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a subsequent application for transfer of execution made within three years from the date of the expiry of the period allowed to the judgment-debtor was within time; and reference was made to the provisions of section 15 of the Indian Limitation Act. It has been contended on behalf of the appellant that the order of the 21st of September 1923 was an order in furtherance and not in stay of the execution. This contention is obviously not sound. The decree-holder was prevented from taking any step during the period the order was in force and it cannot be said that the order was in furtherance of the execution.

In my opinion the view taken by the learned Subordinate Judge is correct and the appeal should be dismissed with costs.

MACPHERSON, J.—I agree. It must be held in this particular case that the execution was in effect stayed for a week by order of the Court.

Appeal dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

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May, 22.

HARLAL CHAUBEY

v.

KUMAR RAMESHWAR NARAYAN SINGH.*

Chota Nagpur Tenancy Act, 1908 (*Bengal Act VI of* 1908), *section* 208—*sale of "holding except house and gharbari," whether invalid.* The Deputy Commissioner has no jurisdiction to sell under section 208 of the Chota Nagpur Tenancy Act, 1908, anything less than the whole holding on which the arrear of rent has accrued.

*Appeal from Appellate Decree no. 705 of 1925, from a decision of Babu Brajendra Prasad, Additional Subordinate Judge of Hazaribagh, dated the 17th February 1925, confirming a decision of Babu Siba Priya Chatterji, Munsif of Hazaribagh, dated the 6th June 1924.

Where, therefore, on a decree obtained by the thikadar of a village against a raiyat for the rent of a holding, the Court ordered the sale of the holding standing in the name of the judgment-debtor in the record-of-rights "except the house and gharbari" which admittedly were part of holding, *held*, that the sale was not binding on the proprietor of the village in which the holding was situate.

Observations on cases where the homestead &c., is not held as part of the raiyati holding.

An argument based on the analogy with the area governed by the Bengal Tenancy Act is exceptionally perilous in Chota Nagpur and should rarely be acceded to.

Kumar Ramyad Singh v. *Chedi Barhi*(1), followed.

Rup Nath Mandal v. *Jagannath Mandal*(2) and *Jugeshar Misra* v. *Nath Keori*(3), referred to.

Appeal by the defendants.

The facts of the case material to this report are stated in the judgment of Macpherson, J.

B. C. De, for the appellants.

S. N. Bose, for the respondent.

MACPHERSON, J.—This appeal is preferred by the auction-purchasers of two holdings in village Meru at a sale held under the provisions of section 208 of the Chota Nagpur Tenancy Act, 1908, at the instance of the thikadar of the village, against the declaration granted by the Courts below to the proprietor of the village that the sales are without jurisdiction and void.

The thikadar, respondent no. 4, in a collective suit obtained decrees for rent against respondents 2 and 3 and put their holdings to sale. As appears from an order on an application of the decree-holder for permission to bid at the sales and from the terms of the sale certificates, the Revenue Court in which the proceedings took place ordered the sale of and sold

(1) (1922) I. L. R. 1 Pat. 750. (2) (1928) I. L. R. 7 Pat. 178.
(3) (1922) I. L. R. 1 Pat. 317.

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the khatas standing in the names of the judgment-debtors "except the house and gharbari." The proprietor has therefore sued in the Civil Court for a declaration that the sales were illegal and without jurisdiction and that the purchasers (the present defendants) have acquired no title to the land sold. Both the Courts below, relying upon the decision in *Kumar Ramyad Singh* v. *Chedi Barhi*(1), held that the sales, being in each case of a part of a holding, were without jurisdiction, and that accordingly section 214 of the Chota Nagpur Tenancy Act does not prohibit the Civil Court from entertaining a suit to set aside or modify the effect of the sales and they granted the declaration sought. When this appeal of the auction-purchasers came up before a learned Judge of this Court, sitting singly, he referred it to a Division Bench on account of the importance of the matter and because the case relied upon was decided ex parte and no authorities were quoted in support of the proposition.

On behalf of the plaintiff-respondent it is admitted at once that the declaration accorded to him is too wide and that all that he is entitled to is a declaration that the sales are not binding upon him. As the Chota Nagpur Tenancy Act significantly contains no provision corresponding to section 88 of the Bengal Tenancy Act relating to subdivision of a tenancy, such a declaration cannot be said to be useless.

But Mr. B. C. De on behalf of the appellants contends further that the suit is barred under section 214 of the Chota Nagpur Tenancy Act which, so far as material runs:

"No suit or application shall be entertained by any Court to set aside or to modify the effect of—

(*a*) any sale made under this Chapter save under section 211, section 212 or section 213 or on the ground of fraud or want of jurisdiction,"

(1) (1922) I. L. R. 1 Pat. 750.

since admittedly the only circumstances in which the suit would be entertainable are that the sales were held without jurisdiction, and there was, he contends, no want of jurisdiction in the Court which ordered and held the sales.

The first and important branch of the argument of the learned Advocate is that if the Revenue Court sells a portion of the holding under section 208 it does not act without jurisdiction since it is not prohibited by law from holding such a sale. The decision of this Court in *Kumar Ramyad Singh* v. *Chedi Barhi*(1) is against that view. There are indeed some differences between that case and the present litigation. There the question was gone into at the trial of the suit whether the ghars and gharbaris were part of the holdings and it was decided that they were, whereas there was apparently no such decision in the present instance. Then in that case the plaintiff was not only the landlord but also the auction-purchaser and it was as aggrieved auction-purchaser that he instituted the civil suit, on the ground that he had been accorded permission to bid at the sales with the reservation, of which (as was found) he had no knowledge, that he should not be allowed to bid for the ghars and gharbaris of the judgment-debtors. In the present case the plaintiff is the superior landlord who is not a party to the sale, and the auction-purchasers are third persons who so far from attacking the sale are the contesting defendants who seek to uphold it. Then the plaintiffs in that litigation could as decree-holder have applied under section 213 to set aside the sale. In the present case the plaintiff had no such remedy—the faint suggestion that the thikadar represented the whole landlord interest is manifestly unsound. These differences are however superficial and do not affect the question whether there is jurisdiction in a Court which sells a

(1) (1922) I. L. R. 1 Pat. 750.

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portion of the holding. The learned vakil is therefore under the necessity of arguing that the case cited was wrongly decided.

In my judgment a Court has no jurisdiction to sell a portion of the holding under section 208 of the Chota Nagpur Tenancy Act. Section 47 of the Chota Nagpur Tenancy Act lays down:

"No decree or order shall be passed by any Court for the sale of the right of a raiyat in his holding, nor shall any such right be sold in execution of decree or order:

Provided as follows:—

(a) Any holding may be sold, in execution of a decree of a competent Court, to recover an arrear of rent which has accrued in respect of the holding."

Here the Court is prohibited from passing an order for the sale of the right of a raiyat in his holding and also from selling the same in execution of such an order, which may have been passed per incuriam or otherwise, see *Rup Nath Mandal* v. *Jagannath Mandal*(1). To this prohibition there is an exception in respect of a holding—it may be sold in execution of a decree for an arrear of rent which has accrued in respect of itself. The exception is quite definite: it does not authorize the sale of anything except the holding or on any ground except in execution of a decree for its own arrears of rent. The terms of the proviso in fact exclude any idea of sale of a portion of the holding. Even a joint-landlord is not authorized, as *Explanation I* shows, to sell the whole holding in execution of a decree obtained by him for the share of rent of the holding due to him still less to sell a portion of the holding. Then section 208(1) sets out the manner in which the proviso to section 47 may be taken advantage of. It enacts (so far as material)—

"When a decree passed by the Deputy Commissioner under this Act is for an arrear of rent due in respect of a holding, the decree-holder may apply for the sale of such holding and the holding may thereupon be brought to sale in execution of the decree" in accordance with the Bengal Rent Recovery Act, 1865.

(1) (1928) I. L. R. 7 Pat. 178.

That Act also clearly contemplates the sale of the whole "under-tenure" which in this case would be the holding. No significance attaches to the difference in form between the prohibitions, in section 46 (*1*) and section 47 as they contemplate sale from a different standpoint. Moreover in the proviso to the former provision had to be made to authorize a mortgage of *a portion* of the holding, while the question in relation to the latter is whether the proviso quoted *excludes a portion* of the holding as well as the whole holding from the prohibition which is the substantive enactment in section 47.

Reference has also been made to the fact that in the area to which the Bengal Tenancy Act applies, a sale of a portion of a non-transferable occupancy holding in execution of a money decree against a tenant is valid. But in the first place an argument based on analogy with the area referred to and its laws, is exceptionally perilous for Chota Nagpur and should rarely be acceded to because the circumstances though they may be superficially similar are almost certainly substantially different and this caution extends even to provisions borrowed from the Bengal Tenancy Act or from the common source of both enactments, which often undergo great modifications from incorporation into a different framework. Then the decision in *Jugeshar Misra* v. *Nath Koeri* (1), to which reference is made, can have no application to a rent decree in Chota Nagpur where the law as to sale of holdings is fundamentally different, and the sale even of a holding on a money decree is forbidden.

The result is that the Deputy Commissioner has no jurisdiction to sell under section 208 of the Chota Nagpur Tenancy Act anything less than the whole holding on which the arrear of rent has accrued. Such a sale is not merely irregular. *Kumar Ramyad Singh* v. *Chedi Barhi*(2) was therefore correctly decided on its own facts.

(1) (1922) I. L. R. 1 Pat. 317. (2) (1922) I. L. R. 1 Pat. 750.

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Accordingly in the present case if anything short of the entire holding was sold, the sale was without jurisdiction and the plaintiff-respondent is entitled to a declaration in the modified form set out above.

The learned advocate would however contend further that the whole holding was actually sold since the exclusion of the ghar and gharbari by the Rent Court amounted to a decision under section 78 that they are in each case not a part of the holding. Reference is also made to Mr. Sifton's Settlement Report of the Hazaribagh district where, at page 52, in respect of the makanbari the following statement of local custom or usage is made :

"When a raiyat's holding is sold for rent he is not by custom deprived of his makanbari but only his dhani and taur lands are auctioned. He is made landless, but not homeless, for his default of rent. A landlord decree-holder, who advertises in the sale proclamation the homestead lands of the raiyat, is always regarded as extremely harsh, and the legality of his action is doubtful. In view of the custom that the members of the village community occupying only makanbari are not held liable to rent, it would appear that in the case of a raiyat the rest of his holding is hypothecated for rent, and not his homestead lands and he is entitled to retain the latter and become a makanbari tenant if the rest of his holding be auctioned."

From the order passed as to the ghar and gharbari in the case of *Kumar Ramyad Singh* v. *Chedi Barhi*(1), and in the present case, an inference is sought to be drawn that by reason of the local custom in Hazaribagh the ghar and gharbari are excluded practically as a matter of course from the sale of the raiyati holding under section 208. Elsewhere in Chota Nagpur such local custom or usage also obtains. Thus it is set out in the Settlement Report of Porahat, at page 60

"If a raiyat's holding is sold up (as it can only be for arrears of rent on itself), he does not lose his house as well, nor his outhouses, nor his homestead, nor in fact anything except the land of the holding."

But in second appeal this Court is not at liberty to go beyond the findings of fact of the lower appellate court unless they are vitiated by error of law. Though a raiyat may, as section 78 shows, hold his

(1) (1922) I. L. R. 1 Pat. 750.

homestead otherwise than as part of his holding in which case the incidents of his tenancy thereof shall be regulated by local custom or usage and by the Act only subject thereto, yet it has throughout been the case of all parties to this litigation and it is the finding of both courts that in fact ghar and gharbari are in these two instances a portion of the holding on which the arrear of rent accrued, and indeed no reliance is placed in the written statement on custom or usage to the contrary. No error of law impairs the findings of fact in this regard and accordingly the sales in controversy being in each case of less than the holding on which the arrear of rent accrued were without jurisdiction and they are accordingly not binding upon the plaintiff-appellant. As superior landlord of a temporary tenancy he has a substantial interest in the matter.

It is here expedient to point out that the Courts below not infrequently miss the real point in cases of this class. The Rent Court has jurisdiction under section 208 read with section 47 to order and to hold only a sale of the holding in respect of which the arrear of rent sought to be recovered by execution of the decree, accrued. The Court must therefore determine what the holding on which the said arrear accrued, includes, and must sell the whole of the holding as so determined. If certain lands such as homestead, are held otherwise than as part of the judgment-debtor's holding as a raiyat, the rent decreed cannot have accrued on such lands, and they cannot be included in the sale (save possibly in extremely exceptional circumstances where local custom or usage under section 78 may countenance that). The landlord will naturally contend that the holding on which the rent decreed accrued is the area including the homestead contained in the Survey Khatian and the burden of proof will lie on the person who avers the contrary. But such a presumption might perhaps be rebutted by proof that for the sake of convenience the Settlement Department has included in one

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khatian both the rent-paying lands of the holding and the homestead of the raiyat irrespective of whether he does or does not hold his homestead as a part of the holding. Again the presumption might readily yield to well known local custom or usage such as has been indicated. In such a matter no general rule can be laid down; each case will depend upon its own circumstances, at least unless and until it has in a test case been established under section 76 or 78 or both that in any village or in any more extended area every raiyat holds his homestead (or homestead and other lands as the case may be) otherwise than as a part of his holding on which the rent under recovery by sale has accrued.

On this view it will be declared in lieu of the declaration granted by the Courts below that the sales in suit are not binding on the plaintiff and quoad ultra this appeal will stand dismissed. The appellants must pay to the contesting respondent the costs of the appeal.

KULWANT SAHAY, J.—I agree.

Order modified.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

1928.

May, 25.

NATHUNI SAHU

v.

MAHANTH BHAGWAN GIR.*

Amalgamation of holdings—recognition by thikadar, binding on landlord. Where an amalgamation of holdings has been recognised in good faith in the ordinary course of business by the thikadar in possession of the village in which the holdings are situated, such amalgamation is binding on the landlord.

*Appeals from Appellate Decree nos. 954, 957 and 1032, 1103, 1104, 1105 of 1926, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Darbhanga, dated the 30th March, 1926, confirming a decision of Babu Rai Krishna Behari Saran, Munsif of Samastipur, dated the 28th October, 1925.