
(1948) 12 AHC CK 0001
In the Allahabad High Court

Jokhan Misra

APPELLANT

Vs

Maresh Pandit and Another

RESPONDENT

Date of Decision : 06-12-1948

Acts Referred:

Uttar Pradesh Tenancy Act, 1939 — Section 23

Citation : AIR 1949 All 637

Hon'ble Judges : Agarwala, J

Bench : Division Bench

Judgement

Agarwala, J.—An interesting point of law has been raised in this appeal. A decree for money was passed against the appellant's father, Kauleshwar Misra in 1939. After Kauleshwar Misra's death the decree is now being executed against his son, the appellant, by attachment of mortgagee rights in an occupancy holding. It appears that Kauleshwar Misra had obtained a usufructuary mortgage of an occupancy holding by a deed dated 19th April 1939. These rights are now with the appellant and he apparently has possession of the occupancy holding. The decree-Holders want to attach these rights for what they are worth and to sell them. The appellant objected that they could not be attached and sold. Both the Courts below have held that the rights are attachable and saleable and have dismissed the objection. He has come up in appeal to this Court.

2. Now, Section 23, U.P. Tenancy Act, [It should be Agra Tenancy Act. The corresponding provision in the U.P. Tenancy Act (XVIII [17] of 1939), is Section 33.-Ed.] (Act III [3] of 1926) provides that the interest of an occupancy tenant is heritable, but is not transferable either in execution of a decree of a civil or revenue Court or otherwise except in accordance with the provisions of the Act. The section further provides that:

Nothing in the foregoing provisions of this section shall render it illegal for a tenant-

(a) to transfer to Government his interest in any land which is required for a

public purpose;

(b) to release or transfer his interest in favour of ft co-tenant;

(c) to sub-let his holding- as hereinafter provided.

3. Mr. Gopal Behari argues that since the law prohibits the mortgage of an occupancy holding of a tenant, an attachment and sale of the mortgagee rights which are void should not be permitted as by doing this the Court would be recognising, and in fact, impliedly countenancing, a transfer which the law prohibits.

4. It will be observed that Section 23 merely makes the interest of an occupancy tenant non-transferable except in certain specified cases. When a certain property is declared by law to be non-transferable. or a certain person is declared to be incapable of making a transfer, the law does not thereby forbid transfers but merely" renders such transfers void or voidable. There is a clear distinction between a transfer being void and a transfer being forbidden by law. This distinction was clearly brought out in a Full Bench decision of this Court Dip Narain Singh Vs. Nageshar Prasad and Others ., which was again followed in Raghunath Ram and Others Vs. Lachman Rai and Others . If a transfer of an occupancy holding were not merely declared to be void but were forbidden by law on grounds of public policy there would have been much force in the argument of the learned Counsel. As I have observed above, this is not a case of that type. All that happens in a transfer of this kind is that a person in possession of an occupancy holding as a transferee, is not entitled to put forward his transfer as a valid transfer. He may, however, be able to retain possession of the holding, as against the transferor till the amount , he has paid is returned to him. I do not decide this question finally as it does not arise directly for decision in this case. He has at least the possessory right to the holding till he is dispossessed by the tenant or the landlord. Such a right is a valuable right of property and the law does not prohibit its attachment and sale. I think the view taken by the Courts below was right and I dismiss this appeal with costs.