

APPELLATE CIVIL.*Before Chitty and Teunon JJ.*

1913
 Jan. 24.

LAKSHMI BIBI KUJRANI

v.

ATAL BIHARY HALDAR.*

*Mortgage—Sale—Chota Nagpur Tenancy Act (Beng. VI of 1908) s. 47
 —Decree for sale of property situate in Manbhum—Estoppel.*

After the preliminary decree on a mortgage was passed, and before the final decree for sale was made, the Chota Nagpur Tenancy Act, 1908, was extended to Manbhum, where the mortgaged property was situate. The judgment-debtor having objected to the application of the decree-holder for sale of the said property, both Courts set aside the objection, and the sale to the decree-holder was thereafter confirmed. Upon appeal to the High Court:—

Held, that the sale was in direct contravention of the provisions of s. 47 of the Chota Nagpur Tenancy Act.

Held, further, that the judgment-debtor cannot be estopped from bringing to the notice of the Court what the Court must be taken to know of itself, that there was a distinct provision of law which prevented the sale of the property.

APPEAL by Lakshmi Bibi Kujrani, the judgment-debtor.

This was an appeal from an order refusing to set aside the sale of a certain mortgaged property. The facts are as follows. Lakshmi Bibi Kujrani, on the 1st January, 1907, executed a mortgage of her property situate in Manbhum in favour of one Atal Bihary Haldar. On the 15th June, 1909, the mortgagee

* Appeal from Order, No. 169 of 1912, against the order of G. B. Mumford, District Judge of Manbhum, dated Dec. 22, 1911, affirming the order of Advaita Prasad De, Subordinate Judge of that district, dated June 15, 1911.

obtained a preliminary decree on the said mortgage and this decree was made final on the 26th November, 1910. In the meantime, pending the passing of this final decree, the Chota Nagpur Tenancy Act (Beng. VI of 1908) was extended to Manbhum. Upon the decree-holder applying for sale of the mortgaged property, the judgment-debtor filed her objection thereto. This objection was disposed of by the Court of first instance on the 15th June, 1911, in favour of the decree-holder, who had the property sold and purchased the same himself on the 22nd July, 1911. Subsequently, on the 22nd December, 1911, the order of the Court of first instance was upheld on appeal and on the 2nd May, 1912, the sale was confirmed. The judgment-debtor, thereupon, appealed to the High Court.

Babu Bepin Behary Ghose, for the appellant.

Babu Dwarika Nath Chuckerburty and *Babu Mohini Mohan Chatterjee*, for the respondent.

CHITTY AND TEUNON, JJ. This is an appeal from an order of the District Judge confirming that of the Subordinate Judge of Manbhum, declining to set aside a sale. It appears that a mortgage was executed by the judgment-debtor on 1st January, 1907, in favour of the present decree-holder. On that mortgage, a preliminary decree was passed on 15th June, 1909, and the final decree for sale was passed on 26th November, 1910. In the interval between the two decrees the provisions of the Chota Nagpur Tenancy Act (Beng. VI of 1908) were extended to the district of Manbhum, and from that time they govern the property in question. The decree-holder asked for sale and the judgment-debtor objected. His objection was disposed of by the first Court on 15th June, 1911, and by the Appellate Court on 22nd December, 1911. It has been brought to our notice by the learned pleader for the

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respondent that the sale actually took place on the 22nd July, 1911, while the appeal in the lower Court was pending, and that it was confirmed on 2nd May, 1912, while the appeal to this Court was pending. The purchaser in this case was the decree-holder.

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.

For the respondent it has been argued that, the sale having taken place and been confirmed, it cannot now be questioned. But, having regard to the fact that the decree-holder is the purchaser and that the rights of third parties are in no way affected, it is clear that the Court, before which the appeal was pending ever since the objection of the judgment-debtor had been first made, could go into the question. The sale was in direct contravention of the provisions of section 47 of the Chota Nagpur Tenancy Act.

Secondly, it has been argued that the mortgagor is in some way estopped from saying that the property is not saleable. He cannot be estopped from bringing to the notice of the Court what the Court must be taken to know of itself, that there is a distinct provision of the law which prevents the sale of the property.

The appeal must be allowed. The orders of the lower Courts are set aside, with all the proceedings

which have taken place in consequence of those orders. The appellant must have his costs in all the three Courts.

O. M.

Appeal allowed.

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APPELLATE CIVIL.

Before Carnduff and Beachcroft JJ.

INDRA CHANDRA MUKHERJEE

v.

SRISH CHANDRA BANERJEE.*

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Appeal—Small cause case tried as an ordinary suit—Jurisdiction.

Where a Judicial Officer invested with Small Cause Court jurisdiction tries a suit, which he might have tried under the summary procedure, in the ordinary manner, the character of the suit is not thereby altered, and his decree is not appealable.

Shankarbai v. Somabhai (1) followed.

SECOND APPEAL by the defendant, Indra Chandra Mukherjee, Chairman of the Jangipore Municipality.

This appeal arose out of an action brought by the plaintiff to recover a certain sum of money, which he alleged that the defendant illegally realised from him. The allegation of the plaintiff was that the defendant realised arbitrarily Rs. 34-3 from him by distress warrant on the 3rd February, 1909; that no notice of demand nor any bill was ever served or presented to him, and as such the action of the Municipality was wholly illegal. The plaintiff also claimed

* Appeal from Appellate Order, No. 254 of 1911, and Rule No. 3396 of 1911, against the order of B. C. Mitter, District Judge of Murshidabad, dated Feb. 23, 1911, discharging the order of Aparas Prasad Mukherjee, Munsif of Jangipore, dated May 11, 1910.