

sentences on Ram Dayal and Dodraj are hereby enhanced to four years' rigorous imprisonment each with effect from the date of the conviction by the learned Sessions Judge.

Appeal dismissed.

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EMPEROR

v.

RAM DAYAL.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

FATMATUL KUBRA (JUDGEMENT-DEBTOR) v. ACHCHI BEGAM (DECREE-HOLDER) NAZIRUDDIN AND OTHERS (JUDGEMENT-DEBTORS) AND AZHAR HUSAIN (AUCTION PURCHASER).*

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November, 1913

Execution of decree—Sale in execution—Grove or garden with house, being ancestral property and forming part of a mahal—Sale by Civil Court amin—Jurisdiction—General Rules (Civil) of 1911, chapter IV, rules 5 and 8

Held that a grove or garden, part of which was occupied by a house, and which was a part of a mahal and assessed to revenue and had been owned continuously by the family of the proprietors for over fifty years was ancestral land within the meaning of Rule 5 of Chapter IV of the General Rules for the Civil Courts and could not be sold by the court amin in execution of a Civil Court decree, but only through the Collector after the decree had been transferred to him for execution.

THE facts of this case are fully set forth in the judgement. Briefly stated they were as follows:—In execution of a Civil Court decree a grove or garden was sold by auction through the court amin. A house stood on a small portion of this land. It appeared that this land was assessed to revenue and included in a certain mahal, and that it formed a portion of that mahal. The property had been with the family of the judgement-debtor for well over fifty years.

The judgement-debtor applied to have the sale set aside on the ground, *inter alia*, that the land was "ancestral land" and that the decree should, therefore, have been transferred to the Collector for execution. The application was dismissed. The judgement-debtor appealed.

Babu Lalit Mohan Banerji (with him Maulvi Muhammad Rahmat-ul-lah for Maulvi Ghulam Mujtaba), for the appellant.

The property sold forms a portion of a mahal. It also satisfies the other conditions of the definition of "ancestral land" as

* First Appeal No. 871 of 1912 from a decree of Pirthi Nath, Subordinate Judge of Bareilly, dated the 22nd of June, 1912.

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contained in Rule 5 of Chapter IV of the General Rules for the Civil Courts. The sale should, therefore, have been held by the Collector in accordance with clause (1) of Rule 8 of the said Chapter. The decree should have been transferred to the Collector for execution under section 68 of the Code of Civil Procedure, and the sale by the Civil Court Amin was without jurisdiction and void. Clause (1) of Rule 8 applies to all "ancestral lands" without exception of any kind. A grove or garden may be either ancestral land or non-ancestral. If it is the former, as in the present case, the sale must be held under clause (1). Clause (3) is an exception to clause (2) and not to clause (1).

Munshi *Govind Prasad* for the respondents :—

The three clauses of Rule 8 deal with three distinct kinds of property which are mutually exclusive of each other. Clause (1) treats of "ancestral land," and that clause is exhaustive of that class of land. Non-ancestral land is dealt with by clauses (2) and (3). Groves, gardens and lands occupied by houses are grouped in a separate class by themselves in clause (3); the inference is that clauses (3) and (1) were not intended to overlap each other. All groves and gardens come under clause (3); there are no qualifying words, such as "non-ancestral groves and gardens." All groves and gardens must, therefore, be sold in accordance with clause (3) by a Civil Court Amin. In the second place, groves and gardens, like resumed *muafi* lands, form part of the miscellaneous *haqiat* separately assessed to revenue, and do not form portions of a mahal; they do not, therefore, come within the term "ancestral land."

Babu *Lalit Mohan Banerji* was not heard in reply.

TUDBALL and MUHAMMAD RAFIQ, JJ :—The facts of this case, so far as it is necessary to state them for deciding this appeal, are as follows :—A decree-holder in execution of her decree attached a grove or garden in mauza Udaipur in the Bareilly district in which stands a house. The area of the grove is some ten bighas *pacca*. The court sold the property through the agency of the Court Amin under clause (3) of rule 8 of chapter IV of the General Rules for the Civil Courts. Among other objections, one objection taken is, that the land in question is ancestral land and could only be sold by the Collector after transfer of the execution

of the decree to his court, under section 68 of the Code of Civil Procedure, and that, therefore, the proceeding of the court below is entirely without jurisdiction. On the issue remitted to the court below, that court held that the land in question is ancestral land, but it has expressed its opinion that in spite of that it is a grove or garden such as is contemplated in clause (3) of rule 8 of chapter IV of the General Rules mentioned above. 'Ancestral' lands for the purposes of these rules are "all lands being mahals or shares in mahals or portions of mahals which have been owned continuously by the proprietor from the 1st of January, 1860, etc." The court below has held that this property has been in the family of the judgement-debtor for well over fifty years. It has also held that it is a portion of a mahal. The patwari's evidence also shows that it is part of mahal *safed* in mauza Udaipur and is assessed to revenue. It is, therefore, clear to us that the property is ancestral land within the definition given in the rules.

It is urged, however, on behalf of the auction-purchaser that the gardens, groves and lands occupied by houses all fall within clause (3) of rule 8, whether they are ancestral or non-ancestral. With this we find it impossible to agree. Lands which are ancestral also include gardens or groves. This is clear from a consideration of rule 8, clause (2), which lays down that non-ancestral land shall be sold by the Collector, who is to be appointed by the court for this purpose, but specially exempts "gardens, groves or lands occupied by houses or appurtenant thereto." An examination of clause (1) shows that in respect of ancestral lands there is no such exception. All ancestral lands have to be sold in accordance with rule 1. Non-ancestral lands have to be sold in the manner laid down in rule 2, except gardens, groves or lands occupied by houses or appurtenant thereto. These latter have to be sold in the manner laid down in clause (3) of the rules. If there had been any intention to exempt ancestral lands, the exemption would have been clearly stated in clause (1), as it has been clearly stated in clause (2), in respect of non-ancestral lands. In our opinion the sale by the court below through the Amin, of the land in question was entirely without jurisdiction, and under the law it was necessary for the court to transfer the decree under section 68 of the Code of Civil Procedure to the Collector, who

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then alone would have jurisdiction to execute the decree and put the property to sale. In this view, it is unnecessary to go into any other point in the appeal. We allow the appeal, set aside the sale and direct the record to be returned to the court below with instructions to proceed with the execution of the decree, according to law. The appellants will have her costs of the appeal.

Appeal allowed.

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November, 21.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

NARSINGH SINGH AND OTHERS (DEFENDANTS) v. ACHHAIBAR SINGH AND OTHERS (PLAINTIFFS).*

Mortgage—Purchase by mortgagees of part of mortgaged property—Tender of proportionate part of mortgage money by purchasers of the residue—Tender refused on ground of subsequent mortgages affecting the property—Suit for redemption—Form of decree.

Tender of payment under section 83 of the Transfer of Property Act was made by the purchasers of part of the property comprised in a mortgage (the rest of the property having been purchased by the mortgagees themselves) who paid into court what they believed to be the proportionate amount due on the share purchased by them and within the period limited by the mortgage-deed. This tender was, however, refused upon the ground that there were two subsidiary mortgages affecting the property under which further sums were due. The mortgagors thereupon brought a suit for redemption expressing their readiness to pay what might be found by the court to be the proper proportionate amount due by them in respect of the property which they had purchased.

Held, on the finding that the plaintiffs when they made their original tender were unaware of the existence of the two subsidiary bonds, that the court below was right in giving a decree for redemption on payment of the amount due under the three mortgages in respect of the share purchased by the plaintiffs and for possession at the corresponding period of the following year.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are set forth in the judgement under appeal, which was as follows:—

“The facts out of which this appeal arises are as follows: The predecessors in title of the plaintiffs respondents executed a usufructuary mortgage in favour of the predecessors of the defendants appellants, dated the 19th of May, 1852, of a one anna four pie share in mauza Bisapur for Rs. 499 ‘with *sir*, *khudkasht* lands and *sair* items and all zamindari rights and cesses.’ The mortgage was redeemable on payment of the mortgage money in the

*Appeal No 117 of 1913 under section 10 of the Letters Patent.