

## APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

DWARKANATH PAL

v

TARINI SANKAR RAY.\*

1907

Jan. 28

*Occupancy holding—Right of occupancy—Sale of non-transferable occupancy holding in execution of money decree—Subsequent recognition by landlord—Code of Civil Procedure (Act XIV of 1852) s. 244—Questions for Court executing decree—Issue raised by judgment-debtor as defendant in separate suit the property sold was not saleable—Estoppel.*

Where the purchaser of a non-transferable occupancy holding at a sale in execution of a money-decree obtains the landlord's consent to the sale and his recognition of the purchaser as a tenant as soon as can reasonably be expected after the objections to the purchaser's obtaining possession have been overcome, the sale is rendered valid in law.

It is not necessary that the consent of the landlord should be obtained prior to the execution proceedings.

Where in execution of a money decree against the defendant an occupancy holding belonging to him was sold and he had failed to raise the objection at the time of the sale that the holding was not transferable, although he had full knowledge of the execution proceedings and had full opportunity to raise the objection.

*Held*, that it was not competent to him to resist the purchaser after the confirmation of the sale and that as between himself and the purchaser the title to the property vested in the latter on such confirmation.

*Sheikh Murullah v. Sheikh Burullah*(1), *Durga Charan Mandal v. Kali Prasanna Sarkar*(2), and *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha*(3) referred to.

SECOND APPEAL by the defendant Dwarkanath Pal.

The suit, out of which this appeal arose, was brought by the plaintiffs Tarini Sankar Ray and another for the declaration

Appeal from Appellate Decree No. 1917 of 1905 against the decree of Srigopal Chatterji, Subordinate Judge of Dacca, dated the 10th August 1905 reversing the decree of Moulvi Asman Ali, Munsiff of Manikgunge, dated the 24th June 1904.

(1) (1905) 9 C. W. N. 972.

(2) (1899) I. L. R. 26 Calc. 727.

(3) (1897) I. L. R. 24 Calc. 355.

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of their title to and for the recovery of separate possession by partition of an eight annas share of certain lands. The material allegations in the plaint were these : —

That the lands formed a *raiyati jote* recorded in the landlord's *sherista* in the name of the defendant; that one Dwarkanath Saha in execution of a money decree obtained against the defendant caused the *jote* to be sold and purchased it himself on the 9th November 1904; that subsequently it was declared in a regular suit that at the date of the auction sale the defendant had only an eight-anna share in the said *jote* and that the purchase of Dwarkanath Saha was valid to the extent of that share only; that Dwarkanath Saha having obtained delivery of possession of the said eight annas share sold it to the plaintiffs on the 29th Magh 1309, who obtained possession by taking settlement from and giving kabuliat to the landlords. The plaintiffs alleged that the defendant having subsequently to the execution sale succeeded to the other eight annas share on the death of his brother was raising obstacles to their possession.

The material allegations in the written statement of the defendant were that the lands in dispute formed an ordinary occupancy holding, which was not transferable according to local custom and usage; that Dwarkanath Saha could derive no title thereto under the alleged auction sale, which moreover had been brought about fraudulently and of which the defendant had no knowledge; that the entire 16 annas of the disputed land was in his possession and that neither Dwarkanath Saha nor the plaintiffs had ever obtained possession; that even after the alleged execution sale the landlords continued to receive rent from him and that the landlords had never made and had no right to make any settlement with the plaintiffs.

The Munsiff, who tried the suit, found that the occupancy holding was not transferable without the consent of the landlord and that the plaintiffs had failed to prove that the landlords had given their consent to the purchase by Dwarkanath Saha by subsequently settling the lands with him or that the plaintiffs themselves had obtained any settlement from the landlords. He accordingly found that the plaintiffs had no title and dismissed the suit.

On appeal by the plaintiffs the Subordinate Judge found that the landlords had recognised the purchase by Dwarkanath Saha and had subsequently accepted a kabuliat from the plaintiffs on receipt of *salami*. He held that the plaintiffs had a valid title to the share claimed by them and made a decree in their favour.

The defendant appealed to the High Court.

*Babu Baikuntha Nath Das* for the appellant.

The finding of the first Court that the holding is not saleable has not been displaced by the lower appellate Court. It being a case of a forced sale the defendant cannot be estopped from contending that the holding is not saleable and though the question could have been raised in the execution proceedings s. 244 of the Civil Procedure Code is no bar to the defendant raising the question in answer to the plaintiff's suit: *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha*(1). A right of occupancy is not transferable: *Nurendro Narain Roy v. Ishan Chunder Sen*(2), and if the holding is not transferable the execution sale passed no title to the purchaser: *Kripa Nath Chakree v. Dyal Chand Pal*(3), *Dwarka Nath Misser v. Hurrish Chunder*(4); the right of occupancy notwithstanding the sale remains in the former raiyat and a subsequent recognition of the purchaser as a tenant by the landlord can neither destroy the right of the old raiyat nor create any right in favour of the purchaser; in the present case the recognition by the landlord took place about six years after the sale; the fact, that six years after the sale, which passed no title to the purchaser, the landlord chose to take rent from him, although the defendant, the rightful raiyat, was on the land and had all along been paying rent, cannot affect his right: *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha*(1).

*Babu Mohini Mohan Chakravarti* for the respondent. Occupancy holdings are saleable with the consent of the landlord and a sale with the landlord's consent would pass the holding to the purchaser: it is immaterial whether the sale is voluntary or involuntary: *Dwarka Nath Misser v. Hurrish Chunder*(4);

(1) (1897) I. L. R. 24 Calc. 355.

(2) (1874) 22 W. R. 22.

(3) (1874) 22 W. R. 169.

(4) (1879) I. L. R. 4 Calc. 925.

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*Ananda Das v. Rutnakar Panda*(1). Moreover, the record clearly shows that the defendant had full knowledge of the execution proceedings and although an order was made for the sale of the holding and the holding was sold, he never raised the objection that the property was not saleable; he is bound by the order of sale and cannot raise the objection now: *Sheikh Murullah v. Sheikh Burullah*(2). The delay in procuring the landlord's recognition is sufficiently explained by the fact that after the sale the defendant and his relatives on his behalf raised various objections to the purchaser's getting possession and these objections were finally overruled in the year 1900, and shortly afterwards in the course of the year the landlord's recognition was obtained.

*Babu Baikuntha Nath Das* in reply.

BRETT AND SHARFUDDIN JJ. The present appeal arises out of a suit brought by the plaintiffs respondents for a declaration of their title to and for partition of an eight-anna share in a certain holding, in which they claimed a title by purchase.

The plaintiffs' case was that the holding in question originally belonged to one Dwarkanath Pal and his brothers, that in execution of a money decree obtained by one Dwarkanath Saha against Dwarkanath Pal the whole holding was put up to sale and was purchased on the 9th November 1894 by the decree holder Dwarkanath Saha. A claim was put in during those execution proceedings by the daughters of one of the brothers, who claimed as such to be entitled to an eight annas share of the holding. That claim was disallowed, and thereupon the claimants brought a regular suit against the purchaser Dwarkanath Saha to have it declared that by the sale in execution of his decree only an eight-anna share belonging to Dwarkanath Pal had passed to the purchaser and not the eight annas share belonging to their father. The claimants appear to have died during the pendency of the suit and the defendants' mother was substituted as their heir on their deaths. In the suit Dwarkanath Pal was added as a *pro forma* defendant.

(1) (1903) 7 C. W. N. 572.

(2) (1905) 9 C. W. N. 972.

It was decided on the 8th July 1896 in favour of the plaintiffs, and it was declared that the sale transferred to the purchaser Dwarkanath Saha only the eight annas share of Dwarkanath Pal. On the 31st December 1898 Dwarkanath Saha obtained delivery of possession of the eight annas share and in 1900 he had his name registered as a tenant of the half share in the sherishta of the landlord. On the 29th of Magh (1902) Dwarkanath Saha sold the eight annas to the plaintiffs.

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The plaintiffs' case was that after the sale had been confirmed and possession had been delivered to their vendor, the vendor and, after the transfer to plaintiffs, the plaintiffs had been in possession of the half share of the holding and had been paying rents to the landlord and receiving receipts. On the basis of this title they claimed the relief sought in the suit.

The defendant Dwarkanath Pal in his defence contended that no right passed under the sale to the vendor of the plaintiffs on the ground that the holding was one in which the tenant had only an occupancy right and it was not transferable by custom, and therefore by the sale the purchaser acquired no right.

The Court of first instance held that the jote was an occupancy jote and not transferable, and it further held that as the sale had been made without the consent of the landlord, therefore no right was transferred by it to the purchaser Dwarkanath Saha. The Munsiff therefore dismissed the plaintiffs' suit entirely.

On appeal the Lower Appellate Court has set aside the judgment and decree of the Court of first instance, and has found that the eight annas share of Dwarkanath Pal passed to Dwarkanath Saha under the sale in the execution proceedings, that the transfer was recognised and consented to by the landlord, and therefore that the purchaser acquired a valid title to the share. He also found that after the purchase the plaintiffs' vendor, and afterwards the plaintiffs, had been in possession of the eight-anna share and therefore they were entitled to the reliefs claimed, namely, a decree declaring their title and for a partition of their share.

The defendant has appealed to this Court. The main point, which has been taken in support of the appeal, is that under the

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sale in the execution proceedings no right passed to the purchaser as the sale was not held with the previous consent of the landlord, and in support of this contention the case of *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha*(1) has been relied upon.

It has also been argued that the plaintiffs have failed to prove such consent to the sale on the part of the landlord either prior or subsequent to the sale as would be sufficient in law to validate the sale and give the plaintiffs a good title. It has been pointed out that, after the sale and purchase in November 1894, the landlords brought a suit for rents for the succeeding years against the defendant in 1898 and obtained a decree, and it is contended that this circumstance is sufficient to indicate that the landlords did not up to that time recognise the purchaser at the auction sale as a tenant of the holding.

In reply to this contention, the learned vakil for the respondents has very properly invited our attention to the following facts, which in our opinion entirely nullify the strength of the argument. The auction sale no doubt took place on the 9th November 1894, but after that the claim was preferred by the heirs of one of the brothers of the defendants, and, when that claim case failed, a regular suit was instituted. That suit was not decided till the 8th July 1896. The purchaser afterwards applied for the delivery of possession, but that was not given until the 31st December 1898. Even after that date the present defendant did not cease to raise obstacles to the enjoyment by the purchaser of the property. At the time of delivery of possession he put in an objection under section 318 of the Civil Procedure Code and then for the first time raised the point that as the holding was an occupancy holding not transferable by custom therefore no right passed to the auction-purchaser. That objection was decided in the Court of first instance in 1899, but an appeal was preferred by the objector, which was not dismissed till the 20th January 1900. An application was made by Dwarkanath Saha to the landlord to be registered as a tenant in 1900. There can in our opinion be no doubt that under these circumstances the purchaser applied at the earliest possible opportunity to the landlord to be recognised as a tenant and to have

(1) (1897) I. L. R. 24 Calc. 355.

effect given to his purchase. We do not think that the ruling already referred to, on which the appellants rely, can be taken as going so far to lay down that no sale of a non-transferable occupancy holding in execution of a decree would be valid, if the consent of the landlord were not obtained prior to the execution proceedings. It is not denied by the learned vakil for the appellants that in the case of a voluntary sale it is almost universally the practice to obtain the consent of the landlord to the sale after it has been effected, and the purchaser then obtains recognition as a tenant by payment of a *salami*. It can hardly be supposed that in the case of a sale in execution of a decree the consent of the landlord can be obtained prior to the sale, as in the first instance it could not then be ascertained who would be the purchaser, and it would not then be possible for the landlord to come to any settlement with that purchaser. We think that, where a settlement is made by the landlord with the purchaser as soon as can reasonably be expected after the sale and where the landlord afterwards recognises the purchaser and receives rents from him, it is sufficient to render the sale valid in law. In this case we think that the facts disclosed by the evidence sufficiently prove that the consent of the landlord to the sale and his recognition of the purchaser as a tenant were obtained as soon as could reasonably be expected after the objections and obstacles raised on behalf of the judgment-debtor to the purchaser's obtaining possession had been overcome, and we therefore hold that the view, which the Subordinate Judge has taken, is correct that under the sale the eight annas share of Dwarkanath Pal passed to the auction-purchaser.

The suit by the landlords for the rents up to 1898 was brought against the old tenants because they were still in possession, and the auction-purchaser had not then obtained possession under his purchase through the Court.

It has been suggested on behalf of the appellants that the Subordinate Judge has come to no finding whether the subsequent sale by the purchaser to the plaintiffs was *bona fide* or not. We think that was a question, which hardly required consideration. The mere fact that the auction-purchaser sold the share to the plaintiffs, because after his purchase he could not enjoy the property to his satisfaction in consequence of the obstacles

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raised by the defendants would not be a sufficient reason by itself for holding that the sale was not a *bonâ fide* one. The conclusions at which we have arrived are in themselves sufficient to determine the present appeal. A further point however has been raised by the appellant based on the judgment of this Court in the case of *Bhiram Ali Shaik Shikdar v. Gop. Kanth Shaha* (1), to which we have already referred. The learned vakil for the respondents has argued that after the present defendant had failed at the time of the auction sale in 1895 or in the suit to which he was a party in 1896 to set up the present objection, namely, that no title passed under the auction sale as the holding was an occupancy holding and not transferable, he was estopped from raising that objection in the present case.

For the appellant it has been urged on the authority of the case to which we have referred that the defendant would not be barred from raising the objections in his defence. We think however that this point has been sufficiently dealt with in the case of *Sheikh Murulih v. Sheikh Burullah* (2). Mr. Justice Mitra in disposing of that case, which was similar to the present, disposes the case on which the appellants rely and following the ruling in a later case of *Durga Charan Mandal v. Kali Prasanna Sarkar* (3) came to the conclusion that after a judgment-debtor with a full knowledge of the execution proceedings and full opportunity of raising an objection to the effect that the holding was an occupancy holding and non-transferable, had failed to raise that objection at the time of the sale, it was not competent to him to resist the purchaser after the confirmation of the sale and that as between the purchaser and the judgment-debtor the title to the property vested in the purchaser on the confirmation of the sale. We agree in the view taken by the learned Judges in that case and we think that it fully disposes of the point raised. We therefore hold that the appellants have failed to make out any good grounds for our disturbing the judgment and decree of the Lower Appellate Court and we dismiss the appeal with costs.

S. CH. B.

*Appeal dismissed.*

(1) (1897) I. L. R. 24 Calc. 355.

(2) (1905) 9 C. W. N. 972.

(3) (1899) I. L. R. 26 Calc. 727.