

APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice B. S. Kisch.

1931
April, 20.

GAYA PRASAD SAHU (DECREE-HOLDER-APPELLANT) v.
BENI MADHO (OBJECTOR-RESPONDENT).*

Execution of decree—Qabzadari rights conferred under settlement decree based on compromise—Condition restraining transfer—Right, if attachable in execution of a decree against tenant—Oudh Rent Act (XXII of 1886), section 5—Occupancy rights arising under section 5 and those arising under decree of court based on compromise, distinction between—Transfer of such occupancy rights, if void or voidable.

There is a clear cut distinction between occupancy rights arising under section 5 of the Oudh Rent Act and occupancy rights arising under a decree of court based on a compromise with the taluqdar, which has been uniformly recognised for a long time in Oudh. In the case of occupancy rights arising under section 5 of the Oudh Rent Act there is a statutory prohibition against transfer based on considerations of public policy. Any transfer in contravention of the terms of the statute would be absolutely void inasmuch as the consideration or object of such transfer being forbidden by law it would be unlawful within the meaning of section 23 of the Contract Act. The position in the case of a transfer in contravention of the restriction imposed under a compromise embodied in a decree of the settlement court is essentially different. Such conditions which are frequently to be found in decrees passed by Settlement Courts have generally been construed as conditions imposed for the benefit of the superior proprietor, and if a transfer is made contrary to those conditions the transfer is not void but only voidable at the instance of the superior proprietor. *Rampher Singh v. Ram Khelawan Singh* (1), *Hirday Behari v. Para Tiwari* (2), *Wazir Mohammad v. Har Pershad* (3), and *Sibta Din v. Braj Rani* (4), relied on.

* Execution of Decree Appeal No. 5 of 1931, against the decree of Sh. Ali Hammad, Additional Subordinate Judge of Fyzabad, dated the 17th of October, 1930, modifying the decree of Pandit Hari Shankar Chaturvedi, Munsif, Haveli Oudh Fyzabad, dated the 29th of May, 1930.

(1) (1899) 2 O.C., 252.

(2) (1903) 14 O.C., 144.

(3) (1911) 15 O.C., 67.

(4) (1927) 1 Luck., Cas., 674.

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Held, that a court in execution has the power to sell any right and interest possessed by the judgment-debtor which the judgment-debtor himself is competent to sell. If a judgment-debtor in the absence of an objection by the taluqdar is competent to sell his interest in such land by a private sale, there is no reason why under similar circumstances the same interest should not be liable to sale by means of execution proceedings. The only person entitled to object against the sale is the taluqdar and if he does not object to the proposed sale it would be wrong to hold that the interest of the judgment-debtor is not liable to sale in execution of a decree against him.

Where, therefore, in a suit brought at the first regular settlement against the taluqdar claiming certain lands as *sir* a compromise was entered into between the parties under which the claimants were allowed to hold the land as *qabzadari* at a specified rent and it was further provided that they would have no rights of transfer and a decree was passed accordingly, the condition restraining transfer being the result of the agreement between the tenant and the taluqdar was inserted for the benefit of the superior proprietor and the rights conferred on the tenant in the absence of any objection by the taluqdar were liable to attachment and sale in execution of a money decree against him. *Mohan Dei v. Balmakund Rastogi* (1), dissented from.

Messrs. *A. P. Sen* and *S. C. Dass*, for the appellant.

Mr. R. D. Sinha, for the respondent.

SRIVASTAVA and *KISCH, JJ.* :—This is a decree-holder's appeal.

The facts relevant to the appeal are that one Har Prasad borrowed some money from Gaya Prasad, appellant, on a pronote. After the death of Har Prasad, Gaya Prasad sued Har Prasad's son Gulab Singh on the basis of the pronote and on the 18th of November, 1929, obtained a money decree against the latter. In execution of this decree, Gaya Prasad on the 15th of December, 1929 attached certain properties belonging to his judgment-debtor. Only one of these properties is in dispute in this appeal, namely,

a moiety of certain plots measuring 34 bighas 8 biswas which were held by the judgment-debtor as an occupancy tenant. It has been found by both the courts below and the finding is not disputed before us, that Gulab Singh died on the 18th of December, 1929 and was succeeded by his uncle Beni Madho Singh respondent. The latter objected to the attachment of the plots aforementioned on the ground that they formed his occupancy tenancy and were not transferable.

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Both the courts below relying on a decision of Mr. SIMPSON, A. J. C., in *Mohan Dei v. Balmakund Rastogi* (1) have held that the plots in question being occupancy plots could not be sold in execution of the appellant's money decree. This appeal is directed against the correctness of this view.

It is the common case of both parties that at the first regular settlement, the predecessors-in-title of the respondent brought a suit against the taluqdar claiming certain lands as their *sir*. In this suit a compromise, exhibit A1, was entered into between the parties under which the claimants were allowed to hold 89 bighas 7 biswas land as *qabzadari* at a specified rent. It was further provided that they would have no right of transfer. Exhibit A2 is a copy of the judgment of the settlement court decreeing the claim in terms of the compromise. The parties are agreed that the plots in dispute are included within the area decreed by the settlement court on foot of the compromise. It is contended on behalf of the appellant that the condition in the compromise against the land being transferable was for the benefit of the taluqdar and as the taluqdar has not raised any objection against the proposed sale, the lower appellate court is wrong in holding that the plots cannot be sold in execution of his decree. We are of opinion that the

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appellant's contention is correct and the appeal ought to succeed. There is a clear cut distinction between occupancy rights arising under section 5 of the Oudh Rent Act and occupancy rights arising under a decree of court based on a compromise with the taluqdar, which has been uniformly recognized for a long time in Oudh. In the case of occupancy rights arising under section 5 of the Oudh Rent Act there is a statutory prohibition against transfer based on considerations of public policy. Any transfer in contravention of the terms of the statute would be absolutely void inasmuch as the consideration or object of such transfer being forbidden by law it would be unlawful within the meaning of section 23 of the Contract Act. The position in the case of a transfer in contravention of the restriction imposed under a compromise embodied in a decree of the settlement court is essentially different. Such conditions which are frequently to be found in decrees passed by settlement courts have generally been construed as conditions imposed for the benefit of the superior proprietor—See *Rampher Singh v. Ram Khelawan Singh* (1), *Hirday Behari v. Para Tiwari* (2) and *Wazir Mohammad v. Har Pershad* (3). The same distinction has been recognized by our brother RAZA, J. in *Sibta Din v. Brij Rani* (4) and by a Bench of our Courts consisting of Sir LOUIS STUART, C. J. and HASAN, J., in *Balbhaddar Singh v. Kusehar Das* (5). If a transfer is made contrary to those conditions, the transfer is not void but only voidable at the instance of the superior proprietor. The position is, if anything, stronger in a case like the present in which the decree was based on a compromise and the condition restraining transfer was the result of an agreement between the tenant and the taluqdar. The case of *Mohan Dei v. Balmakund Rastogi* (6) which has

(1) (1899) 2 O.C., 252.

(3) (1911) 15 O.C., 67.

(5) (1928) 5 O.W.N., 487.

(2) (1903) 14 O.C., 144.

(4) (1927) 1 Luck. Cas., 674.

(6) (1925) 2 O.W.N., 787.

been relied upon by the lower appellate court may be distinguished on the ground that it was a case of a hereditary non-transferable lease. Mr. SIMPSON, A. J. C. after reviewing all the cases bearing on the point came to the conclusion that in the case of such settlement decrees, the condition against alienation is inserted for the benefit of the superior proprietor and that it is not competent to the transferor of the interest in a suit between himself and the transferee to raise the plea that the transfer is void. Thus far the decision is in line with the principle enunciated above. He however differentiated the case of a sale in execution of a money decree. He observed :—

“The condition may be for the benefit of the superior proprietor but it is the right and indeed the duty of the lessee to enforce against an attempt to sell the property under a decree.”

He therefore seems to be of opinion that when such property is proposed to be sold in execution of a money decree the tenant is entitled to object to the sale on the ground of his interest not being transferable even if the taluqdar may not object to the sale. We regret we find ourselves unable to accept the distinction as valid. A court in execution has the power to sell any right and interest possessed by the judgment-debtor which the judgment-debtor himself is competent to sell. If a judgment-debtor in the absence of an objection by the taluqdar is competent to sell his interest in such land by a private sale we can see no reason why under similar circumstances the same interest should not be liable to sale by means of execution proceedings. The only person entitled to object against the sale is the taluqdar. It is admitted, as stated before, that he has not objected to the proposed sale. We are therefore of opinion that the lower

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appellate court is wrong in holding that the interest of the judgment-debtor in the plots in question is not liable to sale in execution of his decree.

We accordingly allow the appeal, set aside the decision of the lower court in respect of the plots measuring 34 bighas 8 biswas and disallow the objection of the judgment-debtor against the sale of the said plots. The appellant will get his proportionate costs of the appeal from the respondent.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice F. M. Nanavutty.

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THE IMPERIAL BANK OF INDIA, LUCKNOW
(DEFENDANT-APPLICANT) v. LT.-COL. V. H. ROBERTS
(PLAINTIFF-OPPOSITE PARTY).*

*Provincial Small Cause Courts Act (IX of 1887), section 25—
Revision—Inference drawn from words contained in a document, whether a question of law—Trial court mismanaging a case and arbitrarily making a party to compensate another for consequences never anticipated by him—High Court's power to interfere in revision with an order of a Small Cause Court.*

Held, that High Courts should not ordinarily exercise the powers under section 25 of the Provincial Small Cause Courts Act unless they have reason to suppose that there has been a real mismanagement of the case or actual perversity in the decision by the trial court. When it appears from a mere perusal of the judgment of a court of small causes that there has been a real mismanagement of the case and that in consequence thereof substantial injustice has resulted to a party, the trial court not having kept the acts of the parties apart from any unfortunate incidental consequences that may have flowed therefrom to a party and having arbitrarily made a party compensate the other for consequences which it could not have anticipated and for which it could never be held

* Section 25 Application No. 8 of 1931, against the decree of Mirza Mohammad Munim Bakht, Second Additional Judge, Small Cause Court, Lucknow, dated the 2nd of December, 1930.