
(1887) 07 AHC CK 0003

Allahabad High Court

Case No: None

Madho Lal and Another

APPELLANT

Vs

Katwari

RESPONDENT

Date of Decision: July 14, 1887

Citation: (1888) ILR (All) 130

Hon'ble Judges: Mahmood, J

Bench: Single Bench

Final Decision: Disposed Of

Judgement

Mahmood, J.

The facts of this case are very simple. The appellants decree-holders are zamindars of the village in which the land to which this litigation relates is situate, and that land was hypothecated by Musammat Katwari, judgment-debtor respondent, to the appellants on the 24th February 1876. The money due upon that mortgage not having been paid, a suit was brought thereunder resulting in the claim being decreed on the 24th February 1882. The decree specifically directs that the land now in question should be sold in enforcement of the lien.

2. By an application made on the 9th February 1884, the decree of the 24th February 1882, was sought to be put into execution by the decree-holders appellants, but such execution was resisted by the judgment-debtor, Musammat Katwari, upon the ground that the land which she held was an occupancy tenure which could not be transferred u/s 9 of the Rent Act, and this plea having been accepted by the lower Courts, the application for execution has been disallowed.

3. From the order so disallowing the application this second appeal has been preferred, and I am of opinion that it should prevail. There is no question that the land held by the respondent, Musammat Katwari, is an occupancy tenure, such as that contemplated by Section 9, and within the prohibition of that section against transfer. The nature of such tenures with special reference to the question of transferability was fully discussed by me

in *Gopal Pandey v. Parsotam Das* I. L. R. All. 121 though, I being in the minority, the majority of the Full Bench held that the hypothecation by an occupancy tenant of his right of occupancy was not a transfer within the meaning of Section 9 of the Rent Act of 1873, which Act would govern the hypothecation of the 24th February 1876, whereon the decree was obtained by the appellants on the 24th February 1882. From the opinion expressed by the majority of the Full Bench in that case I still dissent with profound respect, the more so because I find it difficult to reconcile the ratio decidendi of that ruling with a more recent Full Bench ruling, *Ganga Din v. Dhurandhar Singh* I. L. R. All. 495 in which they held that an usufructuary mortgage was a transfer, and the prohibition of Section 9 of the Rent Act applied to such a case.

4. But it is not open to me to consider in this case the question as to the validity of the hypothecation of the 24th February 1876, or the correctness of the decree of the 24th February 1882, because that decree having been passed, the proceedings which have given rise to this appeal were taken only in execution of the decree, and, as such, this Court, as much as the Courts below, is bound to give effect to that decree. Mr. Kashi Prasad, however, contends on behalf of the respondent that the specific provisions of Section 9 of the Rent Act having prohibited transfer of such occupancy holdings, the lower Courts were right in not giving effect to the terms of the decree, and in declining to sell the property by auction in execution of that decree. For this contention the learned pleader relies on *Naik Ram Singh v. Murli Dhar* I. L. R. All. 371 where it was held by the Full Bench that the landholder who had attached an occupancy right of an occupancy tenant in certain land in execution of a decree before Act XII of 1881 came into force, was not entitled u/s 2 of that Act to bring such right to sale after that Act came into force, that section not saving the right of the landholder to bring such right to sale in execution of the decree, and Section 9 of that Act expressly prohibiting the sale of such a right in execution of a decree.

5. If the Full Bench ruling relied upon were on all fours with this case, I should of course have felt it my duty to have followed it, sitting as a single Judge, but the case is distinguishable from the one before me. In the case before the Full Bench the decree was a simple money decree, so far at least as the property which had been attached in execution thereof and to which that litigation related was concerned. In the present case the decree of the 24th February 1882, is not a simple money decree. It is a decree which decrees a claim for money, and orders sale by specific enforcement of lien against the land which forms the subject-matter of this dispute. It may be that the decree was erroneously passed, but the Court executing that decree has no power to go behind it and to decline to execute it, because such a refusal to execute the decree amounts to nullifying the decree altogether. This view was expressed by me in the case of *Bisheshar Rai v. Sukhdeo Rai* where the case was very similar to this, and Oldfield, J., concurred with me in holding that when a decree is passed and specifically directs the sale of a tenure which may or may not be transferable, the Court executing the decree is bound to give effect to it and not to question the validity of the decree. I still adhere to the views

which I expressed in that case, and following them am constrained to decree this appeal, and setting aside the orders of both the lower Courts, to remand the case to the Court of First Instance for executing the decree of the 24th February 1882, with reference to the observations which I have made, Costs will abide the result. I wish only to add that I must not be understood to say anything as to whether the auction-sale which would take place in execution of the decree would or would not convey any valid title to the purchaser².

¹ The facts of this case are sufficiently stated in the judgment of Mahmood, J.

Munshi Sukh Ram, for the Appellant.

Lala Juala Prasad, for the Respondents.

Mahmood, J.--The facts of this case, so far as it is necessary to state them, are very simple. Sukhdeo Rai and others executed a hypothecation bond on the 10th September 1874, in favour of Bisheshar Rai, and subsequently sold the hypothecated property to Ramjas Rai, who is the respondent in this second appeal. On the 31st March 1882, Bisheshar Rai obtained a decree on his hypothecation bond not only against the obligors, but also against Ramjas Rai. The decree in clear and specific terms decreed the sale of the mortgaged property in satisfaction of the mortgagee's claim. The present dispute has arisen out of Bisheshar Rai's application to put in force the mandate of the Court of the 31st March 1882. He is met by the objection that the property mortgaged is a non-saleable tenure, its sale being made illegal by Section 9 of Act XII of 1881. There is much doubt whether the tenancy here is one at fixed rates, and as such not subject to the prohibition contained in that section. The Courts below have gone behind the decree, and have arrived at the conclusion that the property mortgaged and ordered to be sold was merely an occupancy tenure, and that its sale was prohibited. Such questions could be dealt with only in the suit, but the action of the lower Courts amounts to a proceeding which practically nullifies the decree of 1882. The appellant before us complains of this, and rightly, because where a clear and specific order is made by a decree, it is not competent to a Court in its execution department to take notice of any matter except that which relates to execution. We are not concerned here as to what may be properly ordered as to third parties. As between the parties to the decree, there is nothing in Section 244 (c) which justifies such a procedure as that of declaring a decree to be illegal and refusing to carry it into execution. I do not think that the law contemplates such procedure when an application for enforcement of decree is made. I would set aside the orders of the lower Court, and direct the first Court to entertain the decree-holders' application for execution, and dispose of the same according to law. The costs of the present appellant in this and the lower Courts to be costs in the cause.

²Oldfield, J.--I concur. The case was followed in Ramgobind Das v. Gulzar Singh, (S. A. No. 698 of 1887), decided the 11th August 1887, Jugraj Puri v. Harbans Dyal, (S. A. No. 268 of 1887), decided the 3rd January 1888, and Janki Rai v. Ram Ghulam (S. A. No. 896 of 1887) decided the 27th January 1888.