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of the appellant as regards the amount of rent must be overruled.

The result is that these appeals are dismissed with costs.

MACPHERSON, J. :—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ

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June, 18.

RAM DAS SINGH

v.

BENI DEO.*

Ghatwali (Rohini)—shikmi ghatwali, whether can be sold in execution of decree—raiyati holding in Santal Parganas saleable—Santal Parganas Settlement Regulation, 1872 (Reg. III of 1872), section 27. A shikmi ghatwali tenure held under the ghatwal of Rohini is not liable to be sold in execution of a decree, *Bally Dobey* v. *Ganei Deo*(1), followed.

Thakur Ashutosh v. *Bansidhar Shroff*(2), referred to.

Obiter dictum : A raiyati holding in the Santal Parganas is not saleable by the regular courts except where transferability is recorded in the record-of-rights.

Appeal by the decree-holder.

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

S. S. Bose, for the appellant.

Bindeshwari Prasad, for the respondent

MACPHERSON, J.—This is an appeal against the decision of the District Judge of the Santal Parganas reversing the order of the Subordinate Judge who had

*Appeal from Appellate Order no. 12 of 1925, from an order of R. E. Russell, Esq., District Judge of the Santal Parganas, dated the 20th October 1924, reversing an order of Babu B. Sarkar, Subordinate Judge of Deoghar, dated the 15th July, 1924.

(1) (1883) I. L. R. 9 Cal. 388. (2) (1928) I. L. R. 7 Pat. 744, P. C.

dismissed the objection of Beni Deo, the judgment-debtor, now respondent, that certain property which the decree-holder, now appellant, proposed to sell in execution of his money decree was not saleable.

The decree-holder's description of the property, so far as relevant, is " the undivided one-sixth share of Beni Deo in the mukarrari interest (two pies) in village Sangramloria appertaining to taluq Rohini with Beni Deo's one-sixth share in the nijjote lands appertaining to jamabandi no. 3."

It was objected by the judgment-debtor, his two sons and a co-sharer that the so-called mukarrari interest is a shikmi ghatwali tenure under the Rohini ghatwali and that the lands are raiyati jamabandi jote no. 3 standing in the name of Mosaheb Deo, father of the judgment-debtor, and his co-sharers Chandra Deo and Amani Deo, and that accordingly neither can be saleable.

The learned Subordinate Judge relying upon the judgment of 1891 pronounced by Norris and Beverley, JJ., in First Appeal no 245 of 1889 relating to another portion of the original tenure (which has been subdivided) held, so far as is relevant in this appeal, (*1*) that the tenure was not a shikmi ghatwali, but a mere mukarrari and therefore saleable and (*2*) that jote no. 3 was the nijjote of the mukarridars in whose tenure it is situated, and therefore saleable since " it is only the interest of a raiyat in his holding that is not transferable."

He accordingly rejected the objections and directed the one-sixth share of Beni Deo and his sons in the attached property to be sold.

On appeal by the judgment-debtor the learned District Judge pointed out as to the tenure that the judgment of 1891 was not even inter partes and was long anterior to the entry in the Settlement record of

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1904 which shows the tenure as a khorposh shikmi ghatwali mahal with the shikmidar Mosaheb Deo, Chnadra Deo and Amani Deo as "malik." He held that the tenure was shikmi ghatwali and that accordingly it was not saleable. As to the lands recorded in jote no. 3 he held that it followed from his decision on the first point that they also are not saleable. He then went on to hold further in that regard that even if the tenure were transferable, the entry in the record-of-rights of the holders of the jote as jamabandi raiyats of the village precludes sale of the jote inasmuch as no right of transfer in raiyati land has been recorded in the record-of-rights for the village. As to the argument on behalf of the decree-holder that jote no. 3 must be the mukarridar's kamat land he pointed out that in such a case the land would have been excluded from the raiyati jamabandi and entered in the separate categories outside that jamabandi reserved for miscellaneous lands such as debottar, lakhiraj, etc.

As to the tenure the learned Judge stated in his judgment: "It is now the settled law that shikmi ghatwalis are subject to the same incidents as their superior ghatwals, neither more nor less." In the early stages of this appeal that view was, as the order-sheet shows, accepted both by the Bench and at the Bar and the hearing was adjourned pending the decision by their Lordships of the Judicial Committee of the saleability of the Rohini ghatwali. In *Thakur Ashutosh Deo* v. *Bansidhar Shroff*(1) their Lordships have very recently decided that the Rohini ghatwali cannot be sold in execution of a decree. As long ago as 1882 it was held in *Bally Dobey* v. *Ganei Deo*(2) that a shikmi ghatwali tenure held under the superior ghatwal is not liable to be sold in execution, nor are its proceeds liable to attachment for satisfaction of the debt due from its holder. In that case, as appears from the judgment of 1891 already referred to and the

(1) (1928) I. L. R. 7 Pat. 744 P. C. (2) (1883) I. L. R. 4 Cal. 388.

judgment of the District Judge Mr. W. B. Oldham in *Ganei Deo* v. *Bally Dobey* (1) which is on the record of the lower appellate court, it was sought to enforce the sale of a shikmi ghatwali in the hands of a ghatwal on a mortgage security executed by his deceased father when incumbent in the office of ghatwal. The learned Judges pointed out that an inferior tenure cannot have larger incidents attached to it than the superior. That view has been accepted without question ever since. It follows that the tenure of the respondent is not saleable if it is a shikmi ghatwali under the ghatwal of Rohini. It makes no difference that the subinfeudation was also khorposh.

Mr. S. S. Bose relying upon the judgment of 1891 then contends that the tenure is not a shikmi ghatwali but simply a khorposh mukarrari grant. But in that case the learned Judges only declined to apply the decision in *Bally Dobey* v. *Ganei Deo* (1) because they held that the plaintiff-appellant in the case before them had failed to show in the face of the assertion of a mukarrari tenure in the mortgage bond which was the basis of that litigation, that her tenancy was in fact shikmi ghatwali. Here in view of the record-of-rights there can be no doubt that the tenure proposed to be sold, is shikmi ghatwali. It is therefore, as has been rightly held by the lower appellate court, not saleable in execution of a decree.

As to the lands recorded as jote no. 3, if they are the nijjote of the tenure-holder, as was contended in the Courts below on behalf of the appellants, then, as pointed out by the learned District Judge, it follows from the finding that the tenure is shikmi ghatwali that they are not saleable.

The learned District Judge went on to point out that even if the tenure had been transferable the land recorded as jote no. 3 would not be saleable. Now Mr. S. S. Bose, though apparently as a last despairing effort, contends on behalf of the appellant that it is a

(1) (1883) I. L. R. 4 Cal. 388.

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general delusion that a raiyati jote in the Santal Parganas cannot be sold by the regular courts in execution of a decree. But this point was not taken in the Courts below. Indeed not only was the contention of the decree-holder that the lands of jote no. 3 are nijjote (and not raiyati) land in a transferable tenure but it was in the view of the Judges presiding in those Courts palpably a common place that the interest of a raiyat in his holding in village Sangramlorhia is not transferable at all whether by Court or private sale. In the circumstances the appellant cannot be allowed to raise the point in second appeal when full materials for a decision are not available. It may however be remarked that the considerations in support of the contetnion are prima facie not impressive. True, no direct statutory prohibition such as is found in section 47 of the Chota Nagpur Tenancy Act, 1908, can be indicated. But in 1908 the position in respect of the question of saleability by the Court of the right of a raiyat in his holding was very different in the two areas. In the Santal Parganas there had been no Court sales since 1887 at least, and very few before that and during a brief period only. There is in that district no provision for the sale of a raiyati interest even in execution of a decree for arrears of rent accruing on the holding. In the Courts not subordinate to the Patna High Court, the raiyat may be ejected in execution of a rent decree in respect of his holding but the holding may not be sold. In Chota Nagpur on the other hand a holding had long been saleable in execution of a decree for rent accruing thereon, and Courts were freely selling holdings in execution of money decrees. A direct interdiction of what was in fact not permitted in any Court in the Santal Parganas may well have been adjudged unnecessary. It is indisputably a commonplace in those Courts that the interest of a raiyat in his holding cannot be sold by the Court any more than the raiyat himself can under section 27 of Regulation III of 1872 (substituted for the previous section 26 by

Regulation III of 1908) sell it. In this case the Courts below have so assumed and the remark in the decision in *Chhatradhari Singh* v. *Hem Lal Singh*(1) is entirely typical of the view held in this Court. The learned Judges said, " The sole question for decision now is whether the khorposh mukarrari jote was a raiyati holding or a tenure. If it was a raiyati holding, it was not saleable, but if it was a tenure it was saleable."

The basis of this view may perhaps be that a Court will not countenance a sale which must be ineffective. Under section 25 of Regulation II of 1886 no raiyat can be ejected from his holding otherwise than in execution of an order by the Deputy Commissioner. The effect of section 27 of Regulation III of 1872 and of the entry in the record-of-rights being that the raiyat cannot (except in one pargana) sell his right in his holding, the invariable practice of the Courts over a long period to refuse to sell a raiyati holding (no case of sale can be cited) is highly significant, especially when it would be prima facie unreasonable that a holding could be sold in execution of a money decree when it is not saleable in execution of a rent decree for its own arrears. Moreover other important considerations historical and legal emerge on perusal of the Settlement Report of Sir Hugh McPherson and the Santal Parganas Manual which are adverse to the idea of saleability by the Court of a raiyati holding in the Santal Parganas except where transferability is recorded in the record-of-rights.

In my opinion the contentions on behalf of the appellant cannot prevail and I would dismiss this appeal with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

S. A. K.

(1) S. A. no. 48 of 1925, unreported.