particular class or individual, the order for the sale is void and the executing Court should refrain from putting it into execution. If, on the other hand, it was introduced simply for the benefit of a particular class or individual, a sale would be voidable only and it might be that in such circumstances the matter would be res judicata by reason of the judgment of the Court which granted the decree.

8. In the case of Rabindra Nath v. Jnanendra Mohan 1932 Cal 9, the executing Court had held that the decree sought to be executed was passed without jurisdiction and was therefore a nullity. The decree was not the result of a mere irregular or illegal exercise of the Court's jurisdiction in the shape of the adoption of the wrong procedure but was one made in excess of the inherent jurisdiction of the Court. It was held after a review of the authorities that the executing Court was competent to treat the decree as a nullity. The limitation upon the jurisdiction of the Court that passed the decrees might be a limitation of jurisdiction to special purposes only.

9. Nevertheless it was held that in such a case a decree passed in excess of limit prescribed must also be regarded as void on the ground of lack of inherent jurisdiction. In Katwari v. Sita Ram Tiwari 1921 All 118, the case turned upon Section 20, Agra Tenancy Act, which forbade the alienation of occupancy holdings. A mortgage decree was obtained ex parte directing the realisation of the mortgage debt by sale of the security which consisted of an occupancy holding. The objection of the judgment-debtor was overruled by the execution Court on the ground that the Court executing the decree could not go behind it.

10. The Full Bench held, after a review of the authorities, that the view of the executing Court was wrong and Pramada Charan Banerji, J., said:

No doubt it was not open to the judgment debtor to contest the validity of the decree which was passed against him, but it was open to him to say to the Court that, as the law contains a mandatory provision which precludes a Court executing a decree from selling an occupancy holding, the Court was bound to carry out the provisions of the law and not to act in violation of those provisions. In my opinion, in view of the provisions of Section 20 a Court executing a decree cannot order an occupancy holding to be sold, no

matter whether the decree is a decree directing a sale of the holding or is a simple money decree.

In *Lakshmi Bibi v. Atal Bihary* (1913) 40 Cal 534, a case under the Chota Nagpur Tenancy Act, the sale of the holding actually took place while the appeal in the lower Court (from the decision of the executing Court) was pending and it was confirmed while the appeal to the High Court was pending. The learned Judge said:

It has been argued that the mortgagor is in some way estopped from saying that the property is not saleable. He cannot be estopped, from bringing to the notice of the Court what, the Court must be taken to know of itself, that there is a distinct provision of the law which prevents the sale of the property.

11. But there is the further reason which was not advanced at the hearing of this appeal, but which was subsequently suggested to me by my brother Agarwala, for contending that there can be no question of estoppel by *res judicata* in this case. The mortgagor was himself estopped by his mortgage deed from contending in the mortgage suit that the property mortgaged was not saleable. Such a contention would derogate from his grant. It cannot therefore be held that he might have produced this defence to the mortgage suit. In my opinion, this view is correct, and there can be no question of *res judicata*. This opinion is quite apart from the view that I have expressed that even if the mortgagor might have set up the defence, the executing Court is not prevented from, entertaining the non sale ability of the property by reason of the prohibition in the Regulation.

12. The case of *Ram Das Singh v. Beni* Dec 1929 Pat 198, was one in which a money, decree had been passed) and the decree-holder proposed to sell the judgment-debtor's raiyati holding in the Santal Parganas. The Court decided that Section 27 of the Regulation of 1872, prevented the sale by the executing Court. It has been conceded before us that this view is correct and that in the case of a money decree, where the Court which granted the decree; has not directed the sale of any specific property, the executing Court can properly refuse to sell a raiyati holding. The judgment however of Macpherson, J., is of interest on account of his reference to the Settlement Report of Sir Hugh Macpherson and the Santal Parganas Manual, in which an account of great; value is given of the history and policy of the law in the Santal Parganas for the protection of the interest of the raiyats. The learned Judge says, referring to Section 27 of the Regulation:

True, no direct statutory prohibition such as is found in Section 47, Chota Nagpur Tenancy Act 1908, can be indicated. But in 1903 the position in respect of the question of sale ability by the Court of the right of a raiyat in his holding was very different in the two areas. In the Santal Parganas there had been no Court sales since 1887 at least, and very few before that and during a brief period only. There is in that district no provision for the sale of a raiyati interest even in execution of a decree for arrears of rent accruing on the holding. In the Courts not subordinate to the Patna High Court, the raiyat may be ejected in execution of a rent decree in respect of his holding but the holding may not be sold. In Chota Nagpur on the other hand a holding had long been saleable in execution of a decree for rent accruing thereon, and Courts were freely selling holdings in execution of money decrees. A direct interdiction of what was in fact not permitted in any, Court in the Santal Parganas may well have been adjudged unnecessary. It indisputably a commonplace in those Courts that the interest of a raiyat in his holding

cannot be sold by the Court any more than the raiyat himself can under Section 27, Regn. 3 of 1872 sell it. In this case the Courts below have so assumed and the remark in the decision in S.A. No. 48 of 1925(9) is entirely typical of the view held in this Court, The learned Judges said: The sole question for decision now is whether the khorposh mukarrari jote was a raiyati holding or a tenure. If it was a raiyati holding, it was not saleable, but if it was a tenure it was saleable.

13. The basis of this view may perhaps be that a Court will not countenance a sale which must be ineffective. 'Under Section 25, Regn. 2 of 1886 no raiyat can be ejected from his holding otherwise than in execution of an order by the Deputy Commissioner'. The effect of Section 27, Regn. 3. of 1872 and of the entry in the Record-of-Rights being that the raiyat cannot (except in one pargana) sell his right in his holding, the invariable practice of the Courts over a long period to refuse to sell a raiyati holding (no case of sale can be cited) is highly significant, especially when it would be prima facie unreasonable that a holding could be sold in execution of a money decree when it is not saleable in execution of a rent decree for its own arrears. Moreover other important considerations historical and legal emerge on perusal of the Settlement Report of Sir Hugh Macpherson and the Santal Parganas Manual which are adverse to the idea of saleability by the Court of a raiyati holding in the Santal Parganas except where transferability is recorded in the Record-of-Rights.

14. An examination of Sir Hugh Macpherson's Settlement Report and particularly of the portion contained in pp. 45 to 51 inclusive on "agrarian 9. Chhatradhari Singh v. Hem Lal Singh, Second Appeal No. 48 of 1925. case law" amply justifies the summary by the learned Judge. In Surendra Prasad Singh v. Tekait Singh 1929 Pat 700, it was held by a Full Bench that Section 27 not only prevented an alienation voluntary or involuntary by the raiyat, but also prevented equitable execution by the appointment of a receiver.

15. Now, it was argued that the case of Amrit Lal v. Jagat Chandra 1926 Pat 202, decided by Mullick, J., was similar to the case which we have to decide and was rightly decided because on the face of the decree, which the decree holder sought to put into execution, it did not appear that the decree had been passed without jurisdiction and that the Court was bound to assume that the decree had been made with jurisdiction, This argument appears to me to be unsound. Firstly, if the decree directed a sale of property and it did not appear upon the face of the decree that the property was not affected by the prohibition, the argument amounts merely to a contention that the matter is res judicata as between the parties, inasmuch as the judgment debtor might have contended before the Court, which passed the decree, that it was exempted from sale, and it is answered by the statement of Kulwant Sahay, J., that there can be no estoppel against a statute and by the statement of law as laid down in Venkatalingama Nayanim Bahadur Varu v. Venkatadri Rao 1927 Mad 911, above referred to And yet if, on the other hand, the decree expressly directed the sale of a raiyati interest and was therefore on the face of it bad, the executing Court would be able to treat the decree as a nullity. It seems hardly logical that a judgment debtor against whom the decree in Court has expressly decided that specific property is raiyati and nevertheless saleable (a decision which its is conceded is a nullity) is in a better position to resist the execution of the decree than a judgment-debtor against whom the matter has not been so expressly decided. In short, the plea of res judicata can hardly be more cogent than a contention that the decree is a nullity. In my opinion it was quite open to the executing Court to examine the nature of the property directed by the decree to be sold.

I now turn to the nature of the entry in the Record-of-Rights with which we are concerned in this case. It must be definitely understood that the Record-of-Rights in the Santal Parganas has a status very different from that under the Bengal Tenancy Act. Section 25 of the Regulation provides:

After a period of six months from the date of the publication of the Record-of-Rights of any village such record shall be conclusive proof of the rights and customs therein recorded.

17. In this case under the column headed "name of tenant" the tenant is described as a Brammottar raiyat. The words are not used as part of the description of the landlord, but as a description of the ten. ant. A "raiyat" is defined by Section 5, sub. Section (2), Ben. Ten. Act as:

Primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants or with the aid of partners;

and includes also the successors-in-interest of persons who have acquired such a right. The payment of rent is not a necessary ingredient of a raiyat's position. The fact that the persons named in the record are described as Brahmottar raiyats means merely that they are raiyats of a particular kind. The word "raiyat" is a noun and the word "Brahmottar" is used as a qualifying adjective, and whatever the nature of the qualification may be, the fact that the noun is used as a Statement of the position of the tenant in the Record. of-Rights is absolutely conclusive and renders unnecessary any investigation into the limitation introduced by the adjective "Brahmottar."

18. Even if the entry had been other than what it is, the entry of the word "raiyat" or "raiyati" in connexion with the tenant's rights would, in my opinion have the same effect. I am of opinion that the views expressed by Macpherson and Dhavle, JJ., in referring this case to a Full Bench are entirely right, and the case which has been called in question: Amrit Lal v. Jagat Chandra 1926 Pat 202, was wrongly decided. I would therefore allow this appeal with costs.

Wort, J.

19. I agree with the order proposed.

C.M. Agarwala, J.

20. I agree with the judgment of my Lord.

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