

right to move against a judgment of acquittal. I was, however, of opinion that this being an application for revision, it was competent for a private prosecutor to bring to the knowledge of this Court material errors that had taken place in a judicial proceeding in a Court subordinate to it, with a view to having them set right. The circumstance that an acquittal had taken place in the Court below did not appear to me to affect the consideration of the objection, the whole question appearing to me to be whether the applicant's petition showed upon the face of it material error in law or procedure in the proceedings of the Sessions Court. I have carefully examined it, and find it deals purely with questions of fact, and that no point of law is raised upon it, consequently there is nothing to revise and the record may be returned. Properly I ought to have rejected the former application to send for the record.

1879

SUKHC  
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## APPELLATE CIVIL.

1879  
November

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*

BHUPAL (DEPENDANT) v. JAG RAM (PLAINTIFF.)\*

*Condition against alienation—Mortgage.*

*Held* that where a person stipulates generally not to alienate his property he does not thereby create a charge on any particular property belonging to him (1).

THE plaintiff in this suit obtained a decree for Rs. 72 in a Court of Small Causes on the 16th July, 1870. He applied for the execution of this decree against his judgment-debtor, who on the 19th December, 1871, preferred a petition to the Court executing the decree in which, after promising to pay the judgment-debt, and also another judgment-debt, in instalments, he promised as follows: "I shall not alienate my own property or my father's until the amount of both decrees has been paid: if I do so I will first pay the amount of the decrees." In contravention of this promise he sold his property in a certain village to one Bhupal. The plaintiff now sued Bhupal

\* Second Appeal, No. 370 of 1879, from a decree of H. G. Keene, Esq., Judge of Agra, dated the 14th December, 1878, modifying a decree of Sayyid Munir-ud-din Ahmad, Munsif of Jalesar, dated the 20th September, 1878.

(1) For other cases in which it was held that a mere covenant not to alienate does not amount to a mortgage, see *Gunoo Singh v. Latajut Hossain*, I. L. R., 3 Calc. 336; *Ram Buksh v. Sookh Deo*, H. C. R., N. W. P., 1869, p. 65; *Chonnee Lall v. Puhutsan Singh*, H. C. R., N. W. P., 1868, p. 270.

1879

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to establish his right to recover Rs. 181, the amount of the decrees, by the sale of this property. The Court of first instance gave the plaintiff a decree, and on appeal by the defendant the lower appellate Court affirmed this decree.

The defendant appealed to the High Court.

The *Senior Government Pleader* (Lala Jula Prasad), for the appellant.

Mr. *Chatterji*, for the respondent.

The following judgments were delivered by the Court :

STUART, C. J.—In this case one Jawahir, in the course of execution of a Small Cause Court decree against him at the suit of the plaintiff, had by a petition in the execution department dated the 19th December, 1871, agreed to pay the debt by yearly instalments, and the petition then proceeds as follows : “In case of default I shall pay the amount of both the decrees in a lump sum : I shall not alienate my own property and that of my father until the amount of both the decrees has been paid : if I do so I shall first pay the amount of the decrees : the first instalment shall fall due in the month of Baisakh, Sambat 1929.” It is contended that this has the effect of constituting a valid lien by hypothecation in favour of the plaintiff, and that therefore a subsequent sale to Bhupal the defendant was invalid. But such a contention cannot be allowed. The agreement contained in the petition is not evidence of any hypothecation, not even of a verbal one, but simply an arrangement that the property should not be alienated till the debt was paid. In fact such an agreement goes to disprove that any mortgage or hypothecation was made, or even intended by it, for the very fact of an undertaking “not to alienate” shows that neither the property itself nor any interest in it had actually passed to the plaintiff, which, if there had been a good and valid hypothecation, must have occurred. The sale therefore to the defendant, appellant, cannot be impugned. The present appeal must be allowed, the decrees of both the lower Courts are reversed and the suit dismissed with costs in all the Courts.

OLDFIELD, J.—It appears that the plaintiff obtained a decree in the Small Cause Court against his judgment-debtor for a sum of

money, and in course of execution of it the judgment-debtor entered into an arrangement to pay the amount by instalments, and stipulated that he would not alienate his property until the amount was satisfied. He, however, made an alienation by private sale to the defendant, appellant before us, and the plaintiff has brought this suit to have the property resold, on the ground that it had been hypothecated to him by the arrangement entered into the execution proceedings above referred to. The Courts below have decreed the claim. The appeal on the part of defendant however must prevail, since on examination of the proceedings on which plaintiff relies, it cannot be held that the judgment-debtor made any pledge of any particular property to the plaintiff, for a mere stipulation not to alienate his property generally cannot be taken to effect a mortgage of property as security for a debt. The appeal is decreed and the decrees of the Courts below reversed and the suit dismissed with all costs.

1879

BHUPAI  
v.  
JAG RAO*Appeal allowed.*


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### FULL BENCH.

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1879  
November

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.*

UMRAO BEGAM (JUDGMENT-DEBTOR) v. THE LAND MORTGAGE BANK OF INDIA (DECREE-HOLDER).\*

*Act XVIII of 1873 (N.-W. P. Rent Act), ss. 9, 171—Land-holder—Right of Occupancy tenant—Transfer of Right of Occupancy in Execution of Decree.*

*Held* (SPANKIE, J. dissenting), affirming the decision of a Division Bench of the High Court in this case (1), that s. 9 of Act XVIII of 1873 does not prevent a land-holder from causing the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself.

In this case an application for the review of a judgment passed by a Division Bench of the High Court on the 2nd January, 1878 (1), having been granted by the learned Judges of that Bench (Pearson, J. and Oldfield, J.), those Judges referred to the Full Bench the question whether the view taken in that judgment, viz., that s. 9 of Act XVIII of 1873 was enacted in the interest of the

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\* Application for Review of Judgment, No. 2 of 1878.

(1) Reported at p. 517 of Volume I. of these Reports.