

(1925) 05 PAT CK 0002

In the Patna High Court

Baijulal Marwari and Another

APPELLANT

Vs

Thakur Prasad Marwari and Others

RESPONDENT

Date of Decision : 21-05-1925

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100
Transfer of Property Act, 1882 — Section 91(f)

Citation : AIR 1926 Patna 33

Hon'ble Judges : Kulwant Sahay, J;Adami, J

Bench : Full Bench

Judgement

Kulwant Sahay, J.—This is an application against an order of the Subordinate Judge, Godda, dismissing the petitioners' application under Order 21, Rule 100, Civil P.C. The facts stated in the petition are shortly these:

2. The petitioner brought a money suit against one Gurudayal Baram and obtained a decree, and in execution thereof purchased 5 annas 6 pies share in two properties belonging to the judgment-debtor, namely, in Ghat Lachmipur bearing Touzi No. 494 and in Ghat Fouzdar bearing Touzi No. 485. The petitioner's purchase is dated 9th July 1918, the property having been attached on 26th March 1917. The opposite party Nos. 1 to 4 had also obtained a money decree against Gurudayal Baram and they also applied for execution of their decree and in execution thereof they purchased the remaining 10 annas 6 pies share in each of the two ghats. The petitioner got delivery of possession of the share purchased by him on 16th November 1919. In the meantime it appears that the opposite party Nos. 1 to 4 had taken an assignment of 8 annas share in a certain mortgage-bond executed by Gurudayal Baram in favour of the opposite party Nos. 5 to 7. A mortgage suit was brought on the basis of that mortgage-bond to which the petitioners were not parties. It is to be remembered that the attachment in execution of the decree of the petitioners had taken place on 26th March 1917 and the mortgage suit was brought on 1st December 1918. It was, therefore necessary under Order 34, Rule 1, Civil P.C., to make the petitioners parties to the mortgage suit inasmuch as u/s 91, Clause (f), T.P. Act they had a

right to redeem. A mortgage-decree was obtained on 18th December 1918, and in execution of the mortgage-decree, the opposite party Nos. 1 to 4 purchased the whole of the two ghats mentioned above on 28th May 1923. They obtained a sale certificate and applied for delivery of possession and possession was delivered to them in respect of ghat Lachmipur on 21st December 1923 and in respect of Ghat Fauzdar on 23rd December 1923. As a result thereof, the petitioners say that they were dispossessed of the shares purchased by them. They accordingly made an application under Order 21, Rule 100, on 19th January 1924. After various adjournments, this application came on for hearing before the Subordinate Judge on 11th December 1924. On that date an application was made on behalf of the petitioners for time. This application was refused. The learned Subordinate Judge then rejected the application under Order 21, Rule 100, on the ground that he had no jurisdiction to entertain the application on account of the provisions of Section 5, of Reg. 3 of 1872.

3. It appears that under a Government Notification, dated 27th October 1923, the area within which the property in dispute is comprised was declared to be under settlement from 1st November 1923, and the learned Subordinate Judge, held that under the provisions of Section 5, of the Regulation he had no jurisdiction to entertain the present application under Order 21, Rule 100, Civil P.C. He accordingly rejected that application. Against this order, the petitioners have come up in revision to this Court; and it is contended that the Subordinate Judge was wrong in holding that he had no jurisdiction to entertain the application, and further he was wrong in rejecting the application without giving the petitioners an opportunity to substantiate their case. In my opinion the contention of the petitioners is sound and ought to prevail.

4. As regards the first point, namely, the application for time it is clear that because the petitioners' application for time was rejected, the learned Subordinate Judge was not right in rejecting their application under Order 21, Rule 100 without calling upon them to adduce evidence to substantiate their case. As regards the question of jurisdiction, the learned Subordinate Judge relies on the provisions of Section 5, Regn. 3 of 1872. Now this section provides that "from the date on which the Lieutenant-Governor declares u/s 9 by a notification in the Calcutta Gazette, that a settlement shall be made of the whole or any part of the Sonthal Parganas until the date on which such settlement is declared by a like notification to have been completed, no suit shall lie in any Civil Court established under the Bengal, N.W.P. and Assam Civil Courts Act, 1.887, in regard to any land or any interest in, or arising out of land in the area covered by such notification; nor shall any Civil Court proceed with the hearing of any such suit which may be pending before it."

5. It has been contended that an application in a pending execution proceeding is not a suit within the meaning of Section 5. This contention does not appear to be sound, because execution is merely a continuation of the suit and proceedings in execution are proceedings in the suit. The question, however, is whether the

application of the petitioners ought to have been rejected on the ground that a notification as contemplated by the section had been issued by the Government. Sub-section (2), Section 5, provides that "between the dates referred to in Sub-section (1), all suits of the nature therein described shall be filed before or transferred to an officer appointed by the Lieutenant-Governor u/s 2, Sonthal Parganas Act, 1855 or Section 10. Regn. 3 of 1872.

6. In the present case if an officer had been appointed under Sub-section (2), Section 5 then the Subordinate Judge ought to have transferred the application to that officer. It was a pending execution proceeding at the time when the notification was issued, and under sub-S, (2) the Court could only transfer such applications to the officer appointed under Sub-section (2), Section 5, and it ought not to have rejected the application on the ground of want of jurisdiction.

7. The order of the learned Subordinate Judge will, therefore, be set aside and he will proceed according to the provisions of Sub-section (2), Section 5, Regn. 3 of 1872.

8. There will be no order for costs.

Adami, J.

9. I agree.