

(1961) 02 PAT CK 0009
In the Patna High Court
Case No : A.F.A.D. No. 711 of 1952

Mahadeo Mandar and Others

APPELLANT

Vs

Lilo Mandar and Others

RESPONDENT

Date of Decision : 27-02-1961

Acts Referred:

Bihar Tenancy Act, 1885 — Section 158AA, 162A
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 64

Citation : AIR 1961 Patna 279

Hon'ble Judges : V. Ramaswami, C.J;R.K. Choudhary, J;N.L. Untwalia, J;Kanhaiya Singh, J;K. Sahai, J

Bench : Full Bench

Advocate : K.D. Chatterji, Chunnilal and Leila Seth, for the Appellant;
Lalnarayan Sinha, Krishna Nandan, Prasad Singh and Kumar Bahadur, for the Respondent

Final Decision : Dismissed

Judgement

Choudhary, J.—This is an appeal by the plaintiffs. The facts leading to the institution of the suit, out of which the present appeal arises, stated briefly, are these:

2. Goon Mandar or Mandal, father of plaintiff No. 1, and Dorki Mandal, defendant No. 14 of the fourth party, were two brothers. They had a holding of 9.72 acres, equivalent of 17 blghas 17 kathas and 14 dhurs, bearing Khata. No. 81, Khesra New. 67, 69 and 498, at an annual rental of Rs. 78-7-10%, which, was "Subsequently reduced, by a rent reduction proceeding to Rs. 62-13-0 within the zamindari of defendants third party.

On the 18th of June, 1926, the two brothers executed a usufructuary mortgage bond in favour of the father of defendant No. 4 of the first party for a sum of Rs. 312/- with respect to 2v26 acres of land, being a part of plot No. 498, along with some other lands. On the 7th of May, 1928, Dorki Mandal alone executed another usufructuary mortgage bond in favour of defendant No. 5 of the first party for a

sum of Rs. 80/- with respect to 1.14 acres, equivalent to 2 bighas, of land appertaining to this holding.

On the 10th of July, 1930, a third usufructuary mortgage bond was executed by the two brothers to the ancestor of defendants 6 and 7 of the first party with respect to 1.14 acres equivalent to 2 big-has, of land out of this holding for a sum of Rs. 80/-. On the 11th of July, 1932, they executed a fourth usufructuary mortgage bond for a sum of Rs. 711/-with respect to 5.98 acres of land out of the said holding in favour of defendant No. 1, who subsequently assigned the same to defendants 2 and 3 of the first party.

According to the stipulations in the aforesaid mortgage bonds, the rent was payable by the respective mortgagees in proportion to the land mortgaged to them. There was, however, default in payment of the rent, as a result of which in, 1938 the landlords, defendants third party, instituted a suit for recovery of arrears of rent; being Rent Suit No, 1900 of 1938, in the Court of the Munsif of Banka against the two brothers, and in 1939 they obtained a decree.

That decree was put in execution in the year 1940 in Execution Case No. 842 of 1940 against the two brothers. Some of the mortgagees raised objection to the sale of the mortgaged properties, and the executing Court directed that plot Nos. 67 and 69 and 3.02 acres of plot No. 498 should be sold in the first instance, and, if the decree was not satisfied by the sale of these lands, then the bharna lands measuring 5.98 acres, appertaining to plot No. 498, should be sold.

Accordingly, plot Nos. 67 and 69 and 3.02 acres of plot No. 498 were sold first on the 26th of September, 1940; but as the decree was not satisfied, the rest of plot No. 498 was sold subsequently on the same date. In both the sales, the decree-holders landlords were the auction purchasers. They obtained delivery of possession through Court on the 15th of December, 1940 Thereafter, the lands were settled by the landlords auction-purchasers with defendants 7, 8, 10 and 11 of the second party. Defendant No. 9 of the second party purchased 5.98 acres of plot No. 498 on the 12th of April, 1949 from defendant No. 8, who had taken settlement of the same from the landlords, defendants third party.

3. According to the case of the plaintiffs, the mortgagees, who were liable to pay the rent, wit-fully defaulted in payment thereof, and got, in collusion with defendants second and third parties the suit filed. The plaintiffs allege that the decree was fraudulently obtained, and the sale and the delivery of possession were also void and illegal as having been obtained fraudulently in collusion with each other.

They further allege that the defendants second party, who claim to have taken settlements, are mere benamidars of the mortgagees, who have taken settlements from the landlords in their farzi names. It is, accordingly, asserted that the right of redemption of the plaintiffs was not lost by the decree, the sale and the delivery of possession referred to above. In January, 1947, the plaintiffs tendered the mortgage money to the mortgagees, who refused to accept the

same asserting that the plaintiffs had no right to redeem, as the lands were sold for arrears of rent.

It is alleged on behalf of the plaintiffs that, thereafter, on enquiry they came to know of the fraudulent decree, sale and delivery of possession. They therefore, instituted a suit for redemption of the mortgages on declaration that the decree, the sale, the delivery of possession and the settlements were all fraudulent, void and illegal, and did not affect their right of redemption.

4. Five sets of written statements were filed; one by defendant No. 4, the other by defendant No. 7, the third by defendant No. 9, the fourth by defendant No. 11 and the fifth by defendants 12 and 13, the landlords. In all these written statements, the main pleas taken by them were the same. They pleaded that the default in payment of rent was made by the raiyats themselves, who were also liable to pay rent for portion of the holding which was in their possession, and that the decree, the sale and the delivery of possession were genuine and valid, and not fraudulent.

They denied that the decree, the sale and the delivery of possession were collusive. The settlement-holders further pleaded that they were not benamidars of the mortgagees, and that they were bona fide settlers from the landlords. Defendant No. 9 put forward a further case that he was a bona fide purchaser for value from one of the Settlement-holders, and that he had no knowledge of the mortgages.

5. On the 24th of March, 1950, during the pendency of the suit, defendant No. 10 and the plaintiffs filed a joint petition of compromise, according to which a portion of plot No. 498 and the name of defendant No. 10 were expunged from the plaint. Defendants 4 and 7, after filing their written statements, dropped out of contest. The other defendants did not file any written statement, nor did they contest the suit.

6. The trial Court held that the decree, the sale and the delivery of possession were not fraudulent, but the summonses in the rent suit and the notices under Order XXI, Rule 22 Code of Civil Procedure, and those u/s 158B of the Bihar Tenancy Act in the execution case were not served in accordance with law. It also held that the benami character of the settlements had not been proved. Since, however, plot No. 498 was sold in portions in two lots, the sale contravened the provisions of Section 162A of the Bihar Tenancy Act, and, therefore, it was void so far as that plot was concerned. Accordingly, it held that the plaintiff's right of redemption in respect of this plot was not extinguished by the sale for arrears of rent.

With respect to the other plots, however, it held that the sale was only voidable, but, as no attempt was made to get it set aside within the period of limitation, the same was binding on the plaintiffs. The trial Court, therefore, gave a modified decree for redemption with respect to plot No. 498 only. Defendant No. 9, who had purchased 5.98 acres of land out of the said plot, preferred an

appeal, and the plaintiffs filed a cross-objection. The learned Additional District Judge, who heard the appeal, affirmed the findings of the trial Court on all the points, except with regard to the sale of plot No. 498.

He held that, though this plot was sold in portions in two lots, yet both the lots, taken together, comprised the entire area of this plot, and, the: same having been sold in the same execution case, under the same sale proclamation and on the same date, the sale, in effect, was of the entire plot, and thus did not contravene the provisions of Section 162A of the Bihar Tenancy Act. He, therefore, held that the plaintiffs' right of redemption with regard to this plot also was extinguished. He, accordingly allowed the appeal and dismissed the cross-objection as a result of which the entire suit of the plaintiffs was dismissed.

7. The plaintiffs preferred this second appeal in this Court, which came up for hearing before Ahmad, J., who, on the 7th of March, 1957, referred the same for hearing by a Division Bench. On the 3rd, of December, 1957, a Bench of this Court heard the appeal, and, in view of two Full Bench decisions of this Court, in Ram Ranbijaya Prasad Singh v. Darsu Pandey AIR 1947 Pat 303 and Ram Ranbijaya Prasad Singh Vs. Sukar Ahir, , held that the sale of plot No. 498 was void, and the plaintiffs' right of redemption therefore, was not extinguished with regard to it.

Accordingly, this Court granted a preliminary decree to the plaintiffs for redemption of a portion of a plot No. 498 on payment of a certain amount within a period of three months from the date of the preparation of the decree of the High Court. It appears, however, that respondents 3, 6 and 9 died during the pendency of the second appeal and, their heirs were not substituted as respondents in the appeal.

Thus, the appeal was allowed by this Court against certain dead persons. Respondent No. 1, on the 23rd of January, 1958, then filed an application for review in this Court on the ground that the decree was passed against dead persons, and the same was numbered as Civil Review No. 12 of 1958. After hearing the parties, that review application was allowed, and the appellants were given an opportunity to bring on record the heirs of deceased respondents 3, 6 and 9.

Subsequently, their heirs were substituted, and the appeal was put up for hearing before a Bench of this Court on the 11th of August, 1960. On that date, it was urged on behalf of the respondents that the two Full Bench cases, referred to above, were not correctly decided and they required further consideration by a larger Bench. The Bench of this Court felt doubt about the correctness of these two Full Bench decisions, and the appeal was referred, to a larger Bench. Accordingly, this Bench has been constituted to dispose of the appeal.

8. The main question, therefore, to be decided on this case is whether a sale of a portion of a plot, held in contravention of Section 162A of the Bihar Tenancy Act thereafter to be referred to as "the Tenancy Act"), is without jurisdiction and

void, or the non-compliance of the provisions of that section in this regard is a mere irregularity. Mr. Chatterji appearing on behalf of the appellants, has put forward an argument that the above section in terms gives no jurisdiction to the executing Court to sell a portion of a plot, and, that being so, the sale of a portion of a plot is void as being without jurisdiction; and, in support of his contention, relies on the above two Full Bench decisions, which, according to him were correctly decided.

Mr. Sinha, appearing for the respondents, however, contends that the jurisdiction of the Court to sell a property is not conferred by Section 162A of the Tenancy Act, and the sale of a portion of a plot in contravention of the provisions of that section is a mere irregularity or even an illegality not affecting the sale as being void. In other words, his contention is that such a sale may be voidable, but it is never void, and the Full Bench cases were not correctly decided.

9. Section 38 of the CPC provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. Order XXI, Rule 64, of that Code, as amended by this Court, lays down that any Court executing a decree may order that any property in respect of which it has made an order of attachment and which is liable to sale, or such portion thereof as may seem necessary to satisfy the decree shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same. Reading the above two provisions, it is clear that a Court which passed a decree has jurisdiction to execute that decree, and, in execution thereof, has jurisdiction to sell any property, or a portion thereof, for satisfaction of the decree. Under the terms of the Code of Civil Procedure, therefore, the Court executing a decree could sell the property of a judgment-debtor, whether it be a holding, or a portion of a holding, or a plot or a portion of a plot.

Unlike the Chotanagpur Tenancy Act, where jurisdiction to entertain a suit for recovery of arrears of rent, or an application for execution of a decree for rent, has been conferred on certain authorities, other than the Civil Court, the Tenancy Act does not prescribe any particular authority, apart from the Civil Court, to entertain such a suit or an application for execution. Section 143 of the Tenancy Act rather provides that the High Court may, from time to time, with the approval of the State Government make rules consistent with this Act, declaring that any portions of the Code of Civil Procedure, 1908 (5 of 1908), shall not apply to suits between landlord and tenant as such or to any specified classes of such suits, or shall apply to them subject to modifications specified in the rules, and that, subject to any rules so made, and Subject also to the other provisions of this Act, the Code of Civil Procedure, 1908 (5 of 1908) shall apply to all such suits.

It is, therefore, apparent that the provisions of the CPC are applicable to a suit for arrears of rent or to an application for execution of a decree for rent, unless any of those provisions has been declared by the High Court, with the approval of the State Government or by the Tenancy Act itself, to be not applicable to

them. It is conceded that the High Court has not made any rule declaring the non-applicability of Section 38 and Order XXI, Rule 64, of the CPC to an application for execution of a decree for rent. The jurisdiction of the Civil Court, therefore, to sell a portion of a plot in execution of a decree for arrears of rent is not affected, unless it is shown that, under the provisions of the Tenancy Act itself, such a jurisdiction has been taken away from the Civil Court.

10. The provisions of the Tenancy Act, in my opinion, in regard to the matter of institution of a suit for recovery of arrears of rent or of filing of an application for execution of a decree for rent are not in derogation to or substitution for the procedure laid down in the CPC for such a suit or an application, but they are in the nature of supplement to those provisions regarding certain steps to be taken so as to give the same a special characteristic of being a rent suit a rent decree, a rent execution and a rent sale, as distinguished from a money suit, a money decree, a money execution and a money sale. In this connection, it will, perhaps, be necessary to notice some of the relevant provisions of the Tenancy Act touching the point.

11. Section 65 of the Tenancy Act states that where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding or part of his holding, shall be liable to sale in execution of a decree for the rent of the tenure or holding, and the rent shall be a first charge on the tenure or holding. Thus, this section makes the rent of a holding a first charge on the same.

It is well-settled that, in order that this first charge should be available to an auction-purchaser, be he a landlord or a stranger, the decree and the sale must be a rent decree and a rent sale. It is also well-settled that, prior to the amendment of the Tenancy Act in the year 1938, this charge was not available if the entire holding was not sold in execution of a decree for arrears of rent. In other words, in order to give a sale the characteristic of a rent sale, the entire holding had to be sold as to pass to the auction-purchaser, and the sale of a portion of a holding had not the effect of a rent sale. Nevertheless, a portion of a holding, or even a portion of a plot, could be sold in execution of a decree for rent, but the only effect of such a sale was that it was a money sale.

Thus, prior to the amendment of the Tenancy Act in the year 1938, the sale of a portion of a holding, or even of a plot, was not beyond the jurisdiction of the executing Court and the same could be legally sold even in an execution of a decree for rent, though such a sale could not have the effect of a rent sale. The sale of a part of a holding with full effect of its being a rent sale has been provided in the Tenancy Act by the Amending Act of 1938, and it is, therefore, that, under the above Section 65 of the Tenancy Act, the rent has been made a first charge even if a part of the holding is sold.

12. Section 158AA of the Tenancy Act, as it stood originally stated that a decree for arrears of rent may be executed by the attachment and sale of the property

of the judgment-debtor, both movable and immovable, provided that the movable property of the Judgment-debtor shall not without his consent in writing be so attached or sold unless the decree cannot be satisfied by the attachment and sale of the holding for the arrears of the rent or which the decree was passed.

This section was inserted in the Tenancy Act for the first time by the Bihar Tenancy (Amendment) Act, 1937 (Bihar Act VIII of 1937). By the introduction of this section, the Legislature provided for execution of a decree for arrears of rent, both as rent execution, where on sale the holding or a portion thereof was to pass to the auction-purchaser, and as money execution where the sale of the property of the judgment-debtor transferred to the auction-purchaser only his right, title and interest therein. This section, as it now stands after further amendments, runs as follows:

"158AA. Execution of decrees for arrears of rent:

(1) If within three months of the passing of the decree or, in a case where the Court has fixed a time under the provision of Sub-section (3) of Section 148AA for the payment of the decretal amount, on the expiry of such time, or where under the provisions of Section 1486, a decree has been made payable in instalments on the falling due of such instalments the judgment-debtor fails to pay to the decree-holder or deposit into Court the decretal amount, or the amount of instalment, as the case may be, such amount may, upon an application made in this behalf by the decree-holder, be realised by the attachment and sale of the property of the judgment-debtor, both movable and immovable;

Provided that the movable property of the judgment-debtor shall not without his consent in writing be so attached or sold unless the decree cannot be satisfied by the attachment and sale of the holding for the arrears of the rent of which the decree was passed.

(2) The application referred to in Sub-section (1) shall be in the prescribed form, shall contain the prescribed particulars and shall state the mode in which the assistance of the Court is required".

Under this amended section, certain limitations were put on the right of the decree-holder to execute the decree. The decree-holder could not execute the decree until the expiration of three months of the passing of the decree or of the time fixed by the Court u/s 148AA of the Tenancy Act for payment of the decretal amount or on the failure of the payment of the due instalments, where the decree had been made payable in instalments under the provisions of Section 148B.

Though Section 158AA of the Tenancy Act, both before and after the amendments, made provision for realisation of the decree from the movable properties of the judgment-debtor, it restricted the right-of the decree-holder to

do so without the consent of the judgment-debtor in writing unless the decree could not be satisfied by the attachment and sale of the holding for the arrears of the rent of which the decree was passed.

In other words, under the provisions of the above section, a decree for arrears of rent could be executed as a rent decree against the holding or a portion thereof for the arrears of the rent of which the decree was passed, or as a money decree against any immovable property of the judgment-debtor, or his movable property subject to the conditions referred/ to above.

Thus, this section, providing, as it does, for the-decree to be executed both as a rent decree or as a money decree by the executing Court, which is the ordinary Civil Court and which has the initial jurisdiction to execute a decree under the provisions of the Code of Civil Procedure, only regulates the execution in the manner referred to above. In other words Section 158AA of the Tenancy Act regulates the jurisdiction of the Civil Court in the matter of execution of a decree for arrears of rent, and does not by itself confer any fresh jurisdiction on the Court, which it had already got under the provisions of the Code of Civil Procedure.

13. Section 158B of the Tenancy Act lays down certain conditions on the fulfilment of which a holding or a portion thereof sold in execution of a decree for arrears of rent passes to the purchaser, and, if those conditions are not satisfied, the sale has the effect of a money sale, in which only the right, title and interest of the judgment-debtor therein passes to the purchaser.

14. Section 162A of the Tenancy Act, which is the subject matter of controversy in the instant case and of which the marginal heading is "Sale of a portion of holding", runs as follows:

"When the decree-holder makes the application mentioned in Section 158AA, the Court executing the decree may order that the holding liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold and that the proceeds of such sale or a sufficient portion thereof shall be paid to the party entitled under the decree to receive the same :

Provided that if the decree-holder desires that the portion of the holding mentioned in the plaint or any other portion thereof should be sold, the Court shall order that such portion or so much of such portion as may seem to it necessary to satisfy the decree, shall be sold and the proceeds paid as provided in this section :

Provided further that if there is any incumbrance on any portion of such holding created before the date of the institution of the suit in which the decree was passed, the Court shall not order such portion to be sold unless in the opinion of the Court the decree cannot be satisfied without the sale of such portion :

Provided again that nothing in this section shall be deemed to authorise the sale of a portion of a plot comprised in a holding."

This section permits a portion of the holding to be sold for satisfaction of a decree for arrears of rent, the sale having the full effect of a rent sale. The first two provisos have their application when the decree-holder desires to sell a portion of the holding, and we are not concerned with these two provisos in the present case. The third proviso is important for the purposes of this case as it is the interpretation of this proviso on which rests the decision of the question raised.

It states that nothing in this section shall be deemed to authorise the sale of a portion of a plot comprised in a holding, and it is contended on behalf of the appellants that the jurisdiction of the executing Court to sell a portion of a plot is taken away by this proviso so that if a portion of a plot or a holding is sold, it is void as being without jurisdiction. The argument is that the ordinary jurisdiction of the Civil Court as an executing Court is cut down by this provision of the Tenancy Act as contemplated by Section 143 of that Act, and the executing Court executing a decree for rent has no jurisdiction to sell a portion of a plot, to the execution a rent execution or a money execution (sic).

It is submitted, as has also been held in the second Full Bench in *Ram Ranbijaya Prasad Singh Vs. Sukar Ahir*, that Section 162A speaks of the application for execution having been made u/s 158AA, according to which such an application can be made both as a rent execution as well as money execution, and, as such, the prohibition of sale of a portion of a plot applies to both kinds of execution, and a portion of a plot, therefore, could not be legally sold in any execution of a decree for rent.

But, in my opinion, the argument is based on misconception. As already observed, the executing Court derives its initial jurisdiction under the Code of Civil Procedure, and that jurisdiction is regulated by the provisions of Section 158AA of the Tenancy Act, so far as the execution of a decree for rent is concerned. Section 162A of the Tenancy Act does not by itself confer any kind of jurisdiction on the executing Court, but only creates a right for realisation of the decree money by sale of a portion of a holding only with all the incidents of a rent sale, which was not available prior to the amendment of the Tenancy Act in the year 1938.

The importance of the creation of the right to sell a portion of a holding appears from the provision of Section 163-A of the Tenancy Act, which provides that a holding or portion of a holding shall not be sold for a price lower than that specified in the sale proclamation. Thus, in the absence of a provision for sale of a portion of a holding, it would have created a great hardship on the landlords if they were required to purchase the entire holding for a price fixed by the Court. A provision was, therefore, made for sale of a portion of a holding so that even on such a sale the auction-purchaser might get a portion of the holding itself, and not only the right, title and interest of the judgment-debtor therein.

15. The Legislature, however, did not think it advisable to permit the sale of a

portion of a plot only under the garb of the sale of a portion of a holding, and the reason, in my opinion, is obvious, u/s 163(5) of the Tenancy Act, the Court executing a decree is required to estimate the value of the holding or of that portion of the holding the proceeds of the sale of which it considers will be sufficient to satisfy the decree. If a portion of a plot was allowed to be sold, there would have been serious difficulties and improbabilities in fixing the valuation of an undivided portion of a particular plot.

A portion of a plot may be good and fertile, while its other portion may be bad and unproductive. It would have been again difficult for the Court in such a case to estimate the value of an undivided portion of that plot. u/s 166(2) of the Tenancy Act, a portion of an occupancy holding could be sold with power to avoid all incumbrances. But, if a portion of a plot was permitted to be sold, it would have been improbable for the purchaser to avoid the incumbrances of a portion of a plot only.

Section 167(4) of the Tenancy Act provides that when a tenure or holding or portion of a holding is sold in execution of a decree or a certificate signed under the Bihar and Orissa Public Demands Recovery Act, 1914 (B. and O. Act 4 of 1914) for arrears due in respect of the tenure or holding and there is on the tenure or holding or portion of the holding a protected interest of the kind specified in Section 160. Clause (c), the purchaser may, if he has power under this Chapter or that Act to avoid all incumbrances, sue to enhance the rent of the land which is the subject of the protected interest, and on proof that the land is held at a rent which was not at the time the lease was granted a fair rent, the Court may enhance the rent to such amount as appears to be fair and equitable. If a portion of a plot could be sold in execution of a decree for rent, it could not have been possible for the purchaser to get the rent of that portion only enhanced under the above provisions of the Tenancy Act.

These provisions, however, are applicable only where the sale has the effect of a rent sale, and not that of a money sale. The sale of a portion of a plot, therefore, could offend the above provisions only if it were to have the effect of a rent sale. No such question could possibly arise in case of a money sale. Keeping in view the various provisions of the Tenancy Act, it is perfectly clear that it could not be legally possible to sell a portion of plot under the provisions of that Act so as to give the sale the effect of a rent sale.

In my opinion, this proviso was inserted to prevent the sale of a portion of a plot only in the case of a rent sale, and it has no application to a money execution of a decree for arrears of rent where the auction-purchaser is not entitled to avail of any of the provisions referred to above. The proviso itself makes it perfectly clear when it says that nothing in this section, namely, Section 162A, which permits a portion of a holding to be sold, gives authority to the executing Court to sell a portion of a plot.

It does not take away the jurisdiction of the executing Court to sell a portion of a

plot if it has got that jurisdiction otherwise. Of course, a sale of a portion of a plot in contravention of the last proviso to Section 162A will have only the effect of a money sale, and not a rent sale. But by no stretch of imagination such a sale can be said to be void as being without jurisdiction.

16. In this connection it will now be useful to refer to the reasonings given in the two Full Bench decisions referred to above. In both these cases their Lordships had the impression that the proviso had been inserted as a matter of public policy so as to prevent excessive sub-division of plots. There is, however, nothing in the section or in any other provision of the Tenancy Act to warrant the existence of such, a public policy rather, the Tenancy Act clearly indicates that the Legislature had never in its mind to prevent excessive sub-division of plots.

A reference may be made to Section 26A of the Tenancy Act, according to which every occupancy holding, or a portion thereof, together with the right of occupancy therein, is capable of being transferred and bequeathed in the same manner and to the same extent as other immovable property. There is no prohibition for a transfer of a portion of a plot in this section. If the Legislature had ever intended to prevent sub-division of plots, it would have made a provision in this section also preventing transfer of a portion of a plot.

17. As already observed, the above proviso appears to have been inserted in the section because of the impossibility of the applicability of certain other provisions of the Tenancy Act to the sale of a portion of a plot, if the sale has to have the effect of a rent sale. Apart from that, it seems to me that the object of the Legislature in not providing for the sale of a portion of a plot must have been to protect both the landlords as well as the tenants from being harassed by being required to institute partition suits for division of the plot so sold in execution of a decree. If that be so, then the proviso was inserted, not for any public policy, but for the benefit of a particular class of persons, which could very well be waived by that class of persons.

18. As stated above, the provisions of the Tenancy Act in regard to the institution of a suit for arrears of rent or the filing of an application for execution of a decree for rent are in the nature of supplements to the general provisions of law under the Code of Civil Procedure, the compliance of which renders a sale of a holding or a portion thereof a rent sale. If these provisions are contravened, the sale itself does not become void, but is perfectly a good sale, and the only effect is that it assumes the characteristic of a money sale.

A reference may be made in this connection to the non-compliance of the provisions of Section 158B of the Tenancy Act. It is too well-settled that the effect of such a non-compliance is to make the sale of a holding or a portion of a holding a money sale. For example, in *Lachmi Narayan Lal and Others Vs. Bhupendra Prasad Shukul and Others*, notice u/s 158B(2) of the Tenancy Act was not issued, but, instead of it, notice under Order XXI, Rule 22, of the CPC was issued and served.

It was held by a Bench of this Court that the sale could not be a nullity or without jurisdiction, and it would at least take effect as a money sale, In Baleshwar Chaubey Vs. Ram Ranavijaya Prasad Singh and Others, , a Full Bench decision of this Court, the holding of the judgment-debtor was sold for a price lower than that specified in the sale proclamation. It was contended in that case that the sale was in contravention of Section 163A of the Tenancy Act and was thus void.

Their Lordships, who were also the learned Judges constituting the two Full Benches under consideration, held that the provision was made for the benefit of a particular class of people who could waive the same, and the sale was not void. Their Lordships further pointed out that where the judgment-debtor did not tell the Court before the confirmation of the sale that the sale was not for the full once mentioned in the sale proclamation, there was an implied waiver. Similarly, in my opinion, a non-compliance of the provisions of Section 162A of the Tenancy Act does not render the sale void, but it has the effect of rendering it a money sale, as distinguished from a rent sale.

19. On a careful consideration of the provisions of the Tenancy Act and the law on the subject, my concluded opinion is that the last proviso to Section 162A of the Tenancy Act prevents a portion of a plot from being sold in execution of a decree for arrears of rent so as to have the effect of a rent sale. It, however, does not take away the jurisdiction of the executing Court, which it already has under the Code of Civil Procedure, to sell such a; portion of a plot in execution of that decree as a money sale.

In other words, a non-compliance of the above proviso does not make a sale void as being without jurisdiction, but it is only an irregularity which renders such a sale a money sale. With due respect to the learned Judges who decided the above two Full Bench cases, namely, AIR 1947 Pat 303 and Ram Ranbijaya Prasad Singh Vs. Sukar Ahir, , it must be held that they were not correctly decided, and, therefore, they must be and are overruled.

20. Mr. Chatterji, in support of the appeal, has, however, contended that the view of law as enunciated in the above two Full Bench Cases has been accepted as a correct law for over twelve years, and, therefore, that should not be disturbed and must be accepted as correct. In support of this contention, he has placed reliance on, Murphy v. Deichler, 1909 AC 446 and Pugh v. Golden Valley Rly Co. (1880) 15 Ch D 330. In the first case, a will was executed by a person of German domicile duly attested according to the law of England and Ireland, but invalid under the German Law.

In accordance with the practice which had existed for many years, probably for over seventy years, the validity of the will was accepted. It was pointed out in that case that the argument advanced on behalf of the appellant, who had lodged a caveat, could have prevailed seventy years ago, but, in view of the long established practice, the will must be admitted to probate as a Will. In coming to

that conclusion, Lord Loreburn, L. C. observed that

"this case falls within the rule that it is not necessary or advisable to disturb a fixed practice which has been long observed in regard to the disposition of property, even though it may have been disapproved at times by individual judges, where no real point of principle has been violated".

Thus, it appears that the law on which reliance was placed in that case stood as a good law for a pretty long time of over seventy years, but the two Full Bench decisions, referred to above, were given only about thirteen years back, and, therefore, the first case relied on by counsel for the appellants has no application to these cases. In the second case, the appellants, a railway company, in the course of making a line of railway, formed an embankment in course of which they cut a channel or goit, from the excavation of which they obtained earth for their embankment and into which, when excavated, they diverted water which could otherwise have flown into the old bed of a river between the points of commencement and termination of the got.

The plaintiff, who was the owner of the bed and proprietor of the land which lay along the banks of the river between the points referred to above, was held to have sustained an injury by the diversion of the stream and thus to be entitled to an injunction. The appellants pleaded that what they did, they did under the powers conferred upon them by Section 16 of the Railways Clauses Consolidation Act, 1845. On that point, there was an earlier decision, in *Reg. v. Wycombe Rly. Co.* (1867) 2 QB 310 of the year 1867, on the authority of which it was held that the diversion of a river was unjustifiable.

In that connection Thesigar, L.J., who delivered the judgment of the case, observed that "it is one of a class of decisions which acquire a weight and effect beyond that which attaches to the relative position of the Court from which they proceed", and that "It constitutes an authority which, after it has stood for so long a period unchallenged, should not, in the Interests of public convenience, and having regard to the protection of private rights, be overruled by this Court except upon very special considerations."

In making that observation his Lordship pointed out that for twelve years and upwards the case had continued unshaken by any judicial decision or criticism as an authoritative exposition of the meaning of Section 16 of the Railways Clauses Consolidation Act, 1845 in respect of the matter in dispute, and that during such period hundreds of special Acts of Parliament had been passed sanctioning the construction of lines of railway and the consequent interference with private rights, and incorporating for that purpose the provisions of the general Act. Thus, it is clear that, for the reasons given above, it was not thought desirable to overrule the earlier decision, though it stood unchallenged for only twelve years. The material facts of that case are, however, distinguishable and the above decision, in my opinion, has, therefore, no application to the present case.

21. On a consideration of the law on the subject, as stated above, it is manifest

that the sales of plot No. 498 in portions in two lots were not void for non-compliance of the last proviso to Section 162A of the Tenancy Act, but were legally valid having the effect of a money sale. That being so, the plaintiffs right of redemption was extinguished on such a sale. Their suit was, therefore, rightly dismissed by the lower appellate Court.

22. On behalf of the respondents, two more points were urged in support of the decree of dismissal passed by the lower appellate Court. It was contended that the matter should have been agitated u/s 47 of the Code of Civil Procedure, and not by a separate suit, and that the point raised in the suit, not having been raised by the plaintiffs in the execution proceedings, was barred by constructive res judicata. Various decisions were cited at the Bar for and against these proceedings. But, in view of my decision on the first point, which is enough to dispose of this appeal, I do not think it necessary to decide them. I, therefore, do not propose to deal with them.

23. The result, therefore, is that the appeal fails, and is dismissed; but, in the circumstances of the case, the parties will bear their own costs of this Court.

Ramaswami, C.J.

24. I agree.

Sahal, J.

25. I agree.

Kanhaiya Singh, J.

26. I agree.

Untwalia, J.

27. I agree.