

APPELLATE CIVIL.

Before Mullick and Ross, J.J.

AMRIT LAL SEAL

v.

JAGAT CHANDRA THAKUR.*

Mortgage decree—execution of—Sale—application to set aside on the ground of non-saleability of the subject-matter—Santal Parganas Settlement Regulation, 1872 (Regulation III of 1872), section 27—mulraiyat—non-saleability of a holding, objection as to, whether can be taken in execution of mortgage decree—Execution Court, jurisdiction of, to go behind the decree. An objection that a property is not saleable may, in certain circumstances, be made by the judgment-debtor, in the case of a money decree, either before or even after confirmation of the sale; but in the case of a mortgage decree such an objection cannot be taken in an execution proceeding because it is an attack upon the validity of the decree, and it is not open to the executing Court, where its jurisdiction is based on a decree for sale, to refuse to carry out the sale so long as the decree exists in full force and effect.

Durga Charan Mandal v. Kali Prasanna Sarkar (1), relied on.

Where, therefore, a *mulraiyat* mortgaged his *mulraiyati* interest in a certain *mauza*, with his entire *nij-jote* in two *jamabandis*, to the appellant, who obtained a mortgage decree and in execution thereof brought the properties to sale, and the judgment-debtor thereupon filed an application to set aside the sale on the ground, *inter alia*, that the interest of his co-sharers in one of the *jamabandis* not being saleable under section 27, Santal Parganas Settlement Regulation, only his interest could pass by the sale, *held*, that the executing Court could not go behind the decree and although section 27(2) of the Santal Parganas Settlement Regulation

* Appeal from Appellate Order no. 182 of 1924, and Civil Revision no. 898 of 1924, from an order of R. E. Russell, Esq., I.C.S., District Judge of the Santal Parganas, dated the 19th May, 1924, confirming an order of B. B. Sarkar, Subordinate Judge of Deoghar, dated the 20th February, 1924.

prohibits a Court from recognizing a transfer as valid, if made in contravention of sub-section (1), the prohibition applies only to a Court engaged in a proceeding in which it has jurisdiction to investigate the legality of the transfer.

Bhagwan Das v. Hathibhai (1), *Ramdayal v. Narpat Singh* (2), *Bholunath v. Mussammat Kishori* (3), applied. *Raja of Vizianagram v. Dantivada Chellayya* (4), not followed.

An executing Court has no jurisdiction to set aside a sale for an irregularity which has not caused any substantial loss.

Appeal and application by the decree-holder.

Jagat Chandra Thakur was a *mulraiyat* to the extent of a 8-annas $5\frac{1}{2}$ -pies share in *mauza* Matiara. *Jamabandi* no. 46 in the Survey and Settlement Record was his official *mulraiyati jote* and *jamabandi* no. 43 was his ancestral holding and was called the *mulraiyater jote*, and he had a joint undivided share in it with others. It appeared that both *jotes* were security for the rent which he had to collect and pay to the proprietor of the village and were saleable in execution of a rent decree.

Jagat Chandra mortgaged his *mulraiyati* interest in *mauza* Matiara, together with his entire *nij-jote jamabandis* 43 and 46, to the appellant, Amrit Lal Seal, who brought the properties to sale on the 29th June, 1923, in execution of his mortgage decree. The judgment-debtor thereupon filed an application to set aside the sale on the grounds referred to in Order XXI, rule 90, and also on the ground that the interest of his co-sharers in *jamabandi* no. 43 not being saleable only his interest in the *jamabandi* could pass by the sale.

The Subordinate Judge found that all the recorded tenants were parties to the mortgage decree and that the entire *jote* was saleable.

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(1) (1880) I. L. R. 4 Bom. 25.

(3) (1912) I. L. R. 84 All. 25.

(2) (1911) I. L. R. 88 All. 136.

(4) (1905) I. L. R. 28 Mad. 84.

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He also found that it was not open to the *mulraiyat* to raise this objection in execution as he had not appealed against either the preliminary or the final decree in the mortgage suit.

With regard to the allegation that there had been irregularities in the conduct of the sale, he found that the area notified for sale was 124 *bighas* 1 *katha* 2 *dhurs*, while the correct area was 161 *bighas* 19 *kathas*, the former figure comprising only the paddy and the *bari* lands and the latter including the unproductive jungle lands also. The property was valued at Rs. 4,000 in the sale proclamation and was purchased by one Chatradhari Singh for Rs. 7,100, and the learned Judge found that there was a misstatement as to the exact sum due upon the decree but that the correct calculation was made subsequently and the amount notified at the time of the proclamation. The Subordinate Judge further found that the above irregularities did not cause the property to be sold for an inadequate price. The judgment-debtor's assertion that the value of the lands was Rs. 20,000 was not accepted, and the decree-holder's estimate of Rs. 7,000 was considered reasonable.

In appeal the District Judge found that the bidders were not misled either by the valuation put in the sale proclamation, or by the statement as to the amount of the decretal debt. With regard to the under-statement of the area, the learned Judge found that though the judgment-debtor had failed to prove what was the value of the property, the irregularity was sufficient to invalidate the sale. He accordingly set the sale aside.

N. C. Sinha and *S. S. Bose*, for the appellant.

Jagannath Prasad and *Prasad*, for the respondents.

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MULLICK, J. (after stating the facts set out above, proceeded as follows): It is quite clear that the learned Judge had no jurisdiction to set aside the sale

for an irregularity which did not cause any substantial loss; and the decree-holder's application in revision must succeed. Civil Revision no. 393 of 1924, therefore, is allowed with costs.

The learned Judge, however, has decided in the judgment-debtor's favour on a more serious point which is the subject of second appeal no. 182 of 1924.

Disagreeing with the Subordinate Judge he holds that *jote* no. 43 not being saleable, the whole sale must be set aside. This decision under section 47, Code of Civil Procedure, has the force of a decree as it finally decides a question of right between the parties to the suit and a second appeal lies.

Now it is to be observed that in the mortgage suit at no stage did the *mulraiyat* or any of his co-sharer defendants take the plea of non-saleability, and in the circumstances I do not see how, in the execution stage, the *mulraiyat* can object to the sale of the property. The Court cannot refuse to execute the mortgage decree unless there is a clear statutory injunction in that behalf. It is true there can be no estoppel in the presence of an illegality, and the learned Judge points to section 27 of Regulation III of 1872 (the Santal Parganas Settlement Regulation), which runs as follows:

" Clause (1).—No transfer by a raiyat of his right in his holding or any portion thereof, by sale, gift, mortgage, lease or any other contract or agreement, shall be valid unless the right to transfer has been recorded in the record-of-rights, and then only to the extent to which such right is so recorded."

" Clause (2).—No transfer in contravention of sub-section (1) shall be registered, or shall be in any way recognized as valid by any Court, whether in the exercise of civil, criminal or revenue jurisdiction."

" Clause (3).—If at any time it comes to the notice of the Deputy Commissioner that a transfer in contravention of sub-section (1) has taken place, he may, in his discretion, evict the transferee and either restore the transferred land to the raiyat or any heirs of the raiyat who has transferred it, or re-settle the land with another raiyat according to the village custom for the disposal of an abandoned holding."

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The record-of-rights states that the *mulraiyat* is entitled to transfer by a single transaction his entire *mulraiyati* right in the village including his private holding; but that the successor to a *mulraiyat*, whether acquiring by inheritance or transfer, is not entitled to enjoy his rights or to perform his duties until he has been recognized by the Subdivisional Officer. It also states that it is a *raiyat's* duty to observe whatever orders Government may pass forbidding the transfer, subdivision or subletting of holdings.

What the Government orders are with regard to transfer does not appear in the record-of-rights published in the Santal Parganas Manual of 1912 which is the only material publication produced before us and it has not been shown on what authority the learned Judge finds that the *mulraiyat* in this case has transgressed the law.

The record-of-rights does state that the rights of a recorded *mulraiyat* are not subject to partition by gift, transfer, inheritance or otherwise; from this it only follows that a *mulraiyat* cannot sell or mortgage less than his interest in a *mulraiyater jote*. In the present case there is nothing to show that he has contravened the law in this respect. Again without the mortgage deed it is impossible to say whether he has mortgaged only an undivided fractional interest or the whole *jote* as his own, but in either case there would be no evasion of the law. If it is a fact that the whole *jote* is not his and that some of the other judgment-debtors have an interest therein, then if there is any prohibition by Government against the sale of their shares, the mortgage decree was wrong in directing the sale of the entire undivided holding. The error, however, is not apparent on the face of the record and without further evidence it is impossible to say that the decree was either illegal or without jurisdiction.

But apart from this there is a defect in the learned Judge's proceedings which goes to the root of

jurisdiction; for it is clear that it was not open to the learned Judge at all to question the correctness of the mortgage decree.

Assuming that the trial Court has wrongly ordered the sale of the interest of the co-sharers, does section 27 of the Santal Parganas Settlement Regulation authorize any Court that may choose to do so to set aside the decree? I think not. "Any Court", in sub-section (2) of section 27, means a Court vested with jurisdiction to question the correctness of the decree. The execution Court's powers are derived from section 47 of the Civil Procedure Code, and in my opinion that Court cannot refuse to attach and sell *jote* no. 43 even if satisfied that the decree was wrong. He was not entitled to enter into any inquiry as to the correctness of the decree or the jurisdiction of the Court which passed it. Here it did not even appear on the face of the decree that it was without jurisdiction. The Court was bound to assume that the decree had been made with jurisdiction and that there were no Government orders prohibiting the sale of the *jote*. Certainly the trial Court in the mortgage suit would have been justified in declining to sell the property if the prohibition exists; so again would the execution Court if there had been only a simple decree for money; but where the jurisdiction is based on a decree for sale it is not open to the execution Court to refuse to carry out the sale so long as the decree exists in full force and effect. An objection that the property was not saleable could under certain circumstances have been made by the judgment-debtor in the case of a money decree either before or after the sale, and in *Durga Charan Mandal v. Kali Prasanna Sarkar* (1) it was held that the objection could be made even after confirmation. But in the case of a mortgage decree the objection cannot be taken in an execution proceeding because it is an attack upon the validity of the decree

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(1) (1899) I. L. R. 26 Cal. 727.

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Section 60 of the Civil Procedure Code provides that the house of an agriculturist is exempted from attachment and sale in execution of a decree; but it was held in *Bhagwan Das v. Hathibhai* (1) that where a mortgage decree has been passed for the sale of an agriculturist's house, the execution Court could not refuse to execute the decree notwithstanding the provisions of section 266 of Act X of 1877 which corresponds to section 60 of the present Civil Procedure Code. In *Ramdayal v. Narpat Singh* (2), in a second appeal against the mortgage decree itself, the Court gave effect to the exemption and dismissed the claim for the sale of the hypothecated property. In *Bholanath v. Mussammatt Kishori* (3) two of the learned Judges, disagreeing with the third Judge, held that section 60 was only a bar in a proceeding for the execution of a money decree and that a mortgagee who has obtained a decree for the sale of an agriculturist's house is entitled to have it sold in execution. The Court accordingly gave a decree for the sale of the house in second appeal.

These cases illustrate the principle that an execution Court cannot go behind the decree.

On the other hand, in the *Raja of Vizianagram v. Dantivada Chellayya* (4) it was held that section 5 of the Hereditary Village Officers' Act (Madras Act III of 1895) made it obligatory upon a Court executing a mortgage decree to go behind the decree and to refuse to sell village *inam* lands though their sale was ordered by the decree. The decision was based upon the rule that prohibitions having some object of public policy in view must be literally and strictly enforced and that the principle of personal estoppel does not apply. The rule may be admitted, but the question is, whether any Court can interfere to put the statute in force except in the course of a properly constituted proceeding over which he has

(1) (1880) I. L. R. 4 Bom. 25. (2) (1912) I. L. R. 34 All. 25.

(3) (1911) I. L. R. 38 All. 136. (4) (1905) I. L. R. 26 Mad. 84.

jurisdiction. In this last-mentioned case their Lordships of the Madras High Court held that the execution Court was competent to refuse to sell the *inam* lands; but with great respect it seems to me that this was giving a right to the execution Court to review the judgment of the trial Court on a question of fact. It follows that if such a right is recognized there is nothing to prevent a conflicting decision in the execution Court both as to the facts and the law on the issue of saleability. Such a result could not possibly have been contemplated.

The language of section 27, clause (2), of the Santal Parganas Settlement Regulation is perhaps more express and peremptory than that of section 60 of the Civil Procedure Code; but the same restriction applies. The enactment certainly prohibits any Court from recognizing a transfer as valid if made in contravention of sub-section (1); but the Court must be engaged in a proceeding in which it has jurisdiction to investigate the legality of the transfer. In other words, the proceeding must be properly constituted and the investigation necessary. In my opinion the Court hearing the appeal from the original decree could have investigated its correctness but not the execution Court. Therefore so long as that decree stood, neither the Subordinate Judge sitting as a Court of execution under section 47, Code of Civil Procedure, nor the District Judge in appeal from him, was competent to question it. The learned District Judge's order, therefore, being without jurisdiction must be set aside.

The appeal is decreed with costs which will be paid by the judgment-debtor respondents only. The sale will be confirmed.

Ross, J.—I agree.

Appeal decreed.
Application allowed.

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