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that the present suit is protected by the proviso at the end of clause 3) of section 201 of the Tenancy Act. We, therefore, accept this appeal, and setting aside the decrees of both the courts below, decree the plaintiff's claim for a declaration to the extent already stated, with costs throughout.

Appeal allowed.

FULL BENCH

1911. *July*, 20.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Tudball.

BHOLA NATH (PLAINTIFF) *v.* MUSAMMAT KISHORI AND ANOTHER (DEFENDANTS).*

Civil Procedure Code (1908), *section* 60 (1) *c*) *Execution of decree—Mortgage—Agriculturist's house not appurtenant to his holding.*

Held by RICHARDS, C. J., and TUDBALL, J., (BANERJI, J., *dissentiente*) that section 60 of the Code of Civil Procedure will not operate to bar the sale of a house belonging to an agriculturist in execution of a decree on a mortgage of the same if such house is not an appurtenance of the mortgagor's holding which he is prohibited by law from mortgaging or transferring.

Per BANERJI, J.—The Legislature clearly intended that no court should sell a house belonging to and occupied by an agriculturist, provided that the house is of the description mentioned in clause *c*) of the proviso to section 60, Code of Civil Procedure, and it makes no difference in the powers of the court, whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged. The proviso forbids both attachment and sale, that is, where an attachment must precede a sale it forbids attachment, as well as sale, and where attachment is not a preliminary step, it forbids sale. *Ram Dial* v. *Narpat Singh* (1) referred to.

THE facts of this case were as follows:—

One Gaya, the deceased husband of Musammat Kishori, and another person, Jaisukh, mortgaged to the plaintiff a portion of a dwelling house for Rs. 99. The mortgage was dated the 8th July, 1909. Gaya died childless. The plaintiff brought this suit against Kishori and Jaisukh for payment of mortgage money with interest and in default for the sale of the house. The defendant took up the plea that the house being an agriculturist's house could not be brought to sale. The Munsif dismissed the suit holding the mortgage to be invalid, but he found that it had been genuinely entered into. The Subordinate Judge affirmed

* Second Appeal No. 1194 of 1910 from a decree of Srish Chandra Basu, Subordinate Judge of Bareilly, dated the 14th July, 1910, confirming a decree of Baijnath Das, Munsif of Havali, dated the 4th of April, 1910.

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the decision, on the ground that an agriculturist's house could not be sold, and as six years had expired since date of mortgage, he dismissed the suit altogether. The plaintiff appealed to the High Court.

Munshi *Iswar Saran*, for the appellant, referred to order XXXIV, rules 4 and 5, as governing mortgage suits. Section 60 of the new Code did not apply to decrees obtained on a mortgage. Properties exempted therein were only saved from sale when attachment was necessary. That group of sections was headed 'attachment' and only related to sales in execution of money decrees. Besides, there was nothing to prevent a tenant selling or mortgaging his house of his own accord. Where a heading was given to a group of sections, it controlled their interpretation; Wilberforce on Interpretation, page 294. If a tenant could sell the materials of his house he could mortgage them; *Bhagvandas* v. *Hathibhai* (1).

Babu *Balram Chandra Mukerji* [for Maulvi *Ghulam Mujtaba*], for the respondents :—

The court should not help the plaintiff to bring the house to sale. It would be necessary to hold that section 60 had nothing to do with mortgage decrees. The words in the proviso were 'attachment *or* sale,' '*sale*' there included sales after attachment or otherwise; *Tika Ram* v. *Bachaital* (2), *Ram Dial* v. *Narpat Singh* (3).

Munshi *Iswar Saran*, in reply :—

In the proviso the expression 'attachment *or* sale' was governed by the use of the word '*such*' preceding it. If the mortgage itself were invalid, the mortgagor would not incur any personal liability either. Act V of 1908 mainly dealt with procedure, and such an Act could not override a substantive right and that by implication only.

RICHARDS, C. J.—This appeal arises out of a suit for sale on a mortgage. The property consisted of a house, and it has been found that the mortgagors to whom the house belonged were agriculturists. Both the courts below have dismissed

(1) (1879) I. L. R., 4 Bom., 25. (2) (1909) 6 A. L. J. R., (Notes of cases) 107.
(3) (1909) I. L. R., 33 All., 136.

the suit on the strength of section 60 of the Code of Civil Procedure.

It is to be borne in mind that it is not found that the house in question was an appurtenance of a tenancy which the tenant was incapable of mortgaging or transferring. This is a very important matter, because the question might be very different if the mortgage had been a mortgage of the house of an occupancy tenant which was found to be appurtenant to the holding. The sole question for us to decide is whether or not having regard to the provisions of section 60 of the Code of Civil Procedure the courts below were correct in dismissing the plaintiff's suit.

Section 60 (1) is as follows:—"The following property is liable to attachment and sale in execution of a decree, namely, lands, houses * * * Provided that the following particulars shall not be liable to such attachment or sale, namely:—

"(*a*) The necessary wearing apparel, cooking vessels, beds and bedding of the judgement-debtor, his wife and children, and such personal ornaments, as in accordance with religious usage, cannot be parted with by any woman;

"(*b*) tools of artizans, and where the judgement-debtor is an agriculturist, his implements of husbandry and such cattle and seed grain as may, in the opinion of the court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section;

"(*c*) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him."

The argument on behalf of the respondents is that by virtue of the proviso the house of the defendants cannot be sold, and that inasmuch as the house cannot be sold in execution of the decree, no mortgage decree ought to be made.

On the other hand the appellant argues that section 60 does not apply to mortgage decrees at all, that it deals entirely with attachment and sale in respect of simple money decrees.

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Richards, C.J.

In my judgement the decision of the courts below were incorrect. *Primâ facie* a man is entitled to mortgage his property if he pleases; and if he can make a valid mortgage, the mortgagee is entitled to a mortgage decree entitling him to sell the property. The only aspect in which the decree of the court below can be supported is on the ground that the proviso to section 60 by implication enacts that the mortgage of a house of an agriculturist is illegal. Such a contention in my opinion cannot be sustained. The Code of Civil Procedure is an Act which deals entirely with matters of procedure; and *primâ facie* it is very improbable that the Legislature intended to deal with matters of substantive law. Where it was considered necessary for the protection of certain classes of tenants that their powers of transfer should be restricted, the Legislature by express provisions in the Tenancy Act has so enacted. It seems to me also that it would be a very strained construction to give to section 60 to hold that it applied to the execution of mortgage decrees. The section itself is headed "attachment." In the case of mortgage decrees no attachment is necessary and in practice no attachment is ever made. The section begins :—"The following property is liable to attachment and sale in execution of a decree." It seems quite clear that these words only apply to simple money decrees. Then follows the proviso, where it is true that the words are not "attachment *and* sale," but "attachment *or* sale." It must, however, be remembered that the proviso is a proviso to section 60, clause 1, which deals with simple money decrees. The words "such attachment or sale" also appear in the proviso, clearly showing that the proviso relates to what immediately precedes. It is argued that the word "or" appearing in the proviso, instead of the word "and" necessarily shows that the section relates to mortgage decrees. I do not agree with this argument. There are cases of simple money decrees in which it is not necessary that there should be an attachment, namely, when there has been already an attachment prior to judgement or on foot of another decree. Furthermore, in the explanation the very same words "attachment or sale" appear, where it is quite clear that reference is being made to the execution of a simple money decree of a particular nature, namely, a simple money decree for rent.

In my opinion we would not be justified in holding that it was intended by the proviso to section 60 to render the sale or mortgage of the house of an agriculturist illegal. If it was not so intended, the mortgagor was entitled to mortgage his house, and the mortgagee, under the provisions of order XXXIV, rules 4 and 5, was entitled to a decree for sale, and I think that he would be entitled to execute this decree for sale notwithstanding the provisions of section 60 (1) (*c*) of the Code of Civil Procedure. I would allow the appeal.

BANERJI, J.—I regret I cannot agree with the learned Chief Justice. I see no reason to alter the opinion I expressed in my judgement in the case of *Ram Dial* v. *Narpat Singh* (1), decided by the late Chief Justice and myself, and subsequently followed by me in *Gulzari Lal* v. *Bhikari* (2). The court below must be taken to have found that the house which the plaintiff seeks to bring to sale is a house belonging to an agriculturist and occupied by him within the meaning of clause (*c*) of the proviso to section 60 (1) of the Code of Civil Procedure. If the Legislature forbids the sale of such a house, a court cannot by its decree order that a house of that description should be sold. In my opinion the law forbids the sale of such a house. Section 51 (*b*) provides that a court may order execution of a decree by attachment and sale, or by sale without attachment of any property. Section 60 of the Code specifies the different classes of property which are liable to attachment where attachment is necessary, and to sale. The proviso to the section is to the effect that certain particulars, among which are houses and other buildings belonging to and occupied by an agriculturist, shall not be liable to attachment *or* sale. At the commencement of the section the word "and" is used and in the proviso we find the word "or." The proviso, as I understand it, forbids both attachment and sale, that is to say, where an attachment must precede a sale, it forbids attachment as well as sale, and where it is not necessary that an attachment should be a preliminary step to a sale, it forbids sale. Therefore, in my opinion, section 60 and the proviso to it take away from the court the power to order a sale of property of the description mentioned in the proviso.

(1) (1909) I. L. R., 33 All., 186. (2) (1911) 8 A. L. J., Notes of Cases, 38.

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Banerji, J.

The object of the Legislature is manifest. That object is that certain classes of debtors should be protected against their own improvidence. There can be no doubt that in the case of a simple decree for money the dwelling house occupied by an agriculturist cannot be sold. The policy of the law is that he should not be deprived of his place of residence by a process of court. I fail to see why, if an unsecured creditor of the agriculturist cannot proceed against the debtor's dwelling house, a secured creditor should be allowed to do so. The policy of the law equally applies to both the cases. In my opinion the Legislature clearly intended that no court should sell a house belonging to and occupied by an agriculturist provided that the house is of the description mentioned in clause (*c*) of the proviso to section 60, and it makes no difference in the powers of the court whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged. I think that the use of the disjunctive "or" in the proviso is very significant, and that it leaves no room for doubt as to the intention of the Legislature. The Code of Civil Procedure no doubt lays down the procedure to be followed in the case of attachments or sales. One of the rules on the subject is that the dwelling-house of an agriculturist should not be sold, and that rule a court is bound to follow. To hold that such a house can in some cases be sold will be departing from the prescribed procedure and defeating the policy of the law. For these reasons I am of opinion that, as the court cannot order a sale of property of the description in question, it cannot make a decree directing such sale and the decision of the courts below is right. I would dismiss the appeal.

TUDBALL, J.—I am in full agreement with the learned Chief Justice and have practically nothing to add to what he has said. Presuming that the agriculturist in the circumstances of the present case has a legal right to sell or mortgage his house, it not being appurtenant to a class of holding which is non-transferable according to law, I fail to see how in justice, equity, or good conscience, a court can refuse to grant to the mortgagee a decree for sale. It seems to me as clear as possible that section 60 of the Code of Civil Procedure does not, and was never intended to apply to the case of a mortgage decree, for the execution of which

provision is made elsewhere than in that section. It seems to me to be going much too far to hold that section 60 of the Civil Procedure Code destroys the right of a man to make a mortgage of his property; for it practically amounts to that to say that his mortgagee is not entitled to a decree for sale on the basis of a mortgage which would otherwise be perfectly legal and valid. I think stress must be placed upon the fact that in the present case there is nothing to show that the house in question is appurtenant to the mortgagor's holding, or to show what the nature of that holding is. I say this by reason of the decision in *Ram Dial* v. *Narpat Singh* (1). That case was decided upon two grounds. With one I fully agree; but the other is the subject of discussion in this present case and I cannot accept it. For these reasons I would admit the appeal.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decrees of both the courts below be set aside and the case remanded to the court of first instance, through the lower appellate court, with directions to re-admit it in its original number in the register and determine it according to law. The parties will abide their own costs in this court. Other costs will follow the event.

Appeal allowed.

(1) (1909) I. L. R., 33 All., 136.