

FULL BENCH.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Muhammad Rafiq and Mr. Justice Byves.

1921
March, 18.

KATWARI AND OTHERS (JUDGMENT-DEBTORS) v. SITA RAM TIWARI,
(DECREE-HOLDER).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 20(2)—Occupancy holding—Execution of decrees—Court not competent to sell an occupancy holding, even in execution of a mortgage decree specifically directing the sale thereof.

In view of the provisions of section 20 of the Agra Tenancy Act, 1901, a court executing a decree cannot order an occupancy holding to be sold, no matter whether the decree is a decree directing the sale of the holding or is a simple money decree. *Madho Lal v. Katwari* (1) overruled. *Bhola Nath v. Musammal Kishori* (2) referred to.

THE facts of this case are sufficiently stated in the judgment of BANERJI, J.

Dr. *Surendra Nath Sen*, for the appellants.

Dr. *S. M. Sulaiman*, for the respondent.

BANERJI, J. :—The question to be determined in this case is whether an occupancy holding the sale of which has been ordered in the decree upon a mortgage in which the occupancy holding was hypothecated can be sold in execution of that decree and whether it is open to the judgment-debtors to raise the objection in execution that the property is not liable to sale by reason of the provisions of section 20 of the Agra Tenancy Act. On the 17th of May, 1909, a mortgage was made by four persons of a house, a *nim* tree and certain lands which are admittedly lands which formed the occupancy holding of the mortgagors. In fact in the mortgage deed the lands are described as forming the occupancy holding of the persons who executed that document. A suit was brought on the basis of the mortgage and an *ex parte* decree was passed on the 8th of June, 1914. This decree was made final on the 19th of July, 1917. The plaintiff decree-holder caused the house and the tree to be sold and for the realization of the balance he applied for the sale of the occupancy holding. The

* Second Appeal No. 545 of 1920 from a decree of Lal Gopal Mukerji, Additional Judge of Allahabad, dated the 7th of February, 1920, confirming a decree of Gauri Shankar Tiwari, Subordinate Judge of Mirzapur, dated the 29th of August, 1919.

(1) (1887) I. L. R., 10 All., 180. (2) (1911) I. L. R., 34 All., 25;

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judgment-debtors raised the objection that under the provisions of section 20 of the Agra Tenancy Act, the court was not competent to sell the occupancy holding. This objection was overruled by the court of first instance on the ground that as the decree ordered the sale of the holding the court executing the decree could not go behind it. This view of the court of first instance was upheld by the lower appellate court and from the decision of the lower appellate court the present appeal has been preferred to this Court. In my opinion the appeal must prevail. Section 20, clause (2), of the Agra Tenancy Act distinctly prohibits a court from transferring an occupancy holding in execution of a decree. It seems to me to be immaterial whether the decree ordered sale or whether it was a simple money decree. What the decree-holder is now seeking is to sell an occupancy holding in execution of his decree. This is prohibited by the provisions of section 20, and the court executing the decree is bound to carry out the mandatory provision of the section. A number of cases were cited to us. Dr. Sulaiman on behalf of the respondents referred to the cases of *Deodatt Singh v. Ram Charittar Jati* (1), *Lala Ram v. Thakur Prasad* (2), *Rang Lal Kunwar v. Kishori Lal* (3). These cases do not deal with the question which we have to determine in this case. In some of these cases the question was whether, after a sale in execution of a decree, it was open to the judgment-debtor to dispute the title of the auction purchaser and contend that the sale was an invalid sale. In one of these cases the question was whether a decree should be made for the sale of the property which was included in the mortgage, though the property might be an occupancy holding. That is not exactly the question which arises in this case. A decree has been passed, as I have said above, for the sale of the lands now in dispute. The point is whether in execution of that decree the court has the power to sell the property. The case in which this point was directly dealt with is that of *Madho Lal v. Katwari*, reported in Indian Law Reports 10 Allahabad, page 130, and the case reported at the footnote of that page. In that case which was one under Act No. XII of 1881, the

(1) (1918) 16 A. L. J., 557. (2) (1918) I. L. R., 40 All., 680.

(3) (1915) I. L. R., 37 All., 278.

provisions of section 9 of which were practically the same as those of section 20 of the Agra Tenancy Act, II of 1901, Mr. Justice MAHMOOD held that a court executing the decree could not go behind the decree and therefore was bound to sell the property. The learned Judge at the close of his judgment observes: "Whether any title would pass to the purchaser under the sale was another question". With great respect to the learned Judge I feel myself unable to follow the ruling. No doubt it was not open to the judgment-debtor to contest the validity of the decree which was passed against him; but it was open to him to say to the court that, as the law contains a mandatory provision which precludes a court executing a decree from selling an occupancy holding, the court was bound to carry out the provisions of the law and not to act in violation of those provisions. In my opinion, in view of the provisions of section 20 a court executing a decree cannot order an occupancy holding to be sold, no matter whether the decree is a decree directing a sale of the holding or is a simple money decree. Reference was made on behalf of the respondents to the principle of the ruling of the Full Bench in *Bhola Nath v. Musammatt Kishori* (1). In that case I differed from the decision of the two other learned Judges who formed the Bench and I still adhere to the view which I expressed in that case, although the point in that case was not exactly the same as in the present case. I would allow the appeal, set aside the orders of the courts below and dismiss the application of the decree-holder for execution of the decree by sale of the occupancy holding.

RAFIQ, J.—I agree.

RYVES, J.—I agree.

BY THE COURT.—The order of the Court is that the appeal is allowed, the orders of the courts below are set aside and the application of the decree-holder for sale of the occupancy holding in question is dismissed. In view of the circumstances, we direct the parties to bear their own costs in all courts.

Appeal allowed.

(1) (1911) I. L. R., 84 All., 25.