

Privy Council Appeal No. 99 of 1930.

Patna Appeal No. 18 of 1929.

Thakur Jagdishwar Dayal Singh - - - - *Appellant*

v.

Pathak Dwarka Singh and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY 1933.

Present at the Hearing :

LORD THANKERTON.

SIR GEORGE LOWNDES.

SIR DINSHAH MULLA.

(Delivered by LORD THANKERTON.)

This is an appeal from a decree of the High Court of Judicature at Patna, dated the 17th January 1929, which reversed a decree of the Additional Subordinate Judge of Palamau, dated the 17th December 1925, and decreed the plaintiffs' suit with costs.

The appellant, who is defendant No. 1 in the suit, is the proprietor of the Lokiya Narainpur estate, which includes villages Maran, Rouni, Bedra and an 8 annas share of Chowreah. The rule of primogeniture obtains in the appellant's family. At some time prior to 1865 his ancestor made a khorposh grant to the ancestor of original defendant No. 2, of defendants Nos. 3 and 4, and of Maheshanand, the deceased husband of defendant No. 5. Original defendant No. 2 died pending suit and his two sons were substituted. Defendants Nos. 2, 3 and 4 had an 8 annas share in the khorposh subjects and Maheshanand had the remaining 8 annas share.

The contesting respondents in this appeal are the plaintiffs in the suit, and they are in possession of mokarrari rights in

mouza Maran, which forms part of the khorposh lands, under leases executed in 1865 in favour of their predecessors-in-title by the predecessors-in-title of defendants Nos. 2, 3 and 4.

About 1910 Maheshanand died without issue but leaving a widow, defendant No. 5. The name of the latter was entered in the record of rights, which was completed in 1920, as the holder of an 8 annas share of the khorposh lands, but she did not take any steps to have her name entered in place of that of her deceased husband in the sherishta of the landlord, as prescribed by Section 11 of the Chota Nagpur Tenancy Act, nor did she pay any rent to him in respect of the tenure.

In 1919 the appellant brought a suit in the Court of the Munsif Deputy Collector, Palamau, against defendants 2, 3 and 4 in the present suit for arrears of rent in respect of the khorposh tenure for the years 1916-1919, and obtained a decree for these arrears on the 26th February 1920. Present defendant No. 5 was not joined as a defendant in that suit. In execution of the decree the tenure was put up for sale and was purchased by the present appellant, the decree-holder, on the 15th September 1922. The sale was confirmed on the 25th October 1922, and, on the 7th December 1922 the appellant obtained a sale certificate under Section 11 of the Bengal Rent Recovery Act (VIII of 1865). In course of the proceedings under that section for putting the appellant into possession, some of the plaintiffs in the present suit took objection on the ground that the decree in execution of which the tenure had been put up for sale was not a rent decree and that what had passed by the auction was only the interest possessed by the defendants called in that suit. The Deputy Commissioner sustained the objection but the Commissioner reversed that decision, and the Board of Revenue upheld the Commissioner's decision on the ground that the decree was a rent decree and that the sale was a sale of the tenure under Section 208 of the Chota Nagpur Tenancy Act.

The present suit was accordingly instituted on the 2nd August 1924, seeking a permanent injunction restraining the appellant from recovering possession of mouza Maran from the plaintiff-respondents.

Though the allegations of fraud against the appellant were held by the Subordinate Judge to have failed, and they have not been persisted in, there can be no doubt that, when he obtained the decree of 1920, the appellant was fully aware of the interest of defendant No. 5 in the khorposh lands.

In the first place, the appellant maintains that the failure of defendant No. 5 to have her name entered on the sherishta, along with the fact that she had never paid rent or been recognised by him as a tenure-holder, entitled him to proceed to the sale of the tenure under Section 208 without joining her as a defendant. The Subordinate Judge accepted this view and dismissed the suit, but this contention was rejected by the High Court. Their

Lordships agree with the High Court. No such sanction as forfeiture of rights in the tenure in respect of failure to comply with the provisions of Section 11 is provided by the Act; such failure only affects the transferee's power to recover rent from his under-tenants as provided in Subsection 4.

Their Lordships agree with the High Court that in order to justify a sale of the tenure under the provisions of Section 208 of the Chota Nagpur Tenancy Act, all parties interested in the tenure must be joined as defendants in the rent suit, or be sufficiently represented by parties joined as defendants. In their Lordships' opinion, the cases decided on the construction of Section 159 of the Bengal Tenancy Act, 1869, as regards this point are equally applicable to the construction of Section 208 of the Chota Nagpur Tenancy Act. In particular, reference may be made to the judgment of Jenkins, C.J., in *Chamatkari Dasi v. Triguna Nath Sardar*, (1913) 17 Cal. W.N. 833, in which he refers to the earlier cases. The principle of these decisions was accepted as applicable to a sale under Section 208 of the Chota Nagpur Tenancy Act in *Chandra Nath Tewari v. Protap Udai Nath*, (1913) 18 Cal. W.N. 170. The decision in *Profulla Kumar Sen v. Nawab Sir Salimulla Bahadur*, (1918) 23 Cal. W.N. 590, in which there appears to have been no citation of authority, is difficult to reconcile with the above cases, and must be doubted. The appellant relied on certain passages in the judgment of this Board in *Doolar Chand Sahoo v. Lalla Chabul Chand*, (1878) 6 Ind. App. 47. The sale in that case was clearly not a sale under the Bengal Tenancy Act, 1869, and the present question did not arise for decision; any incidental references to a sale under the Act of 1869 cannot be regarded as a considered decision on the present question. The question of representation does not arise in the present case, for the appellant does not maintain that the defendants joined in the rent suit of 1919 in any way represented the interest of the present defendant No. 5.

There can be no doubt that the sale in the present case purported to take place by virtue of sub-section 1 of Section 208 of the Chota Nagpur Tenancy Act, which—so far as material—provides as follows:—“When a decree passed by the Deputy Commissioner under this Act is for an arrear of rent due in respect of a tenure or holding, the decree-holder may apply for the sale of such tenure or holding, and the tenure or holding may thereupon be brought to sale, in execution of the decree, according to the provisions for the sale of under-tenures contained in the Bengal Rent Recovery (Under-tenures) Act, 1865, and all the provisions of that Act, except Sections 12, 13, 14 and 15 thereof, shall as far as may be apply to such sale.” It may be noted that, under Section 16 of the Act of 1865, the purchaser at the sale of the under-tenure is to acquire it free from all incumbrances created by the under-tenure holders without the landlord's written consent or ratification. Hence the plaintiffs' concern to get rid of any sale under Section 208.

The appellant challenges the jurisdiction of the Civil Court to interfere with the sale that has taken place, and bases this contention on Section 214 of the Chota Nagpur Tenancy Act, which, so far as material, provides as follows :—

“214. No suit or application shall be entertained by any Court to set aside or to modify the effect of—(a) any sale made under this Act, save under Section 211, Section 212 or Section 213, or on the ground of fraud or want of jurisdiction.”

Sections 212 and 213 have no bearing in the present case, but Section 211, which requires consideration, is as follows :—

“211. (1) If, before the day fixed for the sale of any tenure or holding in pursuance of Section 208, a third party appears before the Deputy Commissioner and alleges that he, and not the person against whom the decree has been obtained, was in lawful possession of, or had some interest in, the tenure or holding when the decree was obtained, the Deputy Commissioner shall examine such party according to the law for the time being in force relating to the examination of witnesses; and if he sees sufficient reason for so doing, and if such person deposits in Court or gives security for the amount of the decree, the Deputy Commissioner shall stay the sale, and shall, after taking evidence, adjudicate upon the claim;

Provided that no such adjudication shall be made if the Deputy Commissioner considers that the claim was designedly or unnecessarily delayed :

Provided also that no transfer of a tenure shall be recognised unless it has been registered in the office of the landlord or sufficient cause for non-registration is shown to the satisfaction of the Deputy Commissioner.

* * * * *

“(2) The party against whom judgment is given by the Deputy Commissioner under subsection 1 may, at any time within one year from the date of the judgment, bring a suit in the Civil Court to establish his right, and if the sale has been held, to have it set aside on payment by him of the amount of the decree.”

This section clearly relates to a case where parties interested in the whole 16 annas of the tenure have been joined as defendants, but a third party claims an interest in room and place of one or more of the defendants; it would not apply in the present case, where the whole interest is not covered by the parties joined as defendants, and the party omitted should have been joined in addition.

In order to take advantage of Section 214 the appellant must first establish that the sale was a sale made under Chapter XVI of the Act, which includes Sections 135 to 229, which in effect is a question of jurisdiction. Under Chapter XVI of the Act a statutory jurisdiction is conferred on the Revenue Courts, but that jurisdiction must be exercised within the statutory powers conferred. If then, as already stated, it is not competent to order a sale of the tenure under Section 208 unless the whole interests in the tenure are represented before the Court, it is clear that the order for sale of the tenure in the present case was *ultra vires* of the Revenue Court, and it follows that the sale was not “made under this chapter” and was outside the jurisdiction of that

Court. This view is confirmed by an examination of the terms of the decree of 1920 for arrears of rent, for the claim decreed is "on account of arrears of rent and cesses with interest in respect of khorposh *held by the defendants* in mouza Madan, Bidra, Rano and Chareya," and the decree is thus only apt to attach the interest of the defendants in the tenure, and is no sufficient warrant for a sale of the whole tenure under Section 208.

Accordingly, their Lordships are of opinion that the jurisdiction of the Court is not excluded by Section 214, as the sale under Section 208 was *ultra vires*; and that, consequently, the incumbrances on the tenure were not affected.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court of the 17th January, 1929, should be affirmed, and that the appeal should be dismissed with costs.

In the Privy Council.

THAKUR JAGDISHWAR DAYAL SINGH

vs.

PATHAK DWARKA SINGH AND OTHERS.

DELIVERED BY LORD THANKERTON.

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