

(1880) 04 CAL CK 0018

Calcutta High Court

Case No: None

Ganesh Lal Tewari

APPELLANT

Vs

Shamnarain and
Others

RESPONDENT

Date of Decision: April 13, 1880

Citation: (1881) ILR (Cal) 213

Hon'ble Judges: R. P. Collier, J; M. E. Smith, J; J. W. Colvile, J; B. Peacock, J

Bench: Full Bench

Judgement

Sir M. E. Smith.

1. This was an application by Ganesh Lai Tewari, the appellant, as the representative of Maddan Mohan Tewari and Kalipershad Tewari, who had obtained a decree against the respondents, to execute that decree so far as relates to the recovery of the mesne profits of a mouza called Kukurha awarded by it. The judgment is dated the 2nd of June 1860, and was the result of an action which had been brought by the Tewaris against the predecessors of the respondents. The facts are shortly these: Perhlad Sen, who was the Raja of Ramnagar, executed, on the 23rd December 1851, a zur-i-peshgi mortgage to the Tewaris of certain mouzas including Mouza Kukurha, for a sum of Rs. 19,453. Shortly after the mortgage, one Binda Lal, the predecessor of the respondents, set up a mokurari lease of Mouza Kukurha, which, as he affirmed, had been granted to him by the Raja prior to the zur-i-peshgi mortgage. The suit was brought by the Tewaris to set aside that mokurari, on the ground that it was colourable and put forward by Binda Lal in collusion with the Raja to defeat the zur-i-peshgi, so far as related to Mouza Kukurha. The judgment of the 2nd June 1860, the execution of which is in question, states that the claim was for the recovery of " the entire 16 annas of Mouza Kukurha, the property let out in zur-i-peshgi lease, on the basis of a zur-i-peshgi lease dated 23rd December 1851." The decree was, that the plaintiffs do recover possession of the entire 16 annas of the mouza, and that the mokurari potta be set aside. Then there is this award with

reference to mesne profits: "That the amount of mesne profits from 1262 Fasli to the date of recovery of possession, with interest on the principal amount of each year from the following year up to date of realisation, be awarded to the plaintiffs from the defendant Binda Lall." This was the decree of the Principal Sudder Amin. There was an appeal from it to the High Court, and ultimately an appeal from the High Court to this country; and those appeals went on concurrently with another litigation which was initiated by the Raja to set aside the zur-i-peshgi lease altogether, on the ground that it had been improperly obtained; and in this litigation also there was a series of appeals, ending in an appeal heard before this Committee-Kaleepersad Tewari v. Lalla Binda Lall (12 Moore's I. A. 343). In the result the Raja failed in his suit; and the Tewaris succeeded in theirs, maintaining the decree of the 2nd June 1860, on which the present execution-proceedings are founded.

2. Prior, however, to any proceedings taken to execute this decree, the Raja obtained a judgment for some debt against the Tewaris, and in the under in which he obtained that judgment, he by the usual proceedings attached and sold their interest in the zur-i-peshgi lease. The purchaser under that sale was his own Eani, and it is said that she purchased benami for him. However that may be, no question now arises as to the validity of that purchase. It must be taken that the Rani purchased what she professed to have purchased under that decree. The single question in the case is, whether the mesne profits awarded by the decree of the 2nd June 1860 passed by that sale.

3. We have nothing on this record but the certificate of sale. The preliminary proceedings do not appear. The certificate of sale is as follows; "And a petition being put in for the sale of his estate, a sale notification was issued pursuant to an order of this Court, and the estate aforesaid publicly sold at auction on the 7th December 1874 A. D. Whatever title, right, and concern the judgment-debtor had in the said estate have been purchased by Mussamat Maharani Bind Basini Debi, inhabitant and proprietor of Ramnagar. Parganna Maihwa, for Rs. 15,500, and she has deposited the entire consideration-money. Therefore, this certificate is granted to Maharani Bind Basini Debi, the auction-purchaser of the estate aforesaid; and it is hereby proclaimed that whatever title, right, and concern the said judgment-debtor had in the estate aforesaid have become extinct from the 7th December 1874, the date of sale; and vested in Maharani Bind Basini Debi, the auction-purchaser. Hereafter this certificate will be considered as a valid deed in respect of transfer of the right, title, and interest of the judgment-debtor." Then there is this description of what is sold: "The right and title under the original deed of zur-i-peshgi lease, dated the 23rd December 1851, for Es. 42, 453 in respect of 15 mouzas,"-naming them, and including Kukurha. It may be observed that the purchase-money is only Es. 15,500 (fifteen thousand five hundred) and the zur-i-peshgi was given to secure a sum of Rs. 42,453. Upon the application made by the appellant for the execution of the decree of 1860, so far as it awarded mesne profits, the respondents, who

represent the Judgment [217] debtor, Binda Lall, set up this sale as an answer, contending that the right to the mesne profits had passed by virtue of it to the Rani, the auction-purchaser. But the decree which had been obtained by the Tewaris was not sold, and presumably was not attached; what was sold is that which appears on the certificate, namely, the right and title under the deed of zur-i-peshgi, and the right of the judgment-debtor is declared to have become extinct only from the 7th December 1874. This being all that was sold, their Lordships think that the right to the mesne profit under the decree was not the subject of sale. It was no more the subject of sale than any profits of the estate which the mortgagee had received prior to that sale would have been. The title to the mesne profits is derived from the decree. The defendants in that suit were wrong-doers, and the action was brought by the mortgagee against them as wrong-doers. The right to the mesne profits, therefore, depends wholly upon the decree; and if the decree had been sold, the purchaser, as assignee of the decree, would, no doubt, have been entitled to them. The High Court have based their judgment on the erroneous assumption that the rights under the decree were sold. Their Lordships think that is not the effect of the sale. The High Court refers to the judgment of the Subordinate Judge. The Judges say: "The Subordinate Judge has held that the decree cannot be executed, and that all the rights of the judgment-creditor in that decree have been transferred to the purchaser of the zur-i-peshgi rights, including the right to execute the decree obtained originally by the appellant before us." Then their own judgment is: "We also think with him, that the whole of the rights of the decree-holder (appellant before us) under the decree which he obtained have passed, with the zur-i-peshgi right on which the decree was based, to the purchaser of those rights. Their Lordships think that this is an erroneous view of the sale. If it had been meant to attach and sell the decree, that might have been done. What was done was to sell the existing rights of the judgment-debtors under the zur-i-peshgi.

4. For these reasons their Lordships think the judgments of both the Courts below are wrong. They will, therefore, humbly advise Her Majesty to reverse them, and to remit the case with a declaration that the appellant is entitled to execute the decree of the 2nd June 1860 for the mesne profits up to the 7th December 1874, the date of the sale to the Maharani, with interest, and is also entitled to the costs of the proceedings in both the Courts in India. The appellant will also have the costs of this appeal.