

REVISIONAL CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice
R. L. Yorke

1938
September, 1

SHEO NATH AND ANOTHER, (APPLICANTS) v. MADAN
MOHAN LAL AND ANOTHER, (OPPOSITE-PARTY)*

United Provinces Encumbered Estates Act (XXV of 1934), sections 4, 6 and 7—Civil Procedure Code (Act V of 1908), sections 144 and 151—Execution-sale—Decree-holder purchasing property in execution sale—Delivery of possession and confirmation of sale pending appeal—Compromise in appeal that judgment-debtor to remain in possession and sale to be confirmed only on failure to pay within specified time—Application under section 4, United Provinces Encumbered Estates Act—Order by Collector under section 6, Encumbered Estates Act passed—Decree-holder obtaining possession under order XXI, rule 95, Civil Procedure Code, on failure to pay within specified time—Judgment-debtors, if entitled to get re-delivery of possession—Application under order XXI, rule 95, if barred under section 7, Encumbered Estates Act.

The decree-holder purchased certain property in execution of his decree and was put in possession and the order for confirmation of the sale was also passed. But the judgment-debtor appealed against the orders. The parties entered into a compromise in the appeal by which the judgment-debtor was to remain in possession and the sale was to be confirmed and the decree-holder was to be entitled to take possession only if the decretal amount was not paid within a specified time. The money was not paid within the specified time but the judgment-debtor made an application under section 4 of the United Provinces Encumbered Estates Act and an order under section 6 of the Act was passed by the Collector. Sometimes after this order the decree-holder applied under order XXI, rule 95, Civil Procedure Code and possession was delivered to him. The judgment-debtor then applied for re-delivery of possession.

Held, that the process issued for delivery of possession after the order under section 6 was an execution process and became null and void under section 7(1)(a) and the applicants were consequently entitled to be put back in possession of the property.

*Section 115 Application No. 210 of 1936, against the order of Mr. Shiva Charan, Civil Judge of Unao, dated the 10th of December, 1936.

Held further, that in view of the compromise the first confirmation of sale became non-existent and as up to the date on which the Collector passed the order under section 6 neither had the sale been finally confirmed nor had the decree-holder obtained possession of the property purchased by him so it cannot be said that the debt had been extinguished and the Encumbered Estates Act therefore applied.

Held also, that though section 144, Civil Procedure Code, does not in terms apply to the application for re-delivery of possession, processes issued in contravention of the terms of section 7(1)(a) of the Encumbered Estates Act can be set aside under the provisions of section 151 of the Code of Civil Procedure. *Sushila v. Dwarka Prasad (1)*, referred to.

Messrs. *K. P. Misra* and *Syed Mohammad*, for the applicants.

Mr. Hyder Husain, for the opposite-party.

ZIAUL HASAN and *YORKE, JJ.*:—This is an application for revision of an order of the learned Civil Judge of Unao dismissing the judgment-debtors' application for re-delivery of possession of certain property to them.

The facts are that on the 12th of April, 1930, the opposite-parties obtained a decree for sale for Rs.4,000 on a mortgage against the present applicants. In execution of that decree they put up the property for sale and purchased it themselves on the 20th of October, 1931. The judgment-debtors brought an application under order XXI, rule 90 of the Code of Civil Procedure to have the sale set aside but this objection was dismissed and the sale confirmed on the 20th of April, 1932. On the 15th of May, 1933, the decree-holders were put in possession of the property purchased by them in the court sale. In the meantime the judgment-debtors had appealed against the dismissal of their objection under order XXI, rule 90 and the order confirming the sale. Proceedings were stayed on their application by the appellate court. On the 10th of August, 1933, the parties to the appeal

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entered into a compromise the material terms of which were as follows:

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“(1) That the appellants (judgment-debtors) will pay Rs.3,500 within nine months from today to the respondents with interest at 6 per cent. per annum from the 1st August, 1933.”

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“(2) That on such payment being made, the sale will be set aside and the appellants will become the absolute owners of the property in suit.”

“(3) That if such payment is not made the sale will be confirmed and the appeal will be deemed as dismissed and the respondents will be entitled to take possession of the property in suit.”

“(4) That the possession of the property during these nine months will remain with the appellants.”

In pursuance of this compromise the present applicants remained in possession of the property but no payment was made by them within the stipulated nine months. Some time in 1934 the judgment-debtors deposited Rs.2,000 in court and prayed for further time for the deposit of the balance of Rs 1,500. The prayer for extension of time was, however, refused on the 5th of October, 1934. Against this order they filed an application in revision in this Court and got an order for stay of proceedings in the trial court. The application for revision was dismissed by this Court on the 5th of November, 1935, and the order of stay discharged.

On the 15th of October, 1935, during the pendency of their application for revision in this Court, the judgment-debtors applied under section 4 of the United Provinces Encumbered Estates Act and an order under section 6 of the Act was accordingly passed by the Collector on the same date. On the 15th of February, 1936, the decree-holders-opposite-parties applied under order XXI, rule 95 of the Code of Civil Procedure to be put in possession of the property purchased by them

in execution of their decree and possession was delivered to them on the 17th of February, 1936. On the following day, namely, the 18th February, 1936, the judgment-debtors filed the application which has given rise to this revision alleging that as they had applied under the Encumbered Estates Act and the Collector had passed an order under section 6 of the Act, the proceedings relating to the delivery of possession to the decree-holders became null and void under section 7(1)(a) of the Encumbered Estates Act and prayed that possession be re-delivered to them. The learned Civil Judge to whom the application was made, while holding that after an order under section 6 of the Encumbered Estates Act has been passed, no further proceedings in execution can be taken, came to the conclusion that the judgment-debtors were not entitled to get back possession of the property from the decree-holders in this case as there was no debt to which the judgment-debtors-landlords could be said to be subject and as the execution process issued by his Court was not in connection with any such debt. Against this order the present application in revision has been brought.

We are of opinion that the learned Civil Judge was in error in thinking that in the circumstances stated above, the judgment-debtors were not entitled to the benefit of the Encumbered Estates Act or that the provisions of section 7 of the Act do not apply. Section 7(1) runs as follows:

“When the Collector has passed an order under section 6 the following consequences shall ensue:

(a) all proceedings pending at the date of the said order in any civil or revenue court in the United Provinces in respect of any public or private debt to which the landlord is subject, or with which his immovable property is encumbered, except an appeal or revision against a decree or order, shall be stayed, all attachments and other execution process issued by any such court and then in force in respect of any such debt shall become null and void, and no fresh process in execution shall, except as hereinafter provided be issued;

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The order under section 6 of the Act was passed, as already noted, on the 15th of October, 1935, and there can be no doubt that on that date proceedings were pending in the court below in respect of a private debt to which the applicants-landlords were subject. It is true that sale in execution of the decree had been held and even confirmed but the finality of the order confirming the sale ceased when the judgment-debtors filed an appeal in the Court of the District Judge and this was recognized by the parties themselves as appears from paragraph 3 of the compromise quoted above, which says that if payment is not made the sale will be *confirmed* and the appeal will be deemed as dismissed and the respondents will be entitled to take possession of the property in suit. As soon as the period of nine months fixed by the compromise expired, the decree-holders were entitled to get the sale finally confirmed and to take possession of the property. It was held in *Girdhari Lal v. Mohammad Ishrat Ali* (1) that a sale cannot be said to be automatically confirmed merely because no application had been made under rules 89, 90 or 91 of order XXI of the Code of Civil Procedure or such application had been made and disallowed and that something had to be done by the court for the confirmation of the sale, namely, to make an order confirming the sale and that unless the court made such an order the sale could not be said to have been confirmed. In the present case the confirmation of sale made in 1932 was treated by the parties as non-existent as shown by paragraph 3 of the compromise, but the decree-holders took no steps to get the sale confirmed or to obtain possession or were precluded from doing so by stay orders of courts. In the meantime the Collector had passed an order under section 6 of the Encumbered Estates Act. Therefore, after the passing of that order, all proceedings should have been stayed. The learned counsel for the opposite-parties conceded that his clients' application of the 15th of

(1) (1937) O.W.N., 1153.

February, 1936, was in execution under order XXI, rule 95 of the Code of Civil Procedure, but argued that it was not in execution of the original decree but of the compromise decree of the 10th of August, 1933; but he had again to concede that that decree was also in respect of a debt against the judgment-debtors. It is thus clear that up to the date on which the Collector passed an order under section 6 of the Act neither had the sale been finally confirmed nor had the decree-holders obtained possession of the property purchased by them. In these circumstances we fail to see how it can be said that the debt had been extinguished.

As we are of opinion that on the date of the Collector's order under section 6 there was a debt against the present applicants, it is clear that under section 7(1)(a) the process issued for delivery of possession to the opposite-parties, which was admittedly an execution process, became null and void and the applicants were consequently entitled to be put back in possession of the property.

It was contended by the learned counsel for the opposite-parties that the applicants' application for restitution does not come within the purview of section 144 of the Code of Civil Procedure and that the Encumbered Estates Act does not also provide for the restitution of the kind claimed by them. It is true that section 144 of the Code of Civil Procedure does not in terms apply but as was held in *Musammatt Sushila v. Dwarka Prasad* (1) processes issued in contravention of the terms of section 7(1)(a) of the Encumbered Estates Act can be set aside under the provisions of section 151 of the Code of Civil Procedure.

We allow this application with costs and setting aside the order of the learned Civil Judge direct him to deliver back possession of the property to the applicants-judgment-debtors.

Application allowed.

(1) (1936) O.W.N., 1164.