APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, J.J.

1927.

Nov., 22.

RUP NATH MANDAL

v.

JAGANNATH MANDAL.*

Chota Nagpur Tenancy Act, 1908 (*Bengal Act VI of* 1908), *section* 47, *scope of—raiyati holding, whether can be sold in execution of a mortgage decree—executing Court, duty* of.

Section 47, Chota Nagpur Tenancy Act, provides that "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 any decree or order....."

Held, that under section 47, a raiyati holding cannot be sold even in execution of a mortgage decree which directs the sale of such holding, and it is the duty of the Court executing a decree to guard against evasion of this statutory prohibition.

Jadhu Mahto v. *Kali Prasanno Bhattacharjee* (1) and *Lakshmi Bibi Kujrani* v. *Atal Bihary Haldar* (2), followed.

Amrit Lal Seal v. *Jagat Chandra Thakur* (3), distinguished.

Per Macpherson, J :—"It is altogether illegal to sell a raiyati right in land in execution of a decree or order directing such sale. Not only may an objection be taken in execution that the land sought to be sold is not saleable, but it is incumbent on the Court itself to use every endeavour to prevent abuse of its process in covert attempts to defeat or contravene the law prohibiting the sale of holdings in Chota Nagpur."

Amrit Lal Seal v. *Jagat Chandra Thakur* (3) doubted *quoad hoc*.

*Appeal from Appellate Order no. 126 of 1927, from an order of Rai Sahib Shiva Priya Chattarji, Subordinate Judge of Manbhum, dated the 14th of March, 1927, reversing an order of Babu Nil Kantha Bagchi, Munsif of Dhanbad, dated the 14th July, 1926.

(1) (1916) 1 Pat. L. J. 33. (2) (1913) I. L. R. 40 Cal. 534.

(3) (1925) I. L. R. 4 Pat. 696.

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Appeal by the judgment-debtor.

This was an appeal by the judgment-debtor whose objection to the execution of a mortgage decree by sale of the mortgaged property was allowed by the Munsif but was disallowed on appeal by the Subordinate Judge. The respondent obtained the decree under execution which directed the sale of the lands as being in possession of the appellant within the mauza in which he was a co-sharer in a 4-annas mokarrari interest. The objection of the appellant was that the lands sought to be sold were his raiyati lands and the sale of the right of a raiyat in his holding was expressly prohibited by section 47 of the Chota Nagpur Tenancy Act.

The Munsif found that the status of the appellant was that of a raiyat. The survey khatian supported the appellant's contention, and no evidence was adduced by the decree-holder-respondent to show that the record-of-rights was incorrect. Upon the finding that the land sought to be sold was the raiyati holding of the appellant the Munsif held that the sale of the appellant's right as a raiyat could not be sold in execution of the decree. The Subordinate Judge on appeal did not displace the finding of the Munsif that the land was really the raiyati holding of the appellant; but he held that the decree under execution being a mortgage decree directing the sale of the land in question the executing Court could not go behind the said decree and refuse to execute the same.

Narendra Nath Roy, for the appellant.

S. C. Mazumdar, for the respondent.

KULWANT SAHAY, J., (after stating the facts set out above proceeded as follows :)—In this case I am of opinion, that the learned Subordinate Judge was clearly wrong. Section 47 of the Chota Nagpur Tenancy Act provides that no decree or order shall

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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 any decree or order. Then follow certain exceptions which do not apply to the present case. The second part of section 47 expressly forbids the sale of the right of a raiyat in his holding in execution of any decree, and the fact that the decree under execution is a mortgage decree directing the sale of the land in question does not in any way affect the provisions of section 47 of the Act. The learned Subordinate Judge relied upon the observations of Mullick, J., in *Amrit Lal Seal* v. *Jagat Chandra Thakur* (1); but that was a case under the Santal Parganas Settlement Regulation (III of 1872), and the provisions of section 27 of that Regulation are quite different from the provisions of section 47 of the Chota Nagpur Tenancy Act. It is true that there are certain observations in the judgment in that case which would go to support the contention of the respondent that once a decree has been passed by a Court of competent jurisdiction, although the decree itself might be erroneous in law, the Court executing the decree has no power to go behind the decree and refuse to execute it. There are, however, observations in the same judgment to the effect that if there is a statutory bar to the execution of the decree, the decree cannot be executed. It is no doubt the general rule that a Court executing a decree cannot go behind the decree and examine the correctness or the legality thereof; but the provisions of section 47 of the Chota Nagpur Tenancy Act go clearly to show that even if there is a decree for sale of the right of a raiyat in his holding such a decree cannot be executed. There is nothing in section 47 which would make an exception in the case of a mortgage decree directing the sale of the property. The section clearly provides that the right of a raiyat cannot be sold in execution of any decree. The point was directly raised in this

(1) (1925) I. L. R. 4 Pat. 696.

Court in *Jadhu Mahto* v. *Kali Prasanno Bhattacharjee* (1). There also a mortgage decree had been passed directing the sale of a raiyati holding and the objection was taken by the judgment-debtor to the execution of the decree on the ground that the sale was prohibited by section 47 of the Act, and this Court held that the second portion of the provisions of section 47 applied to the case and that it was the duty of the Court executing the decree to consider whether the sale of the property was forbidden by that section. Reference was made in that case to the decision of the Calcutta High Court in *Lakshmi Bibi Kujrani* v. *Atal Bihary Haldar* (2) where it was held that the sale of a raiyati holding was in direct contravention of the provisions of section 47 of the Chota Nagpur Tenancy Act. In that case the preliminary decree in the mortgage suit was passed before the Chota Nagpur Tenancy Act was extended to Manbhum where the mortgage property was situate and it is contended that the learned Judges were wrong in holding that although the mortgage was created and the decree was passed before the Chota Nagpur Tenancy Act was extended to Manbhum still section 47 of the Act operated as a bar. That is a point which does not arise here, but the decision that section 47 applies and prohibits the sale of a raiyati holding in execution of a mortgage decree was, in my opinion, correct and was accepted as such by this Court in the case of *Jadhu Mahto* v. *Kali Prasanno Bhattacharjee* (1). I am, therefore, of opinion that the lands in dispute being a raiyati holding cannot be sold in execution of the decree in question.

It is next contended on behalf of the respondent that the decree directed the lands to be sold as the 4-annas mokarrari interest of the judgment-debtor and that it was not open to the judgment-debtor to

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raise the question in the execution proceedings that the lands in question formed his raiyati holding and were not his mokarrari lands. The decree, however, does not describe the lands as mokarrari lands of the judgment-debtor but as being in possession of the judgment-debtor who was a co-sharer in 4-annas mokarrari interest in that village, and it was, therefore, open to the judgment-debtor to show in the present proceedings that the lands were his raiyati holding. It is further contended on behalf of the respondent that the objection as regards the nature of the lands, viz., whether they formed the raiyati holding or the mokarrari interest of the defendant might and ought to have been raised in the mortgage suit, and the decree in the mortgage suit must be taken to have decided that the lands did not form the raiyati holding and were therefore saleable. In the first place, a copy of the judgment passed in the mortgage suit has not been produced and we are not in a position to say whether the question was raised and decided or not. In the next place, there is nothing in the decree which is on the record to show that the Court held the lands in dispute to be the mokarrari interest of the judgment-debtor. As I have said above, the description of the mortgaged property does not go to show that it was the mokarrari land: it simply says that the land was comprised within the 4-annas mokarrari interest in which the judgment-debtor was a co-sharer. The fact that the judgment-debtor did not raise the question in the mortgage suit which he might and ought to have raised does not, in my opinion, operate as an estoppel in the present case inasmuch as there can be no estoppel against the statute. The law prohibits the sale of a raiyati holding, and once it is found that the lands in dispute do form the raiyati holding, whether the judgment-debtor took the objection or not, the sale of such a holding cannot take place in the face of the clear provisions of section 47 of the Chota Nagpur Tenancy Act.

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I am, therefore, of opinion that the objection of the judgment-debtor-appellant must prevail. The order of the learned Subordinate Judge must be set aside and that of the Munsif restored. The appeal is, therefore, decreed with costs throughout.

MACPHERSON, J.—I agree.

MACPHERSON, J.

The question is whether, when a mortgage decree directs certain lands to be sold, the objection can be taken in the execution proceedings that the lands are raiyati and therefore by reason of the provisions of section 47 of the Chota Nagpur Tenancy Act, 1908, must not be sold in execution of the decree.

The Munsif answered the question in the affirmative but in appeal the Subordinate Judge relying on certain observations in *Amrit Lal Seal* v. *Jagat Chandra Thakur* (1) disallowed the objection of the raiyat on the ground that the executing Court cannot go behind the decree, especially as that decree does not describe the four plots in controversy as raiyati and therefore does not appear to be illegal on the face of it.

Both on precedent and on principle the question must be answered in the affirmative. There is ample direct authority on the point, while the ruling cited by the lower Appellate Court which relates to section 27 of the Santal Parganas Settlement Regulation, 1872, is at best remotely relevant. No doubt section 46(*1*) of the Chota Nagpur Tenancy Act is based on clause (1) of that provision. Section 46(*3*) is section 27(*2*) and section 46(*4*) is a modified form of section 27(*4*). But in the Chota Nagpur Tenancy Act the Legislature went further and enacted in section 47 (with provisions not here relevant) that

> "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 any decree or order".

Section 47 has no counterpart in the Regulation of 1872, and accordingly the decision cited does not

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bear on the provision now under consideration or on anything similar. Apart from that, the decision itself in my opinion may, when an appropriate case arises, require further examination. Inter alia, the observations in respect of the words " any Court " in clause (2) seem to be of doubtful correctness having regard to the wide terms of that provision and the manifest public policy underlying the whole provision.

The provision prohibiting the sale of the right of a raiyat in his holding in execution of a decree or order is eminently one of public policy, and from the time when in 1903 it was first introduced into Bengal Act I of 1879 as section 10A, it has consistently been held not only that the objection that land sought to be sold was a raiyati holding or part thereof, could be taken in execution proceedings but that the provision imposed upon the executing Court itself the duty of seeing that no sale contravening it takes place. Section 47 was in several aspects the subject of controversy in Manbhum (in which this litigation arose) after the extension of Act VI of 1908, to that district in 1909. In *Babulal Chaudhury* v. *Ganesh Mandal* (1) it was held by the District Judge in appeal that a mortgage decree could not be passed on a mortgage of raiyati land in 1904, as section 47 was a prohibition on the Court imposed by the Legislature on the ground of public policy. The Second Appeal (No. 1859 of 1912) against that decision was summarily dismissed by Chitty and Teunon, JJ. on the 29th November, 1912. In January, 1913, the same learned Judges decided in *Lakshmi Bibi Kujrani* v. *Atal Bihary Haldar* (2) which had been admitted prior to the presentation of Second Appeal no. 1859 of 1912, that a sale in execution of a mortgage decree directing the mortgaged raiyati holding to be sold was in direct contravention of section 47. In that case the preliminary decree for the sale of the raiyati holding was passed before

(1) Second Appeal no. 1359 of 1912. (2) (1913) I. L. R. 40 Cal. 534.

and the final decree after the extension of the Act. In execution proceedings the judgment-debtor relied upon section 47 but his objection was rejected, the local Courts being of opinion that section 47 did not govern sales on mortgages of date prior to the extension of the Act to Manbhum and the judgment-debtor preferred a second appeal. The sale in execution was held during the pendency of the first appeal and confirmed while the second appeal was pending. The High Court held: "The provisions of section 47 of the Chota Nagpur Tenancy Act put the matter beyond doubt. That section provides, subject to the three provisos which do not affect the present case, that 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 any decree or order. The final decree which was passed on the extension of the Act ought not to have been passed; but, putting that aside it is clear that the second portion of the section applies to this case, and prevents any such right being sold in execution of any decree or order."

In that case the learned Judges manifestly went beyond what is necessary for the purposes of this litigation, in which the question of retrospective operation does not arise.

They held further that the sale being in direct contravention of the provisions of section 47, all the proceedings including the sale which had taken place in consequence of the orders of the Subordinate Courts, should be set aside.

The matter was considered in the Patna High Court in the case of *Jadu Makto* v. *Kali Prasanno Bhattacharjee* (1). In that case the defendant objected in execution that the mortgaged properties were raiyati holdings and could not be sold. The learned Judges observed, "It was contended before

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us that the objection to the sale had been taken too late and that if the appellant desired to raise this objection he should have done so before the decree was passed. In the case of *Lakshmi Bibi Kujrani* v. *Atal Behary Haldar* (1) it was decided that an objection of this kind might be taken after the passing of the decree for sale on a mortgage. We are of the same opinion. Section 47 of the Chota Nagpur Tenancy Act provides that 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 any decree or order. It appears to us that the second portion of this provision applies to the present case and that it was the duty of the Court executing the decree to consider whether the sale of the property was forbidden by the section."

Certainly section 47 of Act VI of 1908 is itself clear and emphatic in its terms. The Legislature is insistent that no raiyati holding shall be sold. It may well be that the statutory prohibition on every Court contained in the first sentence of section 47 against decreeing or ordering the sale of a raiyat's right in his holding, may alone be sufficient prohibition on a Court to sell such a right in execution of such a decree or order, but the Legislature was taking no risks. It therefore imposed a double guard: not only may *any* Court not pass a decree or order for the sale of a raiyati right, but no such right shall be sold in execution of any decree or order. In short the Legislature modified the ordinary principle that an executing Court should not go behind the decree. To avoid what it judged to be the greater evil of selling a raiyati holding in Chota Nagpur in execution of a decree or order passed perhaps per incuriam or, perhaps as so often happens, through collusion of parties (the Munsif in this case states " it is common knowledge that in these parts transfers are frequently effected by false recitals in deeds of conveyance to the

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knowledge of both parties ") or as in mortgage decrees, under the principle of estoppel, the Legislature was prepared to face the not inconsiderable but still far less evil of interference with the ordinary legal principle that an executing Court should not go behind the decree.

Accordingly it is altogether illegal to sell a raiyati right in land even in execution of a decree or order directing such sale. Not only may an objection be taken in execution that the land sought to be sold is not saleable, but it is incumbent on the Court itself to use every endeavour to prevent abuse of its process in covert attempts to defeat or contravene the law prohibiting the sale of holdings in Chota Nagpur.

S. A. K.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Wort, JJ.

SANTOKHI MANDAR

v.

MAHARAJA SIR RAMESHWAR SINHA BAHADUR.*

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Bengal Tenancy Act, 1885, *(Bengal Act VIII of* 1885), *section* 120—*proprietor's private land—never cultivated by the proprietor or recognised by village usage as such—presumption —rebuttable by evidence—tenant, admission of, as to the zerait character of disputed land, admissibility of.*

Where it is not shown that land has been cultivated by the proprietor himself or recognised by village usage as proprietor's private land, there is a presumption that the land is not the proprietor's private land within the meaning of section 120, Bengal Tenancy Act, 1885; but the presumption is a

*First Appeals nos. 102, 229, 230 and 281 of 1924, from an order of Babu Shiva Nandan Prasad, Subordinate Judge of Darbhanga, dated the 24th March, 1924.