

(1955) 09 PAT CK 0017
In the Patna High Court
Case No : A.F.O.O. No. 421 of 1950

Chintamani Saran Nath Sah Deo

APPELLANT

Vs

Syed Zahiruddin and Others

RESPONDENT

Date of Decision : 20-09-1955

Acts Referred:

Chotanagpur Tenancy Act, 1908 — Section 46
Civil Procedure Code, 1908 (CPC) — Section 11, 38, 46, 47
Evidence Act, 1872 — Section 36

Citation : AIR 1956 Patna 57 : (1955) 3 BLJR 626

Hon'ble Judges : Das, C.J.;Kanhaiya Singh, J

Bench : Division Bench

Advocate : K.B.N. Singh, for A.K. Chatterji, for the Appellant; L.K. Choudhuri, for the Respondent

Final Decision : Allowed

Judgement

Kanhaiya Singh, J.—This is an appeal by the decree-holder from a decision of the Special subordinate Judge, Ranchi, dated 31-8-1950, in a miscellaneous case u/s 47 of the Civil P. C. upholding the objection of the judgment-debtors respondents to the sale of plot No. 106 in satisfaction of a mortgage decree on the ground that it was exempt from sale u/s 47 of the Chota Nagpur Tenancy Act.

2. The facts may be shortly stated. Syed Zamiruddin and his wife Bibi Rajwan executed in favour of Maharaja Pratap Udai Nath Sah Deo a simple mortgage bond on 7-6-1933, hypothecating three plots bearing Municipal plots Nos. 81, 83 and 106 with houses standing thereon. The mortgagors stipulated to satisfy the mortgage debt in annual instalments of Rs. 500/- with a further condition that in the event of default in payment of two consecutive instalments, the entire sum would become payable at once. No payment was made.

The mortgagee, Maharaja Pratap Udai Nath Sah Deo, then brought a suit to enforce the mortgage in the Court of the Subordinate Judge, Ranchi, being Mortgage Suit No. 49 of 1945, impleading Syed Zamiruddin and the heirs of his

wife Bibi Rajwan, who had died in the meantime. Syed Zamiruddin, one of the mortgagors, did not enter appearance. The suit was contested by the heirs of his wife Bibi Rajwan on various grounds.

One of the grounds urged by them before the Court was that the mortgage bond was invalid, since by reason of Section 46 of the Chota Nagpur Tenancy Act the property, in mortgage was not transferable by mortgage, lease, sale, gift or any other contract or arrangement. The learned Subordinate Judge, accordingly, framed an issue, being issue No. 4 in the suit, in the following terms:

"Is the mortgage bond null and void and against the provisions of the Chota Nagpur Tenancy Act? Is the bond enforceable in law?"

At the time of hearing the question of transfer-ability of the mortgaged property was restricted to plots Nos. 81 and 83 only. There was no dispute as to the saleability of the third plot, namely, plot No. 106. After considering the evidence and the authorities placed before him, the learned Subordinate Judge reached the following conclusion:

"Relying on these decisions, I come to the conclusion that the houses in suit are liable to be sold, and that the mortgage bond cannot be said to be null and void. This issue is also therefore decided in favour of the plaintiff."

The suit was eventually decreed on 13-8-1946, ex parte against Syed Zamiruddin and on contest, against the rest. The decree was made final on 23-9-1948. In due course the mortgagee decree-holder, Maharaja Pratap Udai Nath Sah Deo, levied execution in Execution Case No. 14 of 1949 for satisfaction of the decree by sale of the mortgaged property. He died during the pendency of the execution proceeding, and his great grandson, Maharaja Chintamani Saran Nath Sah Deo, was substituted in his place.

He is the appellant before us. It appears that two miscellaneous cases were filed in the execution case -- one by Syed Zamiruddin, judgment-debtor No. 1, being Miscellaneous Case No. 81 of 1949, u/s 13 of the Money-Lenders Act, and the other by two of the judgment-debtors, namely, Naziruddin and Reyaduddin, being Miscellaneous Case No. 80 of 1949. This application was filed u/s 47 of the Civil P. C. objecting to the sale of one of the mortgaged plots, namely, plot No. 106 on the ground that the land being their raiyati land, the executing Court had no power by reason of Section 47 of the Chota Nagpur Tenancy Act to put up the same for sale.

The appellant resisted the application, substantially, on the ground that the applicants were concluded by the principle of *res judicata*, since the question of the liability of the mortgaged property to sale was decided against them in the original mortgage suit. There was a further plea that plot No. 106 did not constitute the raiyati, holding of the judgment-debtors. It will be observed that so far as the other two plots, namely, plots Nos. 81 and 83, are concerned there was in the execution proceeding no dispute as to their saleability.

In the mortgage suit their objection was just the other way about. They pleaded that plot No. 106 was saleable, but not plot Nos. 81 and 83. The executing Court allowed the parties to adduce evidence as to whether or not plot No. 106 formed the raiyati holding of the judgment-debtors, and he concluded that it was their raiyati land and, therefore, not saleable by virtue of Section 47 of the Chota Nagpur Tenancy Act.

As to the plea of *res judicata*, he, relying on certain decisions of the Patna High Court which will be discussed later on, held that the decision of the Court Issue No. 4 in that mortgage suit regarding the saleability of plot No. 106 did not operate as *res judicata*, because there was no estoppel against a statute. He, accordingly, allowed the objection and exempted plot No. 103 from sale. It is against this order that this appeal has been brought.

3. Two questions have been canvassed before us: first whether plot No. 106 formed the raiyati land to the judgment-debtors, and second, whether the judgment in the mortgage suit operates as *res judicata* and precludes the executing Court from going behind the decree.

4. As to the first question, there is no satisfactory evidence to prove that the interest which the judgment-debtors had in plot No. 106 was raiyati interest. The learned Subordinate Judge found that the Municipal plot No. 106 was a part of the cadastral survey plot No. 1090 bearing khata No. 91, and that plot No. 1090 was recorded as Rajhas (raiya). In the first place, there is no satisfactory evidence to prove that plot No. 106 is a part of plot No. 1090.

The applicants-respondents produced two maps, exhibits 1 and 1a, being respectively copies of cadastral survey map and the Municipal survey map. These copies were prepared by Mangal Missir, Amin. He has not been examined in this case. Instead, one Birendra Nath Chandra, who is a survey-passed pleader, was examined as applicants' witness No. 1. He deposed that he checked these copies of maps with the cadastral survey and the Municipal survey maps and found that plot No. 109 was a part of the cadastral survey plot No. 1090. Though he does not say in clear words, it appears, however, that by superimposition of the map, exhibit 1, upon the map exhibit 1a he found that plot No. 106 was a part of plot No. 1090.

When the accuracy of the copies of maps, exhibits 1 and 1a, prepared by Mangal Missir, Amin," has not been established the conclusion derived from superimposing one map upon the other cannot be accepted. The original maps should have been produced, or at least Mangal Missir, Amin, should have been examined. He was the best witness to say as to how the copies (exhibits 1 and 1a) came to be made. There is, therefore, no sure basis for concluding that plot No. 106 is in fact a part of the cadastral survey plot No. 1090.

There is, therefore, no evidence to prove conclusively that plot No. 106 is in fact a part of the cadastral survey plot No. 1090.

5. Assuming though not admitting, that plot No. 106 is a part of plot. No. 1090, there is no evidence to establish that it was the raiyati land of the respondents. There is no dispute that plot No. 1090 is recorded in the survey khatian as Rajhas Gharbari (raiya homestead) of one Musammam Kujan bearing khata No. 91. There is no evidence to connect Musammam Kujan with the judgment-debtors. No evidence was produced to show how they came to acquire this land from Musammam Kujan. They examined three witnesses; one is the survey-passed pleader (A. W. 1).

He is not a witness on this point. Eajinath Rana is A. W. 2. His evidence is to the effect that there is no custom of saleability of homestead lands in village Nadia Pamarganj and that the judgment-debtors have got raiyati lands in that village. The last witness is Syed Bydz Ahmad (A. W. 3) who is the son of Syed Zamiruddin. His evidence is more or less to the same effect. He has stated, however, in cross-examination that the land on which the house stands was purchased by his mother. There is no evidence to show that his mother was also a raiyat. There is no evidence to show how and when this purchase was made.

Further, there is nothing to show that this purchase was made from Musammam Kujan. It is likely that before this land came to the judgment-debtors it passed through several hands, and, in course of the devolution, had lost the raiyati character. There is no law that a raiyati land will ever continue to be raiyati. It may cease to be raiyati, for instance, when the landlord himself acquires the said raiyati land.

Therefore, the fact that Musammam Kujan was at one time a raiyat of this land does not necessarily lead to the inference that the land continued to be a raiyati land and was also a raiyati land in the hand of Musammam Bibi Rajwan. For these reasons, it must be held that plot No. 106 is not the raiyati land of the judgment-debtors.

6. As regards the plea of res judicata, the learned Advocate for the appellant argued as follows. The mortgagors contested the mortgage suit and specifically raised the question of the saleability of the mortgaged property before the Court which had passed the mortgage decree. They assailed the validity of the mortgage itself on the ground that Section 46 of the Chota Nagpur Tenancy Act forbade the transfer of raiyati land by mortgage.

They further questioned the competency of the Court itself to pass a decree for sale by reason of absolute prohibition against sale, voluntary or involuntary contained in Sections 46 & 47 of the Chota Nagpur Tenancy Act. After considering the evidence on the record and the case laws, the learned Subordinate Judge held that the mortgaged property, namely, plots Nos. 81, 83 and 106, did not constitute the raiyati holding of the mortgagors and, therefore, did not come within the mischief of Sections 46 and 47 of the Chota Nagpur Tenancy Act.

It is argued, therefore, on behalf of the decree-holder appellant that the

judgment-debtors are estopped from raising that question before the executing Court and that the question must be treated as res-judicata. It is further contended that the executing Court is not competent to go behind the decree itself.

On the other hand, the contention raised on behalf of the respondents is that the provisions of Section 47 of the Chota Nagpur Tenancy Act are absolutely prohibitive and the decision of a Court to the contrary does not operate to deprive the executing Court of the powers vested in it by Section 47 to investigate the same question afresh and refuse to implement such decree if on the evidence it finds that the property sought to be sold in the execution of the decree was not saleable. Section 47 of the Chota Nagpur Tenancy Act reads as follows:

"No decree or order shall be passed by any Court for the sale of the right of a raiyat in his holding or any portion thereof, nor shall any such right be sold in execution of any decree or order". Then follows certain exceptions which are not material for our present purpose. It will be necessary also to refer to Section 46 of the Act which bars voluntary transfers. It is in the following terms: "No transfer by a raiyat of his right in his holding or any portion thereof,

(a) by mortgage or lease, for any period, expressed or implied, which exceeds or might in any possible event exceed five years, or

(b) by sale, gift or any other contract or agreement shall be valid to any extent."

It will be unnecessary to quote the provisos to the section which are not relevant in the present case. It is manifest that Sections 46 and 47 of the Chota Nagpur Tenancy Act taken together prohibit transfers, both voluntary and involuntary. Section 47 of the Act consists of two parts. The first part enjoins that no Court shall pass any decree or order for the "sale of the right of a raiyat in his holding" or any portion thereof. The second part precludes an executing Court from selling in execution of any decree or order the right of a raiyat in his holding.

This section proceeds on the assumption that there is a raiyati holding. If there is no raiyati holding at all, the section does not come into operation. The prerequisite condition of the application of Section 47 is the existence of a raiyati holding. Given a raiyati holding, no Court has jurisdiction to pass a decree for sale or to put such a holding to sale in execution of any decree or order. What is forbidden by this section is the sale of the right of a raiyat in his holding.

This section does not prohibit a Court from investigating whether or not the land involved in any suit or execution constitutes the raiyati holding. When in a suit it is admitted or proved that a land forms a raiyati holding, and if in spite of such proof the Court by its decree directs the sale of such a land, the direction is wholly null and void as being contrary to the express provision of law. In all such cases, the decree for sale will be a nullity, and it is well established that the executing Court can refuse to execute a decree which is non-existent in the eyes

of law.

It may well happen that a decree for sale of a raiyati holding, as in the case of a mortgage decree, is passed ex parte against a raiyat. Here also the court should not have passed such a decree, and once the decree has been passed the executing court is not precluded from ignoring such a decree, because what was directed to be sold was admittedly a raiyati holding, the sale of which is absolutely prohibited by Section 47 of the Chota Nagpur Tenancy Act.

It is true that an ex parte decree also constitutes res judicata in a subsequent suit, but in order to determine the extent to which the principle of res judicata applies in PX parts decree, it, will be necessary in such cases to ascertain precisely what matters were involved in such decisions. Assume that an ex parte mortgage decree was passed directing sale of a raiyati holding. Assume further that the land involved was admittedly a raiyati holding and there was no dispute about that.

In such a case the direction about sale of a raiyati holding in an ex parte decree cannot constitute res judicata, since such a direction was in contravention of a statute and, as is well known there is no estoppel against a statute. The case of -- Rup Nath Mandal Vs. Jagannath Mandal, , is directly in point. I would adopt the observations of Kulwant Sahay J. in that case, which are as follows:

"The fact that the judgment-debtor did not raise the question in the mortgage suit which he might and ought to have raised does not, in my opinion, operate as an estoppel in the present case, inasmuch as there can be no estoppel against the statute. The law prohibits the sale of a raiyati holding and once it was found that the lands in dispute had formed the raiyati holding, whether the judgment-debtor took the objection or not, the sale of such a holding cannot take place in face of the clear provision of Section 47 of the Chota Nagpur Tenancy Act."

Therefore, an ex parte decree in such a case has to be distinguished from ex parte decrees of other kinds. But. a case where the question whether or not, a particular land constituted rayati holding was; directly and substantially in issue and was finally determined by the Court in presence of the parties stands on a different footing altogether. In all such cases when the matter has been once decided finally by the Court that certain land is a rayati holding, it is not open to the executing Court to go behind the decree and reasitate the same questions, because it is clearly barred by the principles of res judicata u/s 11, Civil P. C..

There is nothing in Section 47, Chota Nagpur Tenancy Act, to empower an executing Court to reconsider afresh the nature and the character of the land to be sold, notwithstanding the fact that this question had been specifically raised and decided by the Court which passed the decree. The foundation of the application of Section 47 is the existence of a rayati holding, and where by a decision of the Court, which has become final, the land was not a rayati holding, there is an end of the matter, and Section 47 does not come into play at all,

It has been urged by the learned Advocate for the respondents that Section 47, Chota Nagpur Tenancy Act, overrides the provisions of Section 11 Civil P. C. & the executing Court is competent to consider, afresh the question whether or not the disputed land constituted a rayati holding. This argument goes far beyond the provision of Section 47. All that Section 47 purports to do is to put a legal ban on the sale of a rayati holding. It does not lay down a procedure as to how a dispute whether or not a particular land constitutes a rayati holding will be determined, nor does it purport to lay down, the effect of such a determination.

It no doubt empowers the executing Court to refuse to Bell in execution of any decree or order the right of a rayat in his holding. This does not imply that the executing Courts have powers to unsettle what has been settled finally by a Court of competent jurisdiction. To accept this argument will be tantamount to invest both the trying Court and the executing Court with parallel jurisdiction, one having nothing to do whatsoever with the other. In that case the same Court while hearing the case may hold that the land was not a rayati holding and again, while executing the said decree, he may come to a contrary decision, namely, that the land was a rayati holding.

Furthermore, there will be no end to the controversy. The same issue will have to be determined again & again at different stages of the same suit & also in different suits between the same parties. This will render the entire position wholly absurd, and I do not think such a contingency was contemplated by the legislature. There is nothing in Section 47 to, show, either expressly or by necessary implication, that in all cases falling under that section, the principle of res judicata has no application. This section is clearly intended to apply in cases where there has been either no decision as to the nature & character of the land sought to be sold, or the land in question is admittedly a rayati holding.

In my opinion, this question is settled by the ruling of the Privy Council in the case of -- "Bindeshwari Charan v. Bageshwari Charan", AIR 1930 PC 46 (B). In that case the Privy Council had to consider the effect of a prior decision as to the applicability of Section 12-A, Chota Nagpur Encumber ed Estates Act on a subsequent suit. Sub-section (1) of Section 12-A provides:

"When the possession and enjoyment of property is restored under the circumstances mentioned in the first or the third Clause of Section 12, to the person who was the holder of such property when the application u/s 2 was made, such person shall not be competent, without the previous sanction of, the Commissioner-- (a) to alienate such property, or any part thereof, in any way, or (b) to create any charge thereon extending beyond his lifetime".

Sub-section (3) lays down that every alienation and charge made or attempted in contravention, of Sub-section (1) shall be void. What happened in that case was that the management of an impartible estate was vested in a manager appointed u/s 2, Chota Nagpur Encumbered Estates Act (6 of 1876) from 1894 until 15-5-1909, when it was released and made over to the owner. Soon after

the release the holder of the estate executed a maintenance grant in favour of the appellant, transferring to him villages and lands yielding an annual income of Rs. 1300/-.

This was done without the previous sanction of the Commissioner. The appellant having attained majority on 4-9-1917, instituted suit No. 117 of 1917 in the Court of the Subordinate Judge of Hajaribagh against the respondents, claiming a maintenance grant of the yearly value of Rs. 4000/- he being already in possession under the grant of 1909 of properties yielding an income of Rs. 1200/- in cash and Rs. 100/- in kind -- and maintaining that the sanction of the Commissioner was not necessary.

On 12-11-1919, the Subordinate Judge decreed the suit & ordered & decreed that it be declared that the plaintiff is entitled to get as maintenance grant from defendant 1 properties yielding an income of Rs. 3500/- in cash and 500/- in kind only and that it be further declared that the grant made to the plaintiff by his father in November 1909 is legally valid and after leaving out the khorposh properties so obtained by the plaintiff, he do get additional properties in maintenance from defendant 1 yielding an annual income of Rs. 2300/- in cash and Rs. 400/- in kind. Pursuant to this decision the holder of the estate executed and registered a maintenance grant to the present appellant of further properties yielding an income of Rs. 2300/- in cash and Rs. 400/- in kind.

After the death of the holder of the impartible estate in 1920, the respondent succeeded to the estate. It may be stated that the estate again came under the Encumbered Estates Act on 24-7-1921. The respondent instituted the present suit through his representative and next friend, the manager of the estate on 14-5-1926, and impleaded as "defendants the appellant and the mortgagee of some of the properties in suit. In the plaint the respondent asked for a declaration that the two maintenance grants of 1909 and 1920 are illegal and invalid and not binding on him and asked for possession and mesne profits. The appellant contested the suit.

One of the issues raised in that suit was whether the findings in suit No. 117 of 1917 of the Subordinate Judge of Hajaribagh operated as *res judicata* in the present suit. It will appear that the maintenance grant of 1909 was by virtue of Section 12-A void for want of Commissioner's sanction, but the Subordinate Judge had held it to be legal, The Question that came up for decision by their Lordships of the Privy Council was whether the decision of the Subordinate Judge in the previous title suit operated as *res judicata*.

The Subordinate Judge held that the findings in the suit of 1917 did operate as *res judicata* and that in accordance therewith Section 12-A did not affect the grant of 1909 or the grant of 1920, as the latter was executed by way of carrying out the order and decree. He, therefore, dismissed the present suit. On appeal, their Lordships of, the High Court took a different view and held that there was no *res judicata*. While overruling the decision of the Patna High Court, their

Lordships of the Privy Council observed as follows;

"Truly the third sub-section of Section 12-A renders void any transaction to which it is applicable, but the question as to whether it applies to a particular transaction entitles the Court to consider the construction of the section and the determination of its applicability rests with the Court.

The decision of the Court in the suit of 1917 determined that the section had never applied to the transaction of 1909, and it is difficult to follow the reasoning of the learned Judge which allowed him not only to express a strong contrary view as to the applicability of the section, which he was entitled to do, if he so chose, but to try anew the issue as to its applicability -- in face of the express prohibition in Section 11 of the Code..... their Lordships are clearly of opinion that the learned Subordinate Judge was right on this point, and that the decision in the suit as to the construction of Section 12-A is *res judicata* as to the validity of the grant of 1920 which was made in fulfilment of the obligations of that decision.

Their Lordships are therefore of opinion that, in view of the decision in the suit of 1917, it is not open to the respondent to challenge the validity of the grants of 1909 and 1920, that they are binding on him....."

It was urged before the High Court, and successfully, that in the absence of previous sanction of the Commissioner the grant of 1909 was void *ab initio* u/s 12-A, Chota Nagpur Encumbered Estates Act, and that the decision in the 1917 suit could not render valid a transaction which Sub-section (3) to Section 12-A declared to be void.

The Privy Council negated it. In the instant case also, it is similarly argued that the decision in Mortgage Suit No 49 of 1945 to the effect that the lands involved were not rayati lands could not render saleable what was inalienable u/s 47, Chota Nagpur - Tenancy Act. On the authority of the decision of the Privy Council, this argument ignored the provisions of Section 11, Civil P. C. and cannot be accepted.

7. -In support of his argument, Mr. L. K. Choudhuri on behalf of the respondents relied greatly on the decision of a Full Bench of this Court in the case of -- Uchit Lal Misser and Another Vs. Raghunandan Tewari and Others, . Some of the observations made in course of the judgment no doubt lend considerable support to his argument, but these observations must be read in the context of that case. When the facts are closely examined, it will appear that they are quite different. The suit was instituted to enforce a mortgage and the mortgagees obtained an *ex parte* mortgage decree in the Court of the Subordinate Judge of Bhagalpur and sought to put, the mortgaged land in dispute to sale.

An objection was taken by the Judgment-debtors in the executing Court that by reason of Section 27, Santal Parganas Settlement Regulation, 1872, the executing Court had no power to put up the land for sale. Sub-section (1) to

Section 27 of the Regulation provides that no transfer by a rayat of his right in his holding or any portion, thereof, by sale gift, mortgage, lease or any other contract or agreement, shall be valid unless the right to transfer has been recorded in the record-of-rights, and then only to the extent to which such right is so recorded.

Sub-section (2) lays down that no transfer in contravention of Sub-section (1) shall be registered, or shall be in any way recognized as valid by any Court, whether in the exercise of civil, criminal or revenue jurisdiction. This, objection was overruled by the Courts below, and on appeal to the High Court against the decision a Bench of this Court referred the matter to a Pull Bench. The question which the Pull Bench had to consider was whether Section 27(2), Santal Parganas Settlement Regulation, precludes a Court executing a decree passed in a suit on a mortgage of a rayati holding situated in the Santal Parganas from selling the said holding in execution of the decree.

It will be noticed, that the mortgagor did not raise the question of the saleability of the mortgaged property before the Court which has passed the decree. They did not attack the validity of the mortgage itself, nor did they raise the question that it was not competent for the Court itself to pass a decree for sale. It was argued, therefore, on behalf of the decree-holders that the judgment-debtors were estopped from raising that point before the executing Court and that the matter must be treated as *res judicata*.

It was the admitted case of both the parties that the mortgaged land constituted a rayati holding. There was therefore no dispute that the property did come within the mischief of Section 27, Santal Parganas Settlement Regulation. In these circumstances, the *ex parte* decree could not operate as *res judicata*. In considering whether or not there is *res judicata*, it is the substantial effect of the previous decision that must be looked into. The effect of that decision was to direct the sale of what was admittedly a rayati holding.

Since the rayati holding is not transferable by reason of Section 27, of the Santal Parganas Settlement Regulation, the decree for sale was manifestly in excess of the jurisdiction of, the Court and therefore it did not operate as *res judicata*, and the executing Court could legally ignore it. In these circumstances, their Lordships observed that the words of Sub-section (2) of Section 27 are absolutely prohibitive and whether or not another Court has pronounced the decree and said that the property in question can be sold, the executing Court is prevented from implementing such decree and from granting a certificate of sale or delivering possession under such a sale.

As to the matter of estoppel and *res judicata*, their Lordships agreed with the decision in "Rup-nath's case (A)" to which reference has been made above. This case therefore does not assist the respondents for the simple reason that where the properties are admittedly non-saleable, the executing Court cannot sell the property, and the failure to raise the objection in time does not create any

estoppel or res judicata, because there was no estoppel against the statute.

In the present case, a definite issue was raised whether or not the land in question was a rayati holding, and the Court gave a decision that it was not. That (decision does constitute res judicata, and the executing Court was not competent to reconsider the question. The Full Bench decision therefore must be confined to the facts of that case, and the principle laid down therein cannot be extended to cover cases where the nature and character of the land was not admitted and the saleability or otherwise of the land in question depended upon the determination of facts.

In the Full Bench case also the position would have been entirely different if both the parties had disagreed as to whether or not the land was a raiyati holding. Wherever the determination of a dispute involves investigation of facts, the parties must appear and plead those facts before the Court. If they fail to raise the question at the proper time and the Courts proceed to give a decision, either ex parte or on contest, the principle of res judicata comes into operation. The view which I take is in accord with the decision of this court in -- Sham Sundar Singh Vs. Dhirendra Nath Chandra and Others, .

In that case a decree was passed in 1932 and in the execution case which was started in 1935 the judgment-debtor on due service of notice appeared at various stages, raised other objections in regard to the value of the property, etc., obtained time on various pretexts and got adjournments of the sale from day to day undertaking not to raise any objection on the ground of irregularity in the sale proclamation, and for the first time filed an objection in February 1948 that the properties under execution were not saleable as being part of a Government ghatwali.

A Bench of this Court held : It is not open to a judgment-debtor to raise his objections piecemeal and especially where it relates to a plea in bar to the execution case itself, and the judgment-debtor is now debarred from raising the question of fact, namely, whether the property sought to be sold is a Government ghatwali, and as such inalienable, and the objection will be deemed to have been decided against him.

In deciding this case their Lordships applied the doctrine of constructive res judicata and overruled the objection of the judgment-debtor. In that case Uchit Lal Missir's case was relied upon and their Lordships distinguished that case on the ground that in Uchit Lal Missir's case the land sought to be sold was admittedly raiyati. The present case stands on a stronger ground than "Shamsundar's case (D)".

The objection of the judgment-debtor as to the saleability of the land was overruled, because the judgment-debtor had failed to raise that question at the proper time. In the present case, there was a decision of the Court in the mortgage suit that the holding was not raiyati. In face of that decision, it was not open to the respondents to re-agitate that question in the execution proceeding.

"Shamsundar"s case (D)", is therefore directly in point.

8. The next case on which Mr. Choudhuri relied and on which reliance was also placed by the learned Subordinate Judge is the case of -- Dhanu Pathah and Others Vs. Sona Koeri, . When the facts of this case are properly analysed it will appear that the decision instead of supporting the contentions of Mr. Choudhuri demolishes the proposition of law enunciated by him. The plaintiffs instituted a suit to eject the defendant from a piece of land in Chota Nagpur on the allegation that the defendant was an under-raiyat of the plaintiffs who were raiyats and that he did not vacate the land after the service of notice to quit.

The defence was that the plaintiffs representing themselves as tenure-holders had inducted the defendant on the land and had made a raiyati settlement thereof. The finding of the trial Court and the lower appellate Court was that the plaintiffs had in fact made the representation alleged. In the record-of-rights the plaintiffs were recorded as raiyats and the defendant as darraiayat.

The plaintiffs contended that the lease was void as being the lease of a raiyati interest within the meaning of Section 46, Chota Nagpur Tenancy Act, and that there could not be estoppel against the statute. This argument would have held good had the character of the land been admitted. If there is in fact a raiyati holding, the lease was void as being in contravention of the mandatory provisions of Section 46, Chota Nagpur Tenancy Act. The defendant, however, strenuously denied that the plaintiffs were raiyats. In these circumstances, their Lordships observed as follows:

"In this case, however, the defendant denied that the plaintiffs are raiyats and alleges that they are, as represented by them, tenure-holders. This raises an issue of fact and it is not until that issue of fact is concluded in favour of the plaintiffs that any question of the operation of the statute can arise. It is true that the record-of-rights describes the plaintiffs as raiyats but this is a piece of evidence only to which is attached the statutory presumption of correctness which is subject to rebuttal. The first issue, therefore, is as, to whether the plaintiffs are or are, not tenure holders and it is at this stage that the doctrine of estoppel operates.

The plaintiffs having represented themselves as tenure-holders cannot be permitted to enter into a discussion of this question of fact but must be held bound by their own representation. No question, therefore, of the operation of the statute can arise. The plaintiffs are prevented from proving the fact which is indispensable before the matter of the statute can be considered."

These observations, in my opinion, support the appellant. The application of the statute does not arise until the disputed fact is determined in favour of one or the other party. If it is conclusively established, as in the instant cases, that the land is not raiyati, the legal bar created by Section 48 or Section 47, Chota Nagpur Tenancy Act, does not come into operation. This case, therefore, is not an authority for the proposition that the principles of *res judicata* do not apply to

cases governed by Sections 46 and 47 of the Chota "Nagpur Tenancy Act. This case, therefore, has no bearing on the facts of the present case.

9. Similarly, the case of -- "Rajibnath v. Chota Nagpur Banking Association Ltd." 27 Pat 399 (P) has no relevancy. In that case the raiyati holding was sold in execution of a mortgage decree in contravention of the statutory prohibition contained in Section 47, Chota Nagpur Tenancy Act. The mortgagor-judgment-debtor filed a suit, for recovery of the land on the ground that the sale was void and did not pass any title to the auction-purchaser. Their Lordships held that Section 47, Civil P. C., barred the suit. "Uchit Lal Missir"s case (C) was cited before their Lordships, but they refrained from expressing any opinion upon that case.

10. The next case on which reliance was placed by the learned Subordinate Judge and was referred to by Mr. Choudhuri is the case of --Manu Mandal v. Jugal Kishore" 18 PLT 430 (GK Here also, the facts were not correctly appreciated by the learned Subordinate Judge. In that case the mortgagee obtained a mortgage decree and sought to enforce the mortgage by sale.

Objections were raised by the mortgagor, his son and grand-son stating that the Jirea in the mortgage included lands which were in fact their raiyati holding, and on the basis of that tact it was further contended that by reason of Section 47, Chota Nagpur Tenancy Act such raiyati lands could not be sold in execution of any decree. In support of their contention the mortgagors produced the record of rights. In the khatian it was expressly recorded that the lands in respect of which the objections were made were raiyati holdings.

In the connected agreement between the mortgagors and the mortgagee the lands were described as the khas lands of the mortgagors. The mortgagee did not produce evidence of any kind with a view to rebutting the khatian. Their Lordships of the Patna High Court held that the admission or estoppel could not be relied upon as a part of the evidence to rebut the record-of-rights, nor to affect the operation of Section 47. They observed as follows:

"In these circumstances the presumption created by the record must prevail and the learned Judge was not, in my opinion, justified in holding that the presumption had been rebutted. It must be remembered that the object of the statute has been clearly explained. It is to prevent the improvident-raiyats of the area governed by the Act from mortgaging their property in time of need and from having their race gradually displaced by more or less wealthy persons from other parts of India.

If the contention of the respondent were given effect to, it would mean that a mortgagee, who desired to obtain possession of ravati holdings and to defeat the Act, would merely have to obtain an admission in the mortgage deed by the mortgagor that the property as a matter of fact was not raiyati land, and then would be entitled to rely upon an estoppel and the purpose of the Act would be defeated."

Evidently, this decision does not advance the case of the respondents.

11. The last case referred to by the learned Subordinate Judge is the case of -- Joy Chand Kumar and Others Vs. Bhutnath Khan, . The decision of this case is based upon the case of Rup Nath Mandal Vs. Jagannath Mandal, , which I have already discussed above. In none of these cases there was a contested mortgage decree and the question whether the land was raiyati was conclusively established. As a matter of fact, not a single case has been cited before us in which though there was a final decision by the trying Court that the land was not raiyati, the judgment-debtors were allowed to re-agitate that question over again in the execution proceeding; nor is there any direct authority in support of the contention that the provisions of Sections 46 and 47, Chota Nagpur Tenancy Act, override the provisions of Section 11, Civil P. ,C.

On the contrary, there is the authority of the Privy council, above referred to, that where the alienability of a particular land was finally and conclusively determined by a Court of competent jurisdiction, Section 11, Civil P. C. came into operation and debarred the parties in whose presence the decision was given from raising the same issue in a different suit or at a different stage of the same suit, notwithstanding the fact that the alienation was void under any statute.

12. It has been urged on behalf of the respondents that the decision of the Subordinate Judge in the original mortgage suit that the land was not raiyati proceeded on the admission of the mortgagors-judgment-debtors and that notwithstanding this admission the character of the land remained what it was, and the mandatory provisions of Section 47 applied to this, since there was no estoppel against a statute. This is not quite accurate. The judgment is based upon a proper consideration of all the facts and the laws applicable to the case.

Further, the important question is what was the admission of the mortgagors. If the land was admitted by both parties to be raiyati land, and if after accepting the character of the land to be raiyati the mortgagors admitted that the land was saleable, then this admission is legally ineffective On the principle that there is no estoppel against) the statute. If, however, the parties join issue as to whether a particular land is or is not a raiyati land, and the defendants admit before the Court that the land is not a raiyati land, Court is competent to give a decision that the land is not raiyati on the footing of facts thus admitted before it, and when once a decision has been given, the principle of res judicata applies, since res judicata extends not merely to the actual decision in the case but to the common basis or facts admitted by both the parties which are incorporated in and made the foundation of the judgment and decree In the case.

For the application of Section 11. Civil P. C., there is indeed no difference between a decree passed after contest and a decree passed on consent of the parties. Reference may be made in this connection to -- Kambala Sundararajamma Vs. P.S. Ramulu Chetty and Others, and -- AIR 1942 354 (Oudh) . This contention also is, therefore, not tenable.

13. It follows that plot No. 106 is not the raiyati land of the judgment-debtors respondents, and further in view of the previous decision in the mortgage suit that plot No. 106 is not the raiyati land of the judgment-debtors, it is not open to the respondents to challenge the saleability of the land, and the decision operates as res judicata and is binding upon them. Thus, both on facts and on law the judgment of the learned Subordinate Judge cannot be sustained. The appeal is accordingly allowed with costs throughout and the order of the learned Special Subordinate Judge is set aside.

Das C.J.

14. I agree.