

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

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July 30.

JEO LAL SINGH AND OTHERS (DEFENDANTS) v. GUNGA PERSHAD
AND ANOTHER (PLAINTIFFS).^{*}

Right, title, and interest, Sale of, of a registered holder in a tenure—Sale of right, title, and interest—Tenure, Sale of interest of registered holder in a, when there are other joint-holders—Arrears of rent, Suit for, against one of several joint-holders in a tenure who is alone registered—Beng. Act VIII of 1869, ss. 59, 64.

In execution of a decree against one of several joint-holders of a tenure, when it is clear that what is sold, and intended to be sold, is the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holder might have sold the whole tenure had he taken proper steps to do so, or although the purchaser may have obtained possession of the whole tenure under the sale.

But if, however, it appears that the judgment-debtor has been sued as representing the ownership of the whole tenure, and that the sale, although purporting to be of the right, title, and interest of the judgment-debtor only, was intended to be, and in justice and equity ought to operate as a sale of the tenure, the whole tenure must be considered as having passed by the sale.

If the question is doubtful on the face of the proceedings, the Court must look to the substance of the matter, and not to the form or language of the proceedings.

Where a judgment-debtor was alone registered in the *sherista* of the zemindar as owner of a tenure, but it appeared that his two brothers who were joint in estate with him were entitled to an equal share with him in the tenure, but that the judgment-debtor was the manager; and when it appeared that the zemindar being only entitled to a share in the zemindari had obtained a decree against the judgment-debtor alone for arrears of rent, and in execution thereof proceeded to sell his right, title, and interest under s. 64 of the Rent Act,

Held, that as the judgment-debtor represented his brothers, and as they were equally liable to pay the amount of the decree, upon the principle set out above, the latter were not entitled to recover their share of the tenure which the auction-purchaser had obtained possession of in execution of the decree against the judgment-debtor.

^{*} Appeal from Appellate Decree No. 978 of 1883, against the decree of H. Beveridge, Esq., Judge of Patna, dated the 6th of January 1883, reversing the decree of Moulvi Mahomed Nurul Hosain, Khan Bahadur, Second Subordinate Judge of that District, dated the 21st of November 1881.

Doolar Chand Sahob v. Lalla Chabeel Chand (1), and *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh* (2) commented upon.

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In this case the plaintiffs sought to recover possession of two-thirds of a tenure consisting of 50 bighas odd, alleging that it was their ancestral property which had belonged to their father, and on his death had come to them and their brother Gupta Lal.

Gupta Lal, who was the eldest of the three brothers, was the manager of the property, and his name was alone registered in the zemindar's *sherista* as proprietor.

The zemindar, one Mussumat Adhikari Koer, who was entitled to an $8\frac{1}{2}$ annas share of the land in question, brought a suit against Gupta Lal for arrears of rent and obtained a decree. In execution of that decree the right, title, and interest of Gupta Lal in the tenure was brought to sale, and purchased by defendant No. 1, in the names of others who were also made defendants in the suit.

Defendant No. 1, Sew Lal Singh, thereupon took possession of the whole of the tenure, and the plaintiffs accordingly brought this suit to recover their shares, alleging that not being debtors of Mussumat Adhikari Koer the decree against their brother did not affect their interest, and nothing passed to the purchaser except the right, title, and interest of the judgment-debtor. The plaintiffs in their plaint admitted that they were members of a joint undivided family.

Jeo Lal Singh in his written statement denied that he was the purchaser, and pleaded that he was not a necessary party. He further contended that the decree being for arrears of rent, the whole of the tenure was liable, and that the plaintiffs had therefore no right to object to the sale of their interest therein.

He also raised several other issues which are immaterial for the purposes of this report.

The first Court found on the facts that the rent account of the *hasht* sold stood in the name of Gupta Lal; that he was in arrears; and that as the suit was brought against him and the sale held in exe-

(1) L. R., 6 I. A., 47.

(2) L. R., 6 I. A., 233.

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cution of the decree in that suit, the plaintiffs must also be taken to be debtors by implication. That they having failed to pay their rent and protect their right, they could not now come in and claim that their rights had been protected for them.

That s. 59 of the Rent Act was inapplicable to the case, and that the property sold was sold for the debt for which the whole family was liable, and not for Gupta Lal's own personal debt.

The plaintiff's suit was therefore dismissed with costs.

This decision was, however, reversed by the lower Appellate Court, which held that, as the sale took place under s. 64, the zemindar was no better off than an ordinary decree-holder who sold under a money decree, and therefore that he could only sell what his judgment-debtor possessed: that the plaintiffs being parties to the suit and not being bound to pay their brother's debt in the way in which they would have been bound had he been their father, their rights in the property were not affected by the sale. The Court also held that it made no difference that the name of Gupta Lal was alone registered in respect of the property.

The decree of the lower Court was therefore reversed, and the plaintiffs obtained a decree for possession of two-thirds of the property.

The first defendant, Jeo Lal Singh, now specially appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry*, Munshi *Mahomed Yusoof*, and Mr. *C. Gregory* for the appellant.

Baboo *Chunder Madhub Ghose* and Baboo *Saligram Singh* for the respondents.

The judgment of the Court (GARTH, C.J., and BEVERLEY, J.), was delivered by

GARTH, C.J.—The two plaintiffs in this case are the brothers of Gupta Lal, the defendant No. 4, and they bring this suit to recover from the defendant No. 1 possession of their shares of an ancestral tenure which belonged to their father Jugrup Mahton.

This tenure was held under two zemindars, one of whom, Musumat Adhikari Koer, was entitled to an 8 annas odd share in it,

and the other zemindar to the residue, the collections of the two zemindars being made separately.

The defendant Gupta Lal was the eldest of the three brothers and the manager of the property, and his name only was registered as the proprietor of it in the zemindar's *sherista*.

The rent being in arrear, Adhikari Koer sued him (Gupta Lal) for her share of it, and obtained a decree. But being only a part proprietor, she could not sell the entire tenure under s. 59 of the Rent Law, but she brought to sale under s. 64 the right and interest of Gupta Lal, the judgment-debtor, and Jeo Lal Singh *alias* Kushi Singh, the defendant No. 1, became the purchaser.

Under this purchase the defendant No. 1 obtained possession of the whole tenure, whereupon the two plaintiffs, the brothers of Gupta Lal, who were each undoubtedly entitled to a share in the property, brought this suit to recover possession of their shares.

They contend that as the sale was only of the right and interest of Gupta Lal, his share only in it passed to the purchaser.

The defendant No. 1, on the other hand, says that, as the decree was for rent due from all the brothers, and as the defendant No. 1 was the manager and sole registered owner, representing all the brothers, the whole interest in the tenure passed by the sale.

The first Court dismissed the suit; but the Judge has given the plaintiffs a decree.

Against this the defendant No. 1 has appealed, and the only question is, what passed by the sale to defendant No. 1.

Upon this point we have been referred to two cases decided by the Privy Council.

The first of these, which is relied upon by the plaintiffs, is *Doolah Chand Sahoo v. Lalla Chabeel Chand* (1).

In that case one Gooder Khan and his three sisters were entitled as heirs to their father Bachoo Khan to a tenure consisting of a certain mouzah; Gooder Khan's share being 7 annas odd, and his sisters being entitled in separate shares to the residue.

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The rent of this tenure being in arrear, the zemindar brought a suit against Gooder Khan for the whole rent, and obtained a decree; and in execution of that decree he applied by petition for a sale, not of the tenure itself, which he might have done, but "for an attachment" and sale of the "judgment-debtor's property in it."

An order was made in accordance with that petition, and the sale notification expressly stated: "The rights and interests of other persons in the said property will not be sold by auction, besides that of the judgment-debtor's." Doolar Chand and others became the purchasers at the sale, and the sale certificate was in these terms:—

"Hence this certificate being made over to Doolar Chand, Baijnath and Ram Saran Sahoo, the auction-purchasers, it is proclaimed, that whatever rights and interests the judgment-debtor has in the property aforesaid have ceased to exist from the 25th of July 1872, the date of the auction sale, and become vested in the auction-purchasers."

Thereupon the purchasers were let into possession of the entire tenure, and a suit was afterwards brought against them by a person who had acquired the shares of the three sisters to recover possession of those shares.

In that suit the question arose, whether by the sale in execution the whole tenure passed to the purchasers, or only Gooder Khan's share in it.

It was one important element in that suit (which appears from the report of the High Court's judgment, but does not appear in the report of the case before the Privy Council) that the name of the registered owner of the tenure in the zemindar's *sherista* was Bachoo Khan, the father, who was dead; and as the parties were Mahomedans, Gooder Khan and his sisters did not constitute a joint undivided family, as they might have done if they had been Hindus.

Their Lordships held, under these circumstances, that as the zemindar, the decree-holder, sued Gooder Khan alone; and as instead of selling the whole tenure, as he might have done, he sold only the right and interest of one of the heirs, Gooder Khan; and as the sale notification and sale certificate expressly confined

the sale to the right of Gooder Khan, the shares of the sisters did not pass to the purchasers.

The other case to which we were referred is *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh* (1),

In that case two decrees had been obtained against one member only of a joint Hindu family for sums due for the rent of a mouzah, which had been taken on lease, as the Privy Council found, for the benefit of the family. Under these decrees certain property, which belonged to the joint family, was sold in execution: and the question afterwards arose in the case to which we are now referring, whether, under that sale, the whole of the property passed to the purchaser, or only the share of the member of the family against whom the suits were brought, and it was held by their Lordships, that although there was some informality with regard to the form of the decrees, still as the decrees were obtained against the representative of the family in respect of a family debt, they could properly be executed against the joint property of the family.

Their Lordships, after referring to some other authorities in support of that view, say, "that in execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution on mere technical grounds when they find that it is substantially right."

We think that these two cases afford an apt illustration of the principle by which we should be guided in the decision of the present case.

Where it is clear from the proceedings, that what is sold, and intended to be sold, is the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holder might have sold the whole tenure if he had taken proper steps to do so, or although the purchasers may have obtained possession of the whole tenure under the sale.

But if, on the other hand, it appears that the judgment-debtor has been sued *as representing the ownership of the whole tenure*, and that the sale, although purporting to be of the right and interest of the judgment-debtor only, was intended to be, and in justice and equity ought to operate, as a sale of the tenure, the

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whole tenure then must be considered as having passed by the sale. And if the question is a doubtful one on the face of the proceedings or one part of those proceedings may appear inconsistent with another, the Court must look to the substance of the matter, and not the form or language of the proceedings.

The case of *Doolar Chand* illustrates the first of these propositions; the case of *Bissessur Lall Sahoo* illustrates the second.

Now, in the present case, Gupta Lal, the defendant No. 4, was not only the manager, but the sole registered owner of the tenure; and Adhikari Koer, in claiming against him the entirety of her share of the rent, took the ordinary and proper course of suing the tenant, who in the zemindar's *sherista* represented the entire tenure.

Moreover, when she had obtained her decree, she was unable, as she only owned a share in the zemindari interest, to sell the whole tenure under s. 59. She could only obtain her execution in the way in which she proceeded to enforce it, namely, by selling the right and interest of the judgment-debtor under s. 64.

But as between her and the persons interested in the tenure she had a right to treat Gupta Lal as the sole owner of the tenure, and when she sold his right and interest for the rent due, she was in our opinion selling the tenure itself.

As his name was registered as the sole owner of the tenure, he represented his brother's interests in it as well as his own. The rent was due from them all, though he alone was sued for it, and as they were equitably liable to pay the amount of the decree, it was only just that their interests as well as his should be sold to satisfy it.

We think, therefore, that the judgment of the District Judge should be reversed, and that of the Subordinate Judge restored, with costs in both Courts.

Appeal allowed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

RAM PERSHAD CHOWDRY AND OTHERS (PLAINTIFFS) *v.* JOKHOO ROY
AND ANOTHER (DEFENDANTS).*

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Declaratory suit, Ground of—Waste by a Hindu widow—Mitakshara Law.

It is open to a Hindu widow to give over possession to a stranger to the extent of her interest in the estate; but, actually to favour the claims of the latter, and allow him to enter his name in the landlord's *sherista*, would have the effect of setting up an adverse title as against the reversionary heirs, upon which a declaratory suit could lie.

THE plaintiffs, as the brother's sons of one Bikramajit, brought this suit for possession of thirty-nine bighas fifteen biswas of culturable and orchard land in mouzah Bilaur, pergunnah Pawar, on the allegation that Mussumat Khati (defendant No. 2), who held the property as the widow and sole heiress of Sheo Shahai Chowdry, the only son of Bikramajit, had, in collusion with Jokhoo Roy (defendant No. 1) given up the entire possession of the property to him, and allowed him to record his name in the landlord's *sherista*. The plaint also prayed that it might be declared that defendant No. 1 had no right of inheritance to the property. Jokhoo Roy, the principal defendant, contended that inasmuch as the husband of Khati had predeceased his father, he (the defendant) held the property through his mother, the daughter of Bikramajit, on whom the property had descended in the ordinary course of succession, nor were Sheo Shahai or his widow ever in possession of the property.

The Munsiff found that Sheo Shahai had succeeded to his father, and the widow having died after the institution of the suit, gave the plaintiffs a decree as reversioners under the Mitakshara law.

On appeal the Subordinate Judge dismissed the suit, on the ground that the plaint disclosed no cause of action, and that "the mere fact of causing or allowing another's name to be registered in the landlord's *sherista* is not waste, so as to entitle the reversioner to step in and take possession of the property."

* Appeal from Appellate Decree No. 1012 of 1883, against the decree of Baboo Troilokya Nath Mitter, Second Subordinate Judge of Shahabad, dated the 26th of March 1883, reversing the decree of Moulvi Abdul Aziz, Third Munsiff of Arrah, dated the 18th. of March 1882.

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The plaintiffs appealed to the High Court.

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Baboo *Chunder Madhub Ghose* and Baboo *Romesh Chunder Bose* for appellants.

Baboo *Mohesh Chunder Ghowdhry* and Munshi *Mohamed Yusoof* for the respondents.

The facts and arguments fully appear in the judgment of the Court (GARTH, C.J., and BEVERLEY, J.), which was delivered by

GARTH, C.J.—The plaintiffs in this case are the heirs of the brothers of one Bikramajit Singh, who is said to have died in 1252 Fusli.

Bikramajit admittedly left a widow called Sabja, and a daughter, called Moona, who is the mother of the defendant No. 1. He also had a son, Sheo Shahai Singh, whose widow, Khati, is defendant No. 2; and one, the main issue in the case, so far as the question of title is concerned, is, whether or not this son survived his father.

The plaintiff's case was, that he did survive his father, and that after his death his estate descended to his widow, Khati, and that they (the plaintiffs) were the reversionary heirs.

The defendant's case, on the other hand, was, that Sheo Shahai Singh died before his father; and the estate then passed to Bikramajit's widow, Sabja, and after his death to their daughter, Moona; who, with her son, the defendant No. 1, has taken possession of the property.

The plaintiffs brought this suit on the following allegations. They say, in paragraph 2 of the plaint, that after Sheo Shahai's death his widow, Khati, came into possession of the estate, and that Sheo Shahai's mother, that is Sabja, used to live jointly with Khati; and receive her maintenance up to the time of her death in 1276.

Then in paragraph 5 they go on to say, that the defendant No. 1, having fraudulently brought the defendant No. 2 under his influence, entered up on possession from Agrahan 1277; and (in paragraph 6) that defendant No. 2 having relinquished her right and possession, and having got the name of defendant No. 1 registered, has put him into possession.

And they accordingly pray that their title as reversioners may be declared as against defendant No. 1, and that in consequence of defendant No. 2 having wrongfully given over the property to defendant No. 1, they, the plaintiffs, may be declared entitled to recover immediate possession of it.

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The defence was, as already stated, that the plaintiffs had no title as reversionary heirs; that Sheo Shahai died before his father; and consequently that his widow, Khati, the defendant No. 1, never inherited the property; but that, on the contrary, first, Sabja, and after her death in 1264, the defendant No. 1 and his mother Moona, have been in adverse possession.

Defendant No. 2 died during the pendency of the suit; and for this reason the first Court (erroneously as it seems to us) did not think it necessary to try the question of possession. Having found as a fact that Sheo Shahai survived his father, the Munsiff came to the conclusion that the plaintiffs were entitled to a decree for possession, as being the reversionary heirs.

It is clear, however, that if Sabja and Moona, and the defendant No. 1 have been all along in adverse possession as against Khati, this circumstance, though it might not operate to bar the plaintiffs' title as reversioners, may nevertheless be important as showing that Sheo Shahai never in fact succeeded to his father's estate. Khati was admittedly out of possession at the time when the suit was brought, and it is a circumstance well worthy of consideration that the plaintiffs put the death of the mother Sabja at so recent a period as 1276.

The Subordinate Judge disposed of the case on a ground quite irrespective of the question of title. He held that, assuming the plaintiffs to be the reversionary heirs, the plaint disclosed no valid cause of action; and he accordingly dismissed the suit, leaving the question of rights to be determined hereafter.

It has been contended before us, that this decision of the lower Appellate Court was wrong; and that the plaint, as originally framed, disclosed a sufficient cause of action.

It seems clear to us that, so far as the suit was one for immediate possession, it could not have been brought during the lifetime of Khati. Assuming, for the sake of argument, that the estate was properly vested in her, she had a right, of course, to dispose of

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it for the term of her life in any manner she thought fit. But it is clear from the plaint and written statement, as well as from the issues raised in the first Court, that the mere fact of the defendant No. 2 having giving up to the defendant No. 1 the temporary possession of the property, is by no means the real cause of complaint.

It is obvious that the question between the parties is a very serious one of title, and possibly also of adverse possession; and what the plaintiffs say is, not that the defendant No. 2 has merely allowed the defendant No. 1 to enter upon possession *in her interest*, but that she has favoured his claims to the ownership of the property as against those of the plaintiffs and that he has accordingly had his name registered in the landlord's *sherista* as the true owner.

This is in fact setting up an adverse title as against the plaintiffs; and it is plain from the written statement and the issues that this is the declared intention of defendant No. 1.

The suit, therefore, seems to us to be precisely one of those which are referred to by the Privy Council in the late case of *Isri Dut Koer v. Hansbutti Koerain* (1).

In that case a Hindu widow had alienated her husband's estate, not for any legal necessity, or for her own personal benefit, but with a view to change the succession, and to give the inheritance to her own heirs, in preference to those of her husband; and the latter, under these circumstances, brought a suit to obtain a declaration, that the alienation made by the widow was only valid for her life, and void as against the reversionary heirs.

The High Court in that case had refused to interfere; but the Privy Council held, that the plaintiffs were entitled to a decree.

In page 332 of the report their Lordships say:—

“It is laid down, and in their Lordships' opinion correctly, in *Shyama Charan Sircar's Vyavastha Darpana*, that if a widow, without consent of her husband's heirs, dispose of his property for purposes not sanctioned by law, they are entitled to interfere, and prevent any such wrongful alienation by her, yet it is clear, that a widow may alien her own interest. If then she executes

(1) I. L. R., 10. Calc., 324.

a conveyance valid for her own interest, but purporting to convey a larger interest to the grantee, it is difficult to see how the reversioner can get any relief, except by a declaration that the conveyance is void *pro tanto*.

He cannot set the deed aside, because it is partly valid ; nor can he affect the possession, which the widow has a right to keep or to give up to another. Such suits as this would seem to be, at least in many cases, the only practical mode of enforcing the heir's right to interfere with a widow's alienation."

The principle thus laid down by their Lordships appears to us to apply, almost with greater force, in the present instance.

The defendant No. 2 is not only charged by the plaintiffs with having made an alienation of her property, which might be good for her life, and void as against the reversionary heirs, but they say that she has relinquished the property in favor of a rival claimant, the defendant No. 1, who, apparently, with her full consent and concurrence, has been registered as the absolute owner.

It appears to us that this is the very case in which the reversionary heir is justified in asking the Court to interfere.

It is true that under the present Limitation Act his rights as against the rival claimant might not be affected by limitation (see the Full Bench case of *Srinath Kur v. Prosunno Kumar Ghose*) (1); but it is obvious that, apart from limitation, cases may, and often do occur, in which silence, or apparent *acquiescence* on the part of a reversioner, *in assertions of his rights as against the wrongful acts of a rival claimant*, may throw a cloud over his title, and tend seriously to jeopardise his rights.

In such cases it is often most desirable, in the interests of justice, that the question should be brought before the Court with as little delay as possible ; and we consider that in this instance the plaintiffs were perfectly justified (assuming, of course, that their title is what they state it to be), in asking for the assistance of the Court. The case must therefore go back to the Subordinate Judge, in order that the issues may be properly tried with a due regard to these observations.

The costs in both Courts will abide the result.

Case remanded.

(1) I. L. R. 9 Cal., 934.

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