

1887  
July 14.

Before Mr. Justice Mahmood.

MADHO LAL AND ANOTHER (DECREE-HOLDERS) v. KATWARI  
(JUDGMENT-DEBTOR)\*

*Execution of decree—Decree for enforcement of hypothecation—Objection by judgment-debtor that property ordered to be sold is not legally transferable under N.-W. P. Rent Act, s. 9—Such objection not entertainable in execution.*

In execution of a decree for enforcement of hypothecation by sale of specific property, an objection by the judgment-debtor that the property is not transferable, with reference to s. 9 of the N.-W. P. Rent Act, cannot be entertained.

The facts of this case are sufficiently stated in the judgment of the Court.

Lala Juala Prasad, Munshi Hanuman Prasad, and Munshi Sukh Ram, for the appellants.

Munshi Kashi Prasad, for the respondent.

MAHMOOD, J.—The facts of this case are very simple. The appellants decree-holders are zamindárs of the village in which the land to which this litigation relates is situate, and that land was hypothecated by Musammat Katwari, judgment-debtor respondent, to the appellants on the 24th February, 1876. The money due upon that mortgage not having been paid, a suit was brought thereunder resulting in the claim being decreed on the 24th February, 1882. The decree specifically directs that the land now in question should be sold in enforcement of the lien.

By an application made on the 9th February, 1884, the decree of the 24th February, 1882, was sought to be put into execution by the decree-holders appellants, but such execution was resisted by the judgment-debtor, Musammat Katwari, upon the ground that the land which she held was an occupancy tenure which could not be transferred under s. 9 of the Rent Act, and this plea having been accepted by the lower Courts, the application for execution has been disallowed.

From the order so disallowing the application this second appeal has been preferred, and I am of opinion that it should prevail. There is no question that the land held by the respondent, Musammat Katwari, is an occupancy tenure, such as that contem-

---

\* Second Appeal No. 1603 of 1886 from a decree of J. Deas, Esq., District Judge of Jaunpur, dated the 10th July, 1886, confirming a decree of Maulvi Nasur-ul-lah Khan, Subordinate Judge of Jaunpur, dated the 22nd September, 1886.

plated by s. 9, and within the prohibition of that section against transfer. The nature of such tenures with special reference to the question of transferability was fully discussed by me in *Gopal Pandey v. Parsotam Das* (1), though, I being in the minority, the majority of the Full Bench held that the hypothecation by an occupancy tenant of his right of occupancy was not a transfer within the meaning of s. 9 of the Rent Act of 1873, which Act would govern the hypothecation of the 24th February, 1876, whereon the decree was obtained by the appellants on the 24th February, 1882. From the opinion expressed by the majority of the Full Bench in that case I still dissent with profound respect, the more so because I find it difficult to reconcile the *ratio decidendi* of that ruling with a more recent Full Bench ruling, *Ganga Din v. Dhurandhar Singh* (2), in which they held that an usufructuary mortgage was a transfer, and the prohibition of s. 9 of the Rent Act applied to such a case.

But it is not open to me to consider in this case the question as to the validity of the hypothecation of the 24th February, 1876, or the correctness of the decree of the 24th February, 1882, because that decree having been passed, the proceedings which have given rise to this appeal were taken only in execution of the decree, and, as such, this Court, as much as the Courts below, is bound to give effect to that decree. Mr. *Kashi Prasad*, however, contends on behalf of the respondent that the specific provisions of s. 9 of the Rent Act having prohibited transfer of such occupancy holdings, the lower Courts were right in not giving effect to the terms of the decree, and in declining to sell the property by auction in execution of that decree. For this contention the learned pleader relies on *Naik Ram Singh v. Murli Dhar* (3), where it was held by the Full Bench that the land-holder who had attached an occupancy right of an occupancy tenant in certain land in execution of a decree before Act XII of 1881 came into force, was not entitled under s. 2 of that Act to bring such right to sale after that Act came into force, that section not saving the right of the land-holder to bring such right to sale in execution of the decree, and s. 9 of that Act expressly prohibiting the sale of such a right in execution of a decree.

(1) I. L. R., 5 All. 121.

(2) I. L. R., 5 All. 495.

(3) I. L. R., 4 All. 371.

1887

MADHO LAL  
v.  
KATWARI.

If the Full Bench ruling relied upon were on all fours with this case, I should of course have felt it my duty to have followed it, sitting as a single Judge, but the case is distinguishable from the one before me. In the case before the Full Bench the decree was a simple money decree, so far at least as the property which had been attached in execution thereof and to which that litigation related was concerned. In the present case the decree of the 24th February, 1882, is not a simple money decree. It is a decree which decrees a claim for money, and orders sale by specific enforcement of lien against the land which forms the subject-matter of this dispute. It may be that the decree was erroneously passed, but the Court executing that decree has no power to go behind it and to decline to execute it, because such a refusal to execute the decree amounts to nullifying the decree altogether. This view was expressed by me in the case of *Bisheshar Rai v. Sukhdeo Rai* (1) where the case was very similar to this, and Oldfield, J., concurred with me in holding that when a decree is passed and specifically directs the sale of a tenure which may or may not be transferable, the Court executing the decree is bound to give effect to

(1) The facts of this case are sufficiently stated in the judgment of Mahmood, J. *Munshi Sukh Ram*, for the appellant. *Lala Juala Prasad*, for the respondents.

MAHMOOD, J.—The facts of this case, so far as it is necessary to state them, are very simple. Sukhdeo Rai and others executed a hypothecation bond on the 10th September, 1874, in favour of Bisheshar Rai, and subsequently sold the hypothecated property to Ramjas Rai, who is the respondent in this second appeal. On the 31st March, 1882, Bisheshar Rai obtained a decree on his hypothecation bond not only against the obligors, but also against Ramjas Rai. The decree in clear and specific terms decreed the sale of the mortgaged property in satisfaction of the mortgagee's claim. The present dispute has arisen out of Bisheshar Rai's application to put in force the mandate of the Court of the 31st March, 1882. He is met by the objection that the property mortgaged is a non-saleable tenure, its sale being made illegal by s. 9 of Act XII of 1881. There is much doubt whether the tenancy here is one at fixed rates, and as such not subject to the prohibition contained in that section. The Courts below have gone behind the decree, and have arrived at the conclu-

sion that the property mortgaged and ordered to be sold was merely an occupancy tenure, and that its sale was prohibited. Such questions could be dealt with only in the suit, but the action of the lower Courts amounts to a proceeding which practically nullifies the decree of 1882. The appellant before us complains of this, and rightly, because where a clear and specific order is made by a decree, it is not competent to a Court in its execution department to take notice of any matter except that which relates to execution. We are not concerned here as to what may be properly ordered as to third parties. As between the parties to the decree, there is nothing in s. 244 (c) which justifies such a procedure as that of declaring a decree to be illegal and refusing to carry it into execution. I do not think that the law contemplates such procedure when an application for enforcement of decree is made. I would set aside the orders of the lower Court, and direct the first Court to entertain the decree-holder's application for execution, and dispose of the same according to law. The costs of the present appellant in this and the lower Courts to be costs in the cause.

OLDFIELD, J.—I concur.

it and not to question the validity of the decree. I still adhere to the views which I expressed in that case, and following them am constrained to decree this appeal, and setting aside the orders of both the lower Courts, to remand the case to the Court of first instance for executing the decree of the 24th February, 1882, with reference to the observations which I have made. Costs will abide the result. I wish only to add that I must not be understood to say anything as to whether the auction-sale which would take place in execution of the decree would or would not convey any valid title to the purchaser (1).

*Cause remanded.*

*Before Mr. Justice Straight and Mr. Justice Brodhurst.*

BANSIDHAR (DEFENDANT) v. SANT LAL AND ANOTHER (PLAINTIFFS).\*

1887  
December 5.

*Hypothecation—Moveable property—Non-existent moveables—Contract to assign after acquired chattels—Completion of assignment on property coming into existence—Transferee with notice of hypothecation—Suit against transferee for damages for wrongful conversion—Measure of damages.*

*Held*, upon principles of equity, that a hypothecation of certain future indigo produce was a valid contract to assign such produce when it should come into existence; and that the hypothecation became complete when the crop was grown and the produce realized; and was enforceable against a transferee of such produce with notice of the obligee's equitable interest. *Collyer v. Isaacs* (2) and *Holroyd v. Marshall* (3) referred to.

*Held* also that such an interest would not avail against a transferee without notice. *Joseph v. Lyons* (4) and *Hallas v. Robinson* (5) referred to.

In a suit against such a transferee with notice, who had sold the produce, for damages for wrongful conversion of the security,—*held* that the measure of damages, under ordinary circumstances, and where a fair price had been obtained, would be the amount which the defendant had realized by the sale. *Misri Lal v. Mozhar Hossain* (6) referred to.

The facts of this case are stated in the judgment of the Court.

\* Second Appeal No. 1430 of 1886, from a decree of T. R. Wyer, Esq., District Judge of Meerut, dated the 22nd July, 1886; reversing a decree of Babu Brij Pal Das, Subordinate Judge of Meerut, dated the 12th April, 1886.

(1) This case was followed in *Ramgo bind Das v. Gulzar Singh* (S. A. No. 698, of 1887) decided the 11th August, 1887, *Jugraj Puri v. Harbans Dyal* (S. A. No. 268 of 1887) decided the 3rd January, 1888, and *Janki Rai v. Ram Ghulam* (S. A. No. 896 of 1887) decided the 27th January, 1888.

(2) L. R., 19 Ch. D. 342.

(3) L. R., 10 H. L. 191; 36 L. J. Ch. 193.

(4) L. R. 15 Q. B. D. 280.

(5) L. R., 15 Q. B. D. 283.

(6) I. L. B., 13 Calc. 262.