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GOPALJI JHA v. GAJENDRA NARAYAN SINGH. DHAVLE, J.

I would set aside the order of the lower Court with costs. Hearing fee, five gold mohurs.

AGARWALA, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

1936.

January, 10.

Before Macpherson and Fazl Ali, JJ.

MUSAMMAT JAMUNI

v.

BHOLARAM.*

Chota Nagpur Tenancy Act, 1908 (Act VI of 1908), sections 46 and 47—sale of a part of occupancy holding in execution of a mortgage decree, validity of—Code of Civil Procedure, 1908 (Act V of 1908), section 47 and Order XXI, rule 58—purchaser of entire holding in execution of a certificate under the Public Demands Recovery Act, if a representative of the judgment-debtor.

Where the mortgagee of a piece of homestead land which formed part of an occupancy holding proceeded to sell it in execution of his mortgage decree and a purchaser of the entire holding in execution of a certificate under the Public Demands Recovery Act objected to the sale on the ground that section 47 of the Chota Nagpur Tenancy Act was a bar to the sale.

Held, that the purchaser in execution of a certificate under the Public Demands Recovery Act of the entire holding was not a representative of the judgment-debtor under the mortgage decree and could not interfere in the execution proceedings. But it was the duty of the court to decide whether the property sought to be sold could be sold or not. Once it was found that the land sought to be sold is a part of a *raiyati* holding the sale cannot take place in the face of the clear provisions of section 47 of the Act. Although under section 46 the tenant could mortgage the holding or a portion

* Appeal from Appellate Order no. 173 of 1935, from an order of J. A. Saunders, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 14th March, 1935, reversing an order of Babu Charu Chandra Coari, Munsif, Giridih, dated the 23rd November, 1934.

of the holding for a period not exceeding 5 years, yet by reason of the plain provisions of section 47 that holding could not be sold in execution of the mortgage decree.

Appeal by the claimant.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

B. C. De, for the appellant.

K. Mukharji, for the respondent.

FAZL ALI, J.—This is a second appeal arising out of an execution proceeding which was started by the respondents who are admittedly mortgagee decree-holders. It appears that the respondents obtained a mortgage in respect of plot no. 1042 and subsequently having obtained a decree upon the basis of the mortgage proceeded to sell it. Meanwhile the entire holding consisting of some 13 or 14 plots, including the plot in question, had been sold by the landlord, who had obtained a certificate, for arrears of rent under the Public Demands Recovery Act and purchased by the appellant. When, therefore, the landlord attempted to sell the plot in question, the appellant appeared and preferred an objection which she purported to do under Order XXI, rule 58. The main ground of objection was that the plot in question could not be sold under section 47 of the Chota Nagpur Tenancy Act as it was part of a raiyati holding. When these objections came to be heard two questions arose before the executing Court, first, whether the appellant had the locus standi to object; and, secondly, whether the plot in question was in fact part of a raiyati holding or not.

On the first point the learned Munsif came to the conclusion that although the appellant could not prefer an objection under Order XXI, rule 58, in a proceeding which was taken in execution of a mortgage decree yet she could object to the sale as a representative of the judgment-debtor and the objection

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should be taken to have been preferred under section 47 of the Code of Civil Procedure. On the second point he came to the conclusion that the plot in question, though by itself it was a piece of homestead land, was nevertheless governed by the prohibition contained in section 47 of the Chota Nagpur Tenancy Act inasmuch as this plot was part of a raiyati holding.

From the decision of the learned Munsif the mortgagee decree-holders appealed to the Judicial Commissioner of Chota Nagpur who disposed of the appeal on the preliminary ground that the appellant was not a representative of the judgment-debtor under the mortgage decree and, therefore, she had no locus standi to prefer any objection in the course of the execution proceedings. The learned Judicial Commissioner, however, did not devote his attention to the other question, namely, whether the Court was competent to sell the land in question in view of the provisions of section 47 of the Chota Nagpur Tenancy Act.

The appellant has now preferred the second appeal and it is urged by the learned Advocate for her that the learned Judicial Commissioner was in error in holding that she was not a representative of the judgment-debtor. It appears from the judgment of the learned Judicial Commissioner that it was conceded before him by the pleader who appeared for the present appellant in his Court that she was not a representative of the judgment-debtor, and, in my opinion, the learned pleader was quite right in making this concession. The question as to whether a purchaser of the judgment-debtor's property is his representative or not, has been the subject of conflicting decisions; but without referring to all those decisions, it is enough to point out that in this case the appellant cannot be held to be a representative of the judgment-debtor because she would not be bound by the mortgage decree which has been passed as between the decree-holders and the mortgagor. If,

therefore, she is not bound and not affected by the decree, it is obvious that she cannot be deemed to be a representative of the judgment-debtor merely because she purchased the entire holding, a portion of which had been mortgaged. That being so, the learned Judicial Commissioner was correct in his view that the appellant could not intervene in the execution proceedings. The fact, however, remains that apart from whether the appellant objected to the sale or not, it was the duty of the court, in which the execution proceeding was started, to decide whether the property sought to be sold could be sold or not. Section 47 of the Chota Nagpur Tenancy Act provides in plain terms:

> "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 provisions of this section have been elaborately explained in several decisions of my learned brother; but in the present case it will be necessary to refer to one of these only, that being the decision in *Rupnath Mandal* v. *Jagannath Mandal*[1] in which it was pointed out that once it is found that the lands sought to be sold form a 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. In the present case although under section 46 the tenant could mortgage the holding or a portion of the holding for a period not exceeding five years, yet by reason of the plain provisions of section 47 that holding could not be sold in execution of the mortgage decree. That being so, in order to satisfy ourselves as to whether the land in question forms a part of the raiyati holding, we have examined the record and we are of opinion that it did form part of such a holding and so it cannot be sold. That being so, in my opinion the view taken by the Munsif is correct and should be upheld.

(1) (1927) 9 Pat. L. T. 228.

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The appeal is, therefore, allowed and the order of the learned Judicial Commissioner is set aside. As both the parties have partially succeeded in their respective contentions each party will bear his own costs in this Court and the Court below.

FAZL ALI, J.

MACPHERSON, J.—I agree.

Appeal allowed.

REVISIONAL CRIMINAL.

1936.

January, 10.

Before Dhavle and Agarwala, JJ.

ACHARAJA SINGH

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 531 *et. cet.—Magistrate, jurisdiction of, to try offence committed in another district—failure of justice, proof of, whether necessary.*

Where the petitioners were charged with having taken two Munda girls from Ranchi to Monghyr and passed them on to two Rajputs as brides for a consideration of Rs. 200 each and were tried under sections 366, 366A and 420 of the Indian Penal Code, but were acquitted on the charges under sections 366, 366A and were convicted under section 420 only. In revision before the High Court it was contended that the offence of cheating was committed in Monghyr and so the Magistrate of Ranchi had no jurisdiction to try them.

Held, a conviction cannot be set aside merely on the ground that the trial has taken place in a wrong district, but the party aggrieved is entitled to have the conviction set aside if he shows that " such error has in fact occasioned a failure of justice ".

Musammat Bhagwatia v. *Emperor*(1), distinguished.

Held, also that the policy of sections 531 to 538 of the Criminal Procedure Code is to uphold in most cases the orders

* Criminal Revision nos. 650 and 651 of 1935, against an order of F. F. Madan, Esq., I.C.S., Judicial Commissioner of Ranchi, dated the 14th of October, 1935, affirming the decision of Rai Sahib Jug Dutt, Subdivisional Magistrate of Ranchi, dated the 22nd June, 1935.

(1) (1924) 83 Ind. Cas. 577.