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## RAGHUNATH PRADHANI

v.

## DAMODRA MAHAPATRA AND ORS.

November 2, 1978

B [Y. V. CHANDRACHUD, C.J., P. S. KAILASAM AND A. D. KOSHAL, JJ.]

*Orissa Scheduled Areas Transfer of Immovable Property by Scheduled Tribes Regulation 2 of 1956 and Rule 4 made thereunder—Validity of Court attachment without prior permission—Res judicata doctrine of applicability, whether non raising a particular contention operate as—Second Appeal and Appeal under Art. 136 of the Constitution—No new plea can be allowed to be raised.*

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On the strength of the permission granted by the Revenue Divisional Officer, as required under clause 6 of the Orissa Scheduled Areas Transfer of Immovable Property by Scheduled Tribes Regulation 3 of 1956 and Rule 4 made thereunder, to sell his private property to a non-scheduled Tribe person for a sum of Rs. 4000/-, Respondent 3 sold his property on January 2, 1964 by a registered deed of sale to the appellant, despite an attachment order passed by the Executing Court on July 13, 1963 on an application dated June 28, 1963 made by Respondent 1 to recover the decretal amount as per the money decree obtained by him on August 18, 1962 against Respondent 3 and his mother Respondent 4. Later, Respondent No. 1 however, produced the copy of the order passed by the R.D.O. dated October 23, 1963, at the instance of appellant in the Executing Court and got the property put to sale on May 15, 1964. In the court auction respondent 2 son of respondent 1 purchased the property. On June 22, 1964, the appellant filed an application under Order 21 Rules 89 and 90 and Sections 47 and 151 C.P.C. for setting aside the auction sale on the ground that the attachment and the auction sale were void for want of permission from the competent authority under Orissa Regulation 2 of 1956 and also due to fraud committed by the decree holder. The application was allowed followed by confirmation by the appellate judge, in appeal. But the High Court in Second Appeal reversed it accepting the contention of *res judicata*.

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Allowing the appeal by special leave, the Court.

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HELD : 1. Both clauses 6 of the "Orissa Scheduled Areas Transfer of Immovable Property by Scheduled Tribes Regulation 2 of 1956, and Rule 4 made thereunder, provide that no immovable property belonging to a member of the scheduled Tribe is lible to be attached or sold except in accordance with the permission granted by the competent authority. Prior to the sale to the private party, the property was undoubtedly attached in execution proceedings on July 13, 1963, but the order of attachment was void, being contrary to the express inhibition contained in clause 6 of Regulation 2 of 1956 read with Rule 4 made thereunder. [200E-G]

2. The auction sale is bad and invalid :

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It is elementary that what can be brought to sale in a Court sale is the right, title and interest of the judgment debtor and therefore, the auction purchaser can get nothing more than that right, title and interest. In the instant case, the appellant having become an owner of the property on account of the

private sale dated January 2, 1964 respondent 3 had no saleable interest left in the property which could be put to auction. The auction sale therefore cannot displace the title of the appellant which is the same thing as saying that as between the title of the appellant and the so called title of the auction purchaser the appellant's title must prevail. [200G-H, 201A]

Moreover, as the condition imposed by the R.D.O. regarding the price was violated by the auction sale, the auction purchaser cannot get a valid title to the property under that sale. In the private sale, the appellant purchased the property for Rs. 4,000/- and therefore the condition of the permission was complied with. But the auction sale was held in satisfaction of the decretal dues which were far less than Rs. 4,000/- the decree itself being in the sum of Rs. 1,000/- and odd and the highest bid at the auction being of Rs. 3,000/- only. [201B-C]

3. (a) The basic issue being the validity of auction sale in favour of respondent 2, no question of *res judicata* can arise. the appellant claims through the judgment-debtor and neither the latter nor the decree-holder ever disputed that he, the judgment-debtor, was a member of the Scheduled Tribe. On the other hand both of them were conscious of the situation that the property could not be sold without the sanction of the R.D.O., Nowrangpur. The decree-holder himself apprised the Executing Court of that position. The permission which was granted by the R.D.O., Nowrangpur at the instance of the appellant was produced by respondent 1 in the execution proceedings as if the permission was granted in his favour for the sale by respondent 3 of his property. The failure, therefore, of the judgment-debtor to raise any particular contention cannot operate as *res judicata*, actually or constructively, either against him or against the appellant. [201D-F]

(b) Whether "Bhotras" fall within any of the sub groups of the Scheduled Tribes enumerated in Part IX of the Schedule to the Constitution (Scheduled Tribes) Order, 1950 is a question which could not have been permitted to be raised for the first time in the Second Appeal. Much less can it be allowed to be raised in this Court in an appeal under Art. 136 of the Constitution. [200C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 453 of 1969.

(From the Judgment and Order dated 12-9-68 of the Orissa High Court in Misc. Appeal No. 208 of 1966).

*Sardar Bahadur Saharya and Vishnu Bahadur Saharya* for the appellant.

*Nemo* for the respondent.

The Judgment of the Court was delivered by

CHANDRACHUD, C.J. Respondent 1 obtained a money decree on August 18, 1962 against respondent 3 and his mother respondent 4. On June 28, 1963 respondent 1 filed an execution petition for recovering the decretal amount and prayed therein for attachment of the immovable property belonging to respondent 3. The property was attached by an order passed by the Executing Court on July 13, 1963. On November 27, 1963 respondent 1 filed an application in the Executing

**A** Court praying that permission be obtained of the Revenue Divisional Officer for sale of the property since respondent 3 to whom the property belonged was a member of the Scheduled Tribe. The permission was considered necessary by reason of the provisions contained in Clause 6 of the "Orissa Scheduled Areas Transfer of Immovable Property by Scheduled Tribes Regulation No. 2 of 1966". It provides :

**B** In execution of money decree against a member of a Scheduled Tribe no right title or interest held by him in any immovable property within any scheduled area shall be liable to be attached and sold except as and if prescribed.

**C** Rule 4 made under the aforesaid Regulation provides :

There shall be no attachment or sale of immovable property in execution of a money decree against a member of a Scheduled Tribe within any scheduled area without the written permission of the competent authority. The property at such a sale shall be sold only to a member of a Scheduled Tribe unless otherwise specifically directed in writing by the competent authority.

The Revenue Divisional Officer, Nowrangpur, was the competent authority for the present purpose.

**E** Respondent 3 who was in the meantime negotiating for the private sale of the property moved the R.D.O., Nowrangpur on June 18, 1963 for permission to sell the property to a non-Scheduled Tribe person. He obtained the requisite permission by an order dated October 23, 1963 for the sale of the property for Rs. 4,000/-. On the strength of the aforesaid permission respondent 3 sold the property to the appellant on January 2, 1964 by a registered deed of sale.

**F** A copy of the order passed by the R.D.O. was produced by respondent 1 in the Executing Court whereupon, on May 15, 1964 the property was put to sale. Respondent 2, who is the son of respondent 1 purchased the property in the auction sale.

**G** On June 22, 1964 the appellant filed an application under Order 21 Rules 89 and 90 and Sections 47 and 151 of the Code of Civil Procedure praying that the auction sale should be set aside on the ground that the attachment and the auction sale were void since they were effected without obtaining the permission of the competent authority under Orissa Regulation No. 2 of 1956. The appellant also alleged that the decree-holder had played a fraud on the Court by inducing it

**H** 23, 1963 which was passed by the competent authority at the instance of the appellant.

Respondent 2 resisted the appellant's application on the ground that he was a *bona fide* purchaser in a court sale, that the aforesaid sale was held after the competent authority had granted permission for the sale of the property and that therefore his title to the property was not liable to be displaced at the instance of the appellant.

The learned District Munsif who dealt with the matter accepted the contention of the appellant and set aside the auction sale. In Civil Miscellaneous Appeal No. 9 of 1965 filed by respondent 1, the Appellate Judge confirmed the order of the District Munsif and dismissed the appeal.

Respondent 1 then filed a second appeal in the Orissa High Court, being Miscellaneous Appeal No. 208 of 1966. Before the High Court respondent 1 raised two contentions only viz., (1) that the judgment-debtor, respondent 3, was not a member of the Scheduled Tribe and therefore the attachment and the court sale were not void; and (2) that the judgment-debtors, having failed to take objection to the attachment on the ground that they belonged to a Scheduled Tribe, were debarred from objecting to the sale of the property on the principle of constructive *res judicata*.

The High Court rejected the first contention relying mainly on the circumstance that respondent 1, the decree-holder, had accepted the position that respondent 3 whose property was being put to sale was a member of the Scheduled Tribe. The High Court however accepted the second contention on the ground that neither respondent 3 nor the appellant had taken any objection in the execution proceedings that since the former had no saleable interest in the property the auction sale could not be held or that the permission given by the R.D.O. did not authorise the sale. Being apprieved by the judgment of the High Court dated September 12, 1968, the private purchaser from the decree-holder has filed this appeal.

We are in agreement with the view of the High Court that it is not open to respondent 1, the decree-holder, to contend that respondent 3 whose property was put to sale in the execution proceedings was not a member of the Scheduled Tribe. Respondent 1 filed his execution petition for the purpose of recovering the decretal dues by attachment and sale of the property belonging to one of the judgment-debtors, respondent 3. Respondent 1 himself asked the Executing Court to secure the permission of the competent authority for sale of the property on the ground that respondent 3 whose property was to be put to sale belonged to the Scheduled Tribe. The permission from the competent authority was later obtained by the appellant, with whom respondent 3 was negotiating for a private sale of his property. The

- A** permission which was granted by the R.D.O., Nowrangpur at the instance of the appellant was produced by respondent 1 in the execution proceedings as if the permission was granted in his favour for the sale by respondent 3 of his property. Respondent 1 cannot then be permitted to dispute that respondent 3 did not belong to a Scheduled Tribe and therefore the permission of the competent authority was not needed to validate the sale.

- B** The contention that respondent 3 did not belong to a Scheduled Tribe was founded solely on the consideration that he belonged to the Bhotra tribe which is not expressly mentioned as one of the Scheduled Tribes in the schedule to the Constitution (Scheduled Tribes), Order, 1950. It may be assumed that respondent 3 is a Bhotra. But paragraph 2 of the Scheduled Tribes Order, 1950 provides to the extent material that the Tribes, or parts of, or groups within the Tribes specified in the Schedule to the Order shall also be deemed to be Scheduled Tribes. Whether Bhotras fall within any of the sub-groups of the Scheduled Tribes enumerated in Part IX of the Schedule to the 1950
- C** Order is a question which could not have been permitted to be raised for the first time in the second appeal. Much less can it be allowed to be raised before us. This appeal, like the second appeal before the High Court, must therefore be disposed of on the basis that respondent 3 is a member of the Scheduled Tribe.

- D** Upon that footing, the appellant must succeed because after the R.D.O., Nowrangpur granted permission to sell the property on October 23, 1963, the property was purchased by the appellant from respondent 3 on January 2, 1964. Prior to that sale the property was undoubtedly attached in execution proceedings on July 13, 1963 but the order of attachment was void, being contrary to the express inhibition contained in Clause 6 of Regulation No. 2 of 1956 read with Rule 4 made thereunder. Both Clause 6 and Rule 4 provide that no immovable property belonging to a member of the Scheduled Tribe is liable to be attached or sold except in accordance with the permission granted by the competent authority. Under the registered sale, Ext. 4, executed by respondent 3 in favour of the appellant, the title to the property
- E** vested in the appellant. The appellant having become an owner of the property on account of the aforesaid private sale, respondent 3 had no saleable interest left in the property which could be put to sale in the court auction. It is elementary that what can be brought to sale in a court sale is the right, title and interest of the judgment-debtor and therefore, the auction purchaser can get nothing more than that
- F** right, title and interest. The judgment-debtor not having any saleable interest in the property at all on the date of the auction sale, there was nothing that respondent 2 could get in the auction sale which was

held in execution of the money decree obtained by his father, respondent 1. The auction sale therefore cannot displace the title of the appellant which is the same thing as saying that as between the title of the appellant and the so called title of the auction purchaser, the appellant's title must prevail. It must follow that the auction sale is bad and must be set aside.

There is an additional reason why the auction sale is not valid. By the permission granted by the R.D.O., Nowrangpur on October 23, 1963 for sale of the property, one of the conditions imposed on the judgment-debtor was that the property shall be sold for a sum of Rs. 4,000/-. In the private sale, the appellant purchased the property for Rs. 4,000/- and therefore the condition of the permission was complied with. But the auction sale was held in satisfaction of the decretal dues which were far less than Rs. 4,000/-, the decree itself being in the sum of Rs. 1,000 odd and the highest bid at the auction being of Rs. 3,000/- only. As the condition imposed by the R.D.O. regarding the price was violated by the auction sale, the auction purchaser cannot get a valid title to the property under that sale.

In this view, no question of *res judicata* can arise because the basic issue in the appeal is as regards the validity of the auction sale in favour of respondent 2. The appellant claims through the judgment-debtor and neither the latter nor the decree-holder ever disputed that he, the judgment-debtor, was a member of the Scheduled Tribe. On the other hand both of them were conscious of the situation that the property could not be sold without the sanction of the R.D.O., Nowrangpur. The decree-holder himself apprised the Executing Court of that position. The failure, there, of the judgment-debtor to raise any particular contention cannot operate as *res judicata*, actually or constructively, either against him or against the appellant.

For these reasons we allow the appeal, set aside the judgment of the High Court and confirm that of the learned Subordinate Judge, Koraput, setting aside the court sale in favour of respondent 2. There will be no order as to costs.

*Appeal allowed.*

S.R.