

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

GOBIND RAO AND OTHERS (JUDGEMENT-DEBTORS) v. KAMTA PRASAD

(DECREE-HOLDER)*

Act (Local) No. II of 1903 (*Bundelkhand Alienation of Land Act*), section 9—*Mortgage—Suit for foreclosure—Plea of defendants that they were members of an agricultural tribe—Reference to Collector—Effect of Collector's finding in the negative.*

In a suit for foreclosure of a mortgage against two sets of defendants, both sets pleaded that they were members of an agricultural tribe to whom the provisions of the Bundelkhand Alienation of Land Act, 1903, applied, and a reference was accordingly made to the Collector under section 9 (3) of that Act. The Collector took action under the Act with regard to one set of defendants, but as to the other decided that they were not members of an agricultural tribe. Held that this finding left the Civil Court no option but to continue the proceedings before it independently of the provisions of the Bundelkhand Alienation of Land Act, 1903.

THE facts of this case are fully stated in the judgement of the Court.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellants.

The Hon'ble Dr. *Sundar Lal*, for the respondent.

MUHAMMAD RAFIQ and PIGGOTT, JJ.—This is a second appeal by certain judgement-debtors in an execution case. The suit in which the decree in question was passed was a suit for foreclosure on a mortgage by conditional sale, dated the 11th of March, 1877. There was a long array of defendants; but for the purposes of this appeal it is sufficient to say that the first defendant was the heir of the original mortgagor, whereas another set of defendants, who are now appellants before us, were the heirs of one Gopal Rao, who acquired by a transfer subsequent to the mortgage of 1877 a portion of the equity of redemption. Before the court in which the suit was instituted the defendants of both these sets pleaded that they were members of an agricultural tribe within the meaning of the Bundelkhand Alienation of Land Act (Local Act II of 1903). The court held that this was a point to be considered after a preliminary decree for foreclosure had been passed, and such a decree was passed on the 26th of January, 1910. When the decree-holder applied for a decree absolute, the court recorded a finding that inasmuch as the judgement-

*Execution Second Appeal No. 656 of 1913 from a decree of J. H. Cuming, District Judge of Jhansi, dated the 6th of December, 1912, reversing a decree of Sheo Prasad, Subordinate Judge of Jhansi, dated the 6th of August, 1912.

debtors appeared to be members of an agricultural tribe, the case must be referred to the Collector under clause (3) of section 9 of the Bundelkhand Alienation of Land Act. As regards the first defendant, the heir of the original mortgagor, his case has been dealt with by the Collector under the section above referred to and we are not concerned with it now. With respect to those judgement-debtors who represented the subsequent transferee, Gopal Rao, the Collector held that they were not members of an agricultural tribe within the meaning of the Act. It would seem, however, that a question was raised before the Collector as to whether the decree-holder would not accept a mortgage for a term of years from those judgement-debtors also, in lieu of enforcing his strict right to obtain a foreclosure decree. The Collector made a note of the terms on which the decree-holder was prepared to accept such a mortgage and gave these judgement-debtors one week's time within which to execute the same. They did not comply with this order, but appealed to the Commissioner against the decision of the Collector that they were not members of an agricultural tribe. The Commissioner apparently intended to hold that they were members of an agricultural tribe, but based his decision on the finding that, when the judgement-debtors appeared before him they professed themselves willing to execute a usufructuary mortgage as directed by the Collector. He returned the record to the Collector with directions to "allow a mortgage to be given for twenty years as originally directed." The case having thus come back to the Collector's court, the judgement-debtors in question did execute a mortgage; but the decree-holder took exception to the terms of that mortgage and refused to accept it. The Collector, thereupon, returned the record to the Civil Court without taking any further action which can in any way be regarded as falling under the provisions of section 9 of the Bundelkhand Land Alienation Act. The question then arose in the Civil Court whether the decree-holder could or could not be given a decree absolute for foreclosure in respect of the share of these judgement-debtors in the property originally mortgaged. The court of first instance held that no such decree could be passed; but this finding has been reversed by the District Judge on appeal and a decree for foreclosure passed. The appeal before us is

1914

GOBIND RAO
v.
KAMTA
PRAHAD.

1914

GOBIND RAO
v.
KANTA
PRASAD.

against the decree of the District Judge. We have been through the record and considered the arguments addressed to us. On behalf of the appellants we are asked to consider the question whether they should or should not be held to be members of an agricultural tribe under the Bundelkhand Land Alienation Act, and arguments are advanced in favour of the contention that they are so. The real question, however, is as to the effect of the Collector's order returning the record to the Civil Court. Rightly or wrongly the Collector has throughout adhered to the position that these particular judgement-debtors were not members of an agricultural tribe. He at no time put the decree-holder to the option provided by clause (2) of section 9 of the Act. He has in fact refused to allow these judgement-debtors the benefit of the Act. Under these circumstances the District Judge was right, in our opinion, in holding that the Civil Court had no option but to continue the proceedings before it independently of the provisions of the Bundelkhand Land Alienation Act. There was a conditional decree for foreclosure against these judgement-debtors, and the Collector, upon a reference duly made to him, has not passed any order which can be regarded as giving the judgement-debtors the benefit of the Bundelkhand Land Alienation Act. It follows that a decree absolute for foreclosure must inevitably be passed in respect of the share held by these judgement-debtors. We accordingly dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Chamier.

EMPEROR v. GANGA*

1914
April, 24.

Criminal Procedure Code, section 438—Enhancement of sentence—Reference made by District Magistrate after the Sessions Judge has declined to refer—High Court—Practice.

Quære whether a District Magistrate is as a matter of law entitled to make a reference to the High Court under section 438 of the Code of Criminal Procedure in a matter in which the Sessions Judge has been asked to send a case up to the High Court for enhancement of sentence and has refused to do so. But if he is so entitled, it is extremely inconvenient that a District Magistrate should do so, and the High Court would not take action upon such a reference

* Criminal Reference No. 240 of 1914.