

to say that two wrongs cannot make a right. The action of the applicant above referred to could not invest the Subordinate Judge with a jurisdiction which he did not possess, nor regularise his action in making the orders for payments in question if otherwise irregular.

We would accordingly allow applications Nos. 162 to 165 with costs and set aside the orders of payment made by the lower Court.

*Application allowed.*

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## APPELLATE CIVIL

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*Before Mr. Justice Bisheshwar Nath Srivastava and  
Mr. Justice E. M. Nanavutty*

KANDHAI LAL (DECREE-HOLDER-APPELLANT) *v.* SHEO NATH  
(JUDGMENT-DEBTOR-RESPONDENT)\*

1936  
*January, 3*

*Groves—Village custom recording groves to be unalienable—  
Execution of decree—Groves, whether liable to attachment  
or sale—Second appeal—Village custom—Plea of custom  
being qualified not raised—Lower Court's finding that custom  
absolute—Second appeal, whether lies.*

Where according to a village custom as recorded in the *wajib-ul-arz* groves are unalienable, and the judgment-debtor has no saleable interest in them, the groves are not liable to attachment or sale in execution of decree. *Baij Nath v. Mauji Mal* (1), *Ali Mohammad Khan v. Chhedan* (2), and *Gaya Prasad v. Beni Madho* (3), distinguished.

Where a decree-holder does not plead in lower courts that a custom is qualified in the sense of a restraint against alienation being merely for the benefit of the proprietor, and the courts below find the custom to be absolute under which the judgment-debtor has no saleable interest in the property, a second appeal is concluded by the finding of the lower courts about the existence of the custom.

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\*Execution of Decree Appeal No. 67 of 1934, against the order of Thakur Surendra Vikram Singh, Subordinate Judge of Partabgarh, dated the 14th of July, 1934, upholding the order of Babu Gopal Chandra Sinha, Munsif, Kunda at Partabgarh, dated the 21st of February, 1934.

(1) (1932) 9 O.W.N., 1144.

(2) (1912) 15 O.C., 91.

(3) (1931) L.L.R., 7 Luck., 111.

1936

KANDHAI  
LAL  
v.  
SHRO NATH

Mr. *Radha Krishna Srivastava*, for the appellant.

Mr. *H. D. Chandra*, for the respondent.

SRIVASTAVA and NANAVUTTY, JJ.:—This is an appeal by the decree-holder who has been unsuccessful in both the lower Courts. In execution of a money decree he applied for attachment and sale of certain groves. The judgment-debtor objected to their attachment and sale on the ground that he had no saleable interest in the said groves which were by custom inalienable. Both the lower Courts have unanimously found that according to the village custom as recorded in the *wajib-ul-arz* the groves were unalienable. The learned counsel for the appellant does not question the correctness of this finding. He has, however, contended that the custom in question merely imposes a fetter on the right of alienation and that this fetter has been imposed for the benefit of the landlord. It is argued that as the landlord has not raised any objection against the attachment or sale therefore he is entitled to put the groves to sale. We regret we are unable to accede to the argument. The custom pleaded by the judgment-debtor was an absolute one under which he had no saleable interest in the groves. The decree-holder did not plead in the Courts below that the custom was qualified in the sense of the restraint against alienation being merely for the benefit of the proprietor. The learned counsel is also unable to refer us to any terms of the *wajib-ul-arz* which might support his contention of the custom being qualified in the sense alleged by him. Our reading therefore of the finding of the lower appellate Court is that according to the village custom the judgment-debtor has no saleable interest in the groves in question. In this view of the case it is fully covered by the decision of one of us in *Baij Nath v. Mauji Lal* (1).

Reference has been made to the decisions in *Ali Mohammad Khan v. Chhedan* (2) and *Gaya Prasad v.*

(1) (1932) 9 O.W.N., 1144.

(2) (1912) 15 O.C., 91.

*Beni Madho* (1). Both these cases appear to us to be distinguishable. In *Ali Mohammad Khan v. Chhedan* (2) the suit was brought by the proprietor for possession of a grove which had been mortgaged with possession on the ground that the grove-holders had no transferable right and that by transferring possession to a stranger they had forfeited whatever rights they possessed so as to give the plaintiff a right of re-entry. It was held that the breach of any condition for which forfeiture is not prescribed as the proper penalty could not involve forfeiture. It was also pointed out in this case that there was an essential distinction between a transfer by way of mortgage and a transfer by way of sale. Thus it will be seen that there is hardly anything in common between this case and the present one. The decree-holder before he can attach or sell the groves must show that the judgment-debtor possessed a saleable interest therein. This he cannot do in the present case by reason of the finding of the two lower Courts.

*Gaya Prasad v. Beni Madho* (1) was a case of lands held as qabzadari under a compromise to which the taluqdar was a party. It was 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. In the present case the finding being that the judgment-debtor has no saleable interest it is hardly possible to say that he was competent to sell the groves. It follows that the decree-holder cannot apply to the execution Court for attachment or sale of the judgment-debtor's interest. We are accordingly of opinion that the appeal is concluded by the finding of the lower Courts about the existence of the custom.

The appeal therefore fails and is dismissed with costs.

*Appeal dismissed.*

(1) (1931) I.L.R., 7 Luck., 111.

(2) (1912) 15 O.C., 91.

1936

KANDHAI  
LAL  
v.  
SHEO NATH

*Srivastava  
and  
Nanavatty,  
JJ.*