

22nd July, 2019

Attachment of Rent (of units in their residential use) under the provisions of Code of Civil Procedure

1. Ramesh Himmatlal Shah Vs. Harsukh Jadhavji Joshi, 1975 AIR 1470

“1. This appeal in forma pauperis raises an important question of law : Is a flat in a tenant co-partnership housing society under the Maharashtra Cooperative Societies Act, 1960 liable to attachment and sale in execution of a decree against a member in whose favour or for whose benefit the same has been allotted by the society ?

...19. This right or interest to occupy is a species of property. We have to consider whether this right to the particular property is attachable and saleable in execution of the decree against the judgment-debtor....

...We, therefore, unhesitatingly come to the conclusion that this species of property, namely the right to occupy a flat of this type, assumes significant importance and acquires under the law a stamp of transferability, in furtherance of the interest of commerce. We have seen no fetter under any of the legal provisions against such a conclusion. The attachment and the sale of the property: in this case in execution of the decree are valid under the law.

24... It is contended by Mr. Chatterjee that section 60, Civil Procedure Code, does not specify that this species of property is liable to attachment. The argument, however, fails to take note of section 60 being not exhaustive as such. It refers also to any other saleable property, movable or immovable, whether the same be held in the name of the judgment-debtor or by another person on his behalf. We have held that the right to occupation of a flat is property both attachable and saleable. Specific non inclusion of a particular species of property under section 60 is, therefore, not of any consequence if it is saleable otherwise...”

A Copy of the judgment attached hereto at **page no. 2 to 11**.

2. Abdul Khaleque Vs. Medaswar Hossain, AIR 1967 Cal 56

1. The main and significant question of law raised by this second appeal is whether the intermediary's right to compensation under the West Bengal Estates Acquisition Act can be sold under a Mortgage decree at the instance of the mortgagee with whom the intermediary mortgaged the three items of properties in suit. The sale proclamation in this case under the mortgage decree relates to three items--Hems Nos. 1, 2 and 3 valued respectively at Rs. 450, Rs. 325 and Rs. 225 amounting altogether to a sum of Rs 1000.

14. This much is certain that an estate which has vested under the West Bengal Estates Acquisition Act in the State free from all encumbrances cannot be sold under this mortgage decree. The right

to compensation cannot itself be sold under this mortgage decree because the right is to get satisfaction from the compensation money under Section 73 of the Transfer of Property Act and which independently of the procedure for attachment and Receiver mentioned in the four Calcutta cases discussed above, can also be enforced through the well-recognised procedure under Order 21, Rule 46 of the Code of Civil Procedure. It lays down how a debt or share and other property not in possession of a judgment-debtor can be attached in execution of a decree and that attachment is made by a written order prohibiting, in the case of a moveable property other than a debt, or share, the person in possession of the same from giving it over to the judgment-debtor. The terms of the Calcutta Amendment in Rule 46-A are in addition to the provisions of Order 21, Rule 48 and therefore, the non-applicability of Rule 46-A to a debt secured by a mortgage is no obstacle. The prohibitory order on the Collector in this case preventing him from paying over the compensation money to the intermediary-mortgagor without leaving sufficient to satisfy the charge of the mortgagee decree-holder appears to be a sensible and practical remedy.

18. Mr. Ghosh for the appellant has also contended before me that this right to compensation is similar to a kind of right to recover mesne profits and, therefore, is not transferable. He relies in this branch of his argument on the decision of this Court in Durga Chandra Roy v. KoilashChunder Roy. (1898) 2 Cal WN 43. That decision turns on Section 6 of the Transfer of Property Act dealing with what properties can be transferred. It is not necessary in my view to deal with Section 6 of the Transfer of Property Act and its various clauses and their interpretation in respect of what properties can and what properties cannot be transferred having regard to the express provision in Section 73 of the Transfer of Property Act giving the mortgagee the right to the compensation money which are the proceeds of the mortgaged property by compulsory acquisition by the State. Where there is an express provision as in Section 73 of the Transfer of Property Act it is unnecessary and irrelevant to consider the effect of Section 6 in that context.

21. The appeal is, therefore, allowed The order and judgment of the lower appellate Court are set aside and I hold that the right to the compensation money cannot be sold under the mortgage decree. This is without prejudice to the rights of the respondent to proceed and take appropriate legal steps for satisfaction of his mortgage debt from the compensation money.

A Copy of the judgment attached hereto at **page no. 12 to 19**.

licences for that year and begin with no stock-on-hand have to pay at a higher rate. Again, if only the respondent had surrendered his surplus stocks on March 31, 1964, as ordinarily he would have had to, had he not been permitted to retain that quantity in view of his getting a fresh licence for the same premises, he would have had to pay the enhanced rate for such left-over stock. Thus, both law and logic, correct construction and commonsense, coincide in the conclusion that the Eagle Cafe Bar owner (the respondent) had to pay the higher fee on the balance of stock as on April 1, 1964. The High Court erred in its interpretation of the rules as applicable to the present situation.

11. We allow the appeal but, having regard to the fact that the sum involved is unsubstantial although the High Court regards the question of law involved as substantial, we direct that the parties do bear their costs.

(1975) 2 Supreme Court Cases 105

(Before A. Alagiriswami, P. N. Bhagwati and P. K. Goswami, JJ.)

RAMESH HIMMATLAL SHAH Appellant ;
Versus
HARSUKH JADHAVJI JOSHI Respondent.

Civil Appeal No. 1539 of 1974, decided on April 25, 1975

Co-operative Societies — Maharashtra Co-operative Societies Act, 1960 — Sections 29, 31, 47(3) — Whether contravened — Auction sale of right to occupation of a flat allottee — Whether valid — Bye-laws of the Co-operative Housing Society — Society, owner of the flats — Allotment of a flat's right of occupation whether attachable and saleable in execution of decree — Section 60, C. P. C. — Whether bar to attachment of such flat — If specific inclusion of any particular species of property necessary under Section 60 even when saleable otherwise — Section if exhaustive

The Co-operative Housing Society Limited was the owner of the flats allotted to the members of the Society who had only the right of occupation. The appellant, a decree-holder, took out against respondent judgment-debtor a warrant of attachment of flat No. 9 which was allotted to the respondent by the Society. Respondent filed a chamber summons for the dismissal of the execution petition and for setting aside the warrant of attachment and proclamation of sale on the ground that the flat being a flat in a co-operative housing society was not liable to attachment and sale and that his interest in the flat was not saleable under Section 60, C. P. C. and therefore not liable to attachment. The trial Judge dismissed the chamber summons but in appeal the Single Judge of the High Court allowed the claim and made the summons absolute by directing that the attachment and sale of the flat being illegal be set aside. A Letters Patent appeal was dismissed. The question for consideration was whether the right of the judgment-debtor who claimed the right (benami) to occupation of flat No. 9, owned by the Society, is liable to attachment and sale in execution of a decree.

Held :

(a) The right or interest to occupy is a species of property. There is no absolute prohibition in the Act or in the Rules or in the bye-laws against transfer of interest of a member in the property belonging to the Society. This species of property assumes significant importance and acquires under the law a stamp of transferability in furtherance of the interest of commerce. In the absence of clear and unambiguous legal provisions to the contrary, it will not be in

public interest nor in the interest of commerce to impose a ban on saleability of these flats by a tortuous process of reasoning. The prohibition, if intended by the Legislature, must be in express terms. There is none in the present case. The attachment and the sale of the property in this case in execution of the decree are valid under the law. (Paras 18 to 20)

(b) Now that attachment and sale have been held to be valid, it will be for the auction purchaser first to obtain membership of the Society, and the Court before confirmation of the sale will insist upon his membership of the Society which, it would not be unreasonable to assume, will be granted by the Society unless there are cogent and relevant reasons for not doing so. The fact that at the time of auction-sale the purchaser was not a member of the Society would not in law affect the saleability or prior attachment of the property in execution of a decree. If ultimately the Society turns down his application for membership, it is up to him to take such course of action as available under the law. Such a remote contingency per se will not make the particular right of the judgment-debtor in the flat non-attachable or non-saleable. (Paras 23 & 24)

(c) Section 60, C. P. C. refers also to any other saleable property. The right to occupation of a flat is property both attachable and saleable. Specific non-inclusion of a particular species of property under Section 60 is, therefore, not of any consequence if it is saleable otherwise. The section is not exhaustive as such. (Para 25)

Appeal allowed

I-M/2492/C

Advocates who appeared in this case :

B. B. Zaiwala, D. R. Zaiwala, K. J. John and J. B. Dadachanji, Advocates, for the Appellant;

P. K. Chatterjee, Senior Advocate, A. C., (D. P. Mukherjee, Advocate, A. C. with him), for the Respondent.

G. L. Sanghi, Senior Advocate (H. K. Puri, Advocate, with him), for Shri Suryakant N. Sangani (Purchaser).

The Judgment of the Court was delivered by

GOSWAMI, J.—This appeal in forma pauperis raises an important question of law : Is a flat in a tenant co-partnership housing society under the Maharashtra Co-operative Societies Act, 1960 liable to attachment and sale in execution of a decree against a member in whose favour or for whose benefit the same has been allotted by the Society ?

2. We may briefly note the facts : The appellant is the decree-holder. He obtained a money decree against the respondent judgment-debtor and took a warrant of attachment of Flat No. 9 of Paresh Co-operative Housing Society Limited at Santacruz, Bombay. This flat (described as ownership flat in common parlance) was attached on August 8, 1970 and a warrant of attachment was served on the judgment-debtor while he was in jail in Rajkot. In due course a sale proclamation was also issued in respect of the flat while the judgment-debtor was yet in jail. At this stage of the proceedings, the judgment-debtor's brother, Hasmukh J. Joshi (for brevity Hasmukh) took out a chamber summons challenging the execution on the ground that the flat did not belong to the judgment-debtor but belonged to him and to the judgment-debtor's wife and that the attachment should be raised. His chamber summons was made absolute but in appeal the order was set aside and the matter was remanded. The aforesaid chamber summons was, however, finally dismissed on September 30, 1971. Hasmukh did not take any further

action against the rejection of his claim to the property. After coming out of the jail, the judgment-debtor filed a suit sometime in 1972 to set aside the decree. He, however, could not secure an order for injunction to prevent the execution of the decree and the suit is pending. The flat was offered for sale and was purchased in auction by one Bhupendra N. Shah for a sum of Rs.24,000. The sale, however, is not yet confirmed. Subsequently a new plea was taken by the judgment-debtor. This time he filed a chamber summons on March 28, 1972, praying for the dismissal of the execution petition filed by the decree-holder and for setting aside the warrant of attachment and proclamation of sale on the ground that the flat being a flat in a co-operative housing society was not liable to attachment and sale. It was also stated that he had no saleable interest in the said property under Section 60, Civil Procedure Code, and therefore, it was not liable to attachment. The Judge City Civil Court, Bombay, dismissed the chamber summons. The learned Single Judge, Bombay High Court, however, in appeal allowed the claim and made the summons absolute by directing that the attachment and sale of the flat being illegal be set aside. The appellant preferred a Letters Patent appeal before the Bombay High Court without success and the decision of the learned Single Judge was affirmed. Hence this appeal by special leave.

3. The flat in question is admittedly owned by the Paresh Co-operative Housing Society Limited (briefly the Society). Originally this flat stood in the name of one Ramesh Hariram Chande and his wife. It is not disputed before us and it has been so held by the Court in the claim case by the judgment-debtor's brother that the respondent purchased the flat benami in the name of his brother Hasmukh and his wife Shashikala. Although, therefore, the respondent is not a registered holder of the flat, it is clear that the flat is held by his brother and his wife on behalf of the respondent. This is to be noted as Section 60, Civil Procedure Code, reaches a benami holding. It may also be noted that the respondent is now fighting the case on the basis that the right to occupy the flat in question is his property which is not liable to attachment and sale. We should also note here that after the High Court invalidated the attachment and sale, the flat was purchased by one Suryakant N. Sangani (briefly Suryakant) having acquired the shares in the Society from Hasmukh and Shashikala. It is said that on the joint application of Shashikala and Suryakant, the shares were transferred to the latter on or about May 15, 1974.

4. The appeal came up for hearing earlier and when it was found that the respondent was not represented the Court issued notice to the purchaser, Suryakant, and also directed for appointment of an amicus curiae. Mr. Chatterjee has now appeared before us as amicus curiae and the purchaser has also entered appearance through Mr. Sanghi. Ultimately, however, we did not hear Mr. Sanghi, as we are concerned in this appeal only with the question of attachability and saleability which is a condition prior to the purchase of the property by Bhupendra N. Shah. Mr. Sanghi, therefore, had to retire from the appeal.

5. The point that arises for consideration in this appeal, as stated

earlier, is whether the right of the judgment-debtor, who claims the right to occupation of Flat No. 9, is liable to attachment and sale in execution of a decree. Before we proceed further it is necessary to go through the relevant provisions of the Maharashtra Co-operative Societies Act, 1960 (briefly the Act), the Maharashtra Co-operative Societies Rules, 1961 (briefly described as the Rules) and the Bye-laws of the Society. The Act was passed in the year 1961 to consolidate and amend the law relating to co-operative societies in the State of Maharashtra.

6. Section 2 of the Act contains the definitions. By Section 2(5) “by-laws’ means by-laws registered under this Act and for the time being in force, and includes registered amendments of such by-laws”. By Section 2(11) “dividend’ means the amount paid, out of the profits of a society, to a member in proportion to the shares held by him”. By Section 2(16) “housing society’ means a society the object of which is providing its members with dwelling houses”. By Section 2(19) ‘member’ means a person joining in an application for the registration of a co-operative society which is subsequently registered, or a person duly admitted to membership of a society after registration, and includes a nominal, associate or sympathiser member.

By Section 2(19)(b) “associate member’ means a member who holds jointly a share of a society with others, but whose name does not stand first in the share certificate”. By Section 2(19)(c) “nominal member’ means a person admitted to membership as such after registration in accordance with the by-laws”. By Section 2(21) “prescribed’ means prescribed by rules”. By Section 2(31) “working capital’ means funds at the disposal of a society inclusive of paid-up share capital, funds built out of profits, and money raised by borrowing and by other means”.

7. By Section 4

a society, which has as its objects the promotion of the economic interests or general welfare of its members, or of the public, in accordance with co-operative principles, or a society established with the object of facilitating the operations of any such society, may be registered under this Act :

Provided that, no society shall be registered if it is likely to be economically unsound, or the registration of which may have an adverse effect on development of the co-operative movement.

8. Chapter III of the Act deals with members and their rights and liabilities. Section 22 with which this chapter opens provides how a person may become a member. For example by Section 22(1A) subject to the provisions of Section 24, an individual competent to contract under the Indian Contract Act may be admitted as a member. By Section 23(1) : No society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefor under the provisions of this Act and its by-laws.

By sub-section (2), “Any person aggrieved by the decision of a society, refusing him admission to its membership, may appeal to the Registrar” and the decision of the Registrar under sub-section (3) shall be final. By Section 25

a person shall cease to be a member of a society on his resignation from the membership thereof being accepted, or on the transfer of the whole of his share or

interest in the society to another member, or on his death, or removal or expulsion from the society.

By Section 26,

no person shall exercise the right of a member of a society, until he has made such payment to the society in respect of membership, or acquired such interest in the society, as may be prescribed by the rules, or the by-laws of such society.

Section 28 contains certain restrictions on holding shares. Two of the material sub-sections of Section 29 which are important and with which we are concerned may be set out :

29. (1) Subject to the provisions of the last preceding section as to the maximum holding of shares and to any rules made in this behalf, a transfer of, or charge on, the share or interest of a member in the share capital of a society shall be subject to such conditions as may be prescribed.

(2) A member shall not transfer any share held by him or his interest in the capital or property of any society, or any part thereof, unless—

- (a) he has held such share or interest for not less than one year ;
- (b) the transfer is made to a member of the society or to a person whose application for membership has been accepted.

Section 31 may also be set out :

The share or interest of a member in the capital of a society, or in the loan-stock issued by a housing society, or in the funds raised by a society from its members by way of savings deposit, shall not be liable to attachment or sale under any decree or order of a Court for or in respect of any debt or liability incurred by the member ; and accordingly, neither the Official Assignee under the Presidency-towns Insolvency Act, 1909, nor a Receiver under the Provincial Insolvency Act, 1920, nor any such person or authority under any corresponding law for the time being in force, shall be entitled to, or have any claim on, such share or interest.

9. Section 47 so far as material for our purpose may be quoted :

47. (1) Notwithstanding anything in any other law for the time being in force, but subject to any prior claim of Government in respect of land revenue or any money recoverable as land revenue and to the provisions of Sections 60 and 61 of the Code of Civil Procedure, 1908,

- * * * * *
- (b) any outstanding demands or dues payable to a society by any member or past member or deceased member, in respect of rent, shares, loans or purchase money or any other rights or amounts payable to such society, shall be a first charge upon his interest in the immovable property of the society.
- * * * * *

(2) No property or interest in property, which is subject to a charge under the foregoing sub-section, shall be transferred in any manner without the previous permission of the society ; and such transfer shall be subject to such conditions, if any, as the society may impose.

(3) Any transfer made in contravention of sub-section (2) shall be void.

10. Section 165 contains the rule-making power. The last Section 167 provides that

for the removal of doubt, it is hereby declared that the provisions of the Companies Act, 1956, shall not apply to societies registered or deemed to be registered, under this Act.

11. We may now turn to the relevant Rules. By Rule 9 “when a society has been registered the by-laws of the society as approved and registered by the Registrar shall be the by-laws of the society”. Rule 10 contains classification and sub-classification of societies and we are concerned with the fifth class mentioned therein, namely, the ‘Housing Society’ which again is sub-divided into three categories and we are concerned in this appeal with the second category, namely, ‘Tenant Co-partnership Housing Society’, which is described therein as an example of “Housing Societies which hold both lands and buildings either on leasehold or freehold basis and allot them to their members”.

12. Chapter III of the Rules deals with members and their rights and liabilities. Rule 19 contains conditions to be complied with for admission for membership. Rule 24 provides for the procedure for transfer of shares. Rule 28 provides for expulsion of members and expulsion from membership may involve forfeiture of shares held by the member.

13. We may now notice some of the material bye-laws of the Society :

Bye-law 6.—All persons permanently residing in Bombay city and suburban area and who have signed the application for registration, are original members. Other members may be admitted by the General Body. Every person on applying for membership shall deposit Re.1 as entrance fee and the value of at least five shares for which he shall receive a copy of the Bye-laws. In case where an application is refused, the deposit shall ordinarily be returned.

6. (1) The General Body may admit any new members other than the promoters subject to the applicants satisfying the qualifications for membership as prescribed under the bye-laws.

(2) The General Body shall not admit members exceeding the number of tenements or plots available for allotment.

(3) The General Body alone shall be competent to allot tenements to the members on the basis of policy framed by it for such allotment.

7. (a) A person may be admitted as a nominal member on payment of Re.1 only as entrance fee for the purposes of occupying a shop/godown/garage in the society. A nominal member shall not exercise any right of membership or receive any advantage, or benefit or dividend, etc.

7. (b) A sublettee, a licensee or a caretaker may also be admitted as a nominal member of the Society on payment of Re.1 as entrance fee. Such member shall not exercise any right of membership or receive any advantage or benefit or dividend, etc.

8. (a) No person shall be admitted as a member of the Society who already owns a house, a plot or a flat in Bombay city and suburban area, in his own name or in the name of any of his dependents or of his family members, such as wife/husband, children, etc. and whose need of a house, a plot or a flat in the opinion of the General Body are not considered pressing or deserving

10. No person shall exercise the rights of a member of the Society until he is admitted as such as laid down in Bye-law No. 6 and holds not less than five fully paid shares in the Society and his name has been entered in the Register of Members.

14. Chapter VII of the Bye-laws provides for transmission of interest. Bye-law 14 contains how a nomination has to be made, how a member may nominate a person to whom his share or interest in the society or so much thereof as is specified in such nomination shall be

transferred at his decease, etc. Bye-law 15(1) provides that on receiving satisfactory proof of the death of a member, the General Body may transfer the share or the interest of the member to the person or persons nominated or if there is no person so nominated to such person as may appear to the General Body to be the heir or the legal representative of the member or to pay such a sum representing the value of such nominator's share or interest as determined in accordance with the Rule 23 of the M. C. S. Rules, 1961, deducting all sums due to the Society from the nominator

Under Bye-law 15(4) where a share or shares were issued to a member by virtue of his being a tenant or a lessee what would happen on the death of such a member is provided for.

15. Chapter XX deals with tenants. Bye-law 71 with which it opens says

no member shall be a tenant of the Society unless he subscribes to such number of shares as the Managing Committee prescribes.

71A. Whenever a member to whom a dwelling house/tenement or flat has been allotted by the society does not require it for his own use for any particular period, he may hand it over to the society for using the same in such manner as it may consider best.

71B. The Society may offer the dwelling house/tenements or flats falling vacant in its possession in terms of the provisions of bye-law No. 71(A) above, to any person in its discretion for temporary occupation for the period indicated by the original allottee on such clear understanding provided that:

- (i) It shall give preference to such person as has already been enrolled as member of the society in terms of the provisions in bye-law but who could not be allotted a dwelling house/tenement or flat by it.
- (ii) It shall enroll the person to whom the dwelling house/tenement or flat is proposed to be allotted as a nominal member if he is not already a member of the society.
- (iii) The payments received for such temporary occupation shall be credited to the account of the original allottee and be apportioned towards satisfaction of the dues and the demands of the society outstanding against him under these Bye-laws and the tenancy regulations.

71D. A member to whom a tenement is allotted shall occupy it himself and shall not assign, underlet, vacate or part with the possession of the tenement or any part thereof without the previous consent in writing of the Managing Committee.

72. No dwelling house offered on lease shall be taken by persons who are not members of the Society unless no member is willing to take it.

16. Form A to the Bye-laws contains "regulations relating to tenancies to be granted by the Society to members in respect of houses held by the Society".

17. From a review of the foregoing provisions the position with reference to the particular Society is as follows.

18. There is no absolute prohibition in the Act or in the Rules or in the Bye-laws against transfer of interest of a member in the property belonging to the Society. The only transfer which is void under the Act is one made in contravention of sub-section (2) of Section 47 [see Section 47(3)]. We have not been able to find any other provision anywhere to the same effect. In the scheme of the provisions a dichotomy

is seen between share or interest in the capital and interest in property of the Society. While Section 29(2) refers to transfer of a member's share or his interest in the capital or property of any society, Section 31 in contrast speaks of "the share or interest of a member in the capital of a society". The Act, therefore, makes a clear distinction between the share or interest in the capital and share or interest in property of the Society. We have also noticed that the Act does recognise interest in the immovable property of the Society as well [see Section 47(1)(b)]. We have seen the qualifications for membership. There is no reason to suppose that if the qualifications under the Bye-laws are fulfilled an application for membership may be rejected. It is admitted that the flat is owned by the Society and the judgment-debtor has a right or interest to occupy the same.

19. This right or interest to occupy is a species of property. We have to consider whether this right to the particular property is attachable and saleable in execution of the decree against the judgment-debtor. It is contended by Mr. Chatterjee, amicus curiae, that Section 31 of the Act completely bars attachment and sale of the said property in execution of the decree. We have already pointed out the difference in language between Section 29 and Section 31 and also made reference to Section 47(1)(b) in that connection. There is nothing in the language of Section 31 to indicate that the right to occupation which is the right to be sold in auction is not attachable in execution of the decree. There is nothing in Section 31 to even remotely include a prohibition against attachment or sale of the aforesaid right to occupation of the flat. Once Section 31 is out of the way, we are left with Section 29 wherein we do not find even a provision of prior consent for transfer of share or interest in such property. The only restrictions under Section 29(2) are that the member may not transfer his interest in the property prior to one year and the transfer is made to an existing member of the Society or to a person whose application for membership has been accepted by the Society. It is true that Bye-law 71D says that a member to whom a tenement is allotted shall not assign or underlet, vacate or part with the possession of the tenement or any part thereof without the previous consent in writing of the Managing Committee, but there is nothing to show that contravention of this bye-law makes the assignment void under the Act unlike in the case of a transfer being void under Section 47(3). There is no impediment to ratification of the assignment by the Committee particularly in view of the legal position arising out of the conjoint effect of Section 29, Rule 24 and Bye-law 9. Section 29 read with Rule 24 shows that there is no prohibition as such against transfer of a share to a member or even to a non-member if he consents to be a member and makes an application for membership by purchasing five shares as provided under Bye-law 9. Reading the aforesaid provisions there is no reason to think that there is any question of refusal of membership of the Society to a non-member if he is qualified otherwise and makes an appropriate application in which case the transfer of shares will be operative and thus the assignment of the right to occupation will hold good. Further it is significant that under Section 146(a) of the

Act, contravention of sub-section (2) of Section 47 is punishable under Section 147 of the Act. Contravention of any bye-law is, however, no offence. We, therefore, unhesitatingly come to the conclusion that this species of property, namely the right to occupy a flat of this type, assumes significant importance and acquires under the law a stamp of transferability in furtherance of the interest of commerce. We have seen no fetter under any of the legal provisions against such a conclusion. The attachment and the sale of the property in this case in execution of the decree are valid under the law.

20. Multi-storeyed ownership flats on co-operative basis in cities and big towns have come to stay because of dire necessity and are in the process of rapid expansion for manifold reasons. Some of these are : ever growing needs of an urban community necessitating its accommodation in proximity to cities and towns, lack of availability of land in urban areas, rise in price of building material, restrictions under various rent legislations, disincentive generated by tax laws and other laws for embarking upon housing construction on individual basis, security of possession depending upon fulfilment of the conditions of membership of a society which are none too irksome. In absence of clear and unambiguous legal provisions to the contrary, it will not be in public interest nor in the interest of commerce to impose a ban on saleability of these flats by a tortuous process of reasoning. The prohibition, if intended by the Legislature, must be in express terms. We have failed to find one.

21. The phenomenon of ownership of flats as contra-distinguished from personal houses has been in vogue in England as well as in the European Continent. Ownership rights over separate parts of a building are mentioned in Coke on Littleton and such "super-imposed freeholds" have existed in England in various places for a long time (see *International and Comparative Law Quarterly*, Volume VII, January, 1958, pages 36-37).

22. With regard to a flat-owner's right to dispose of his rights, it is pointed out that "the flat-owner may", in the words of a leading French commentator "sell, donate, leave by will, let or hypothecate" his right. The rights are regulated by statutes in the Continent. The German Statute, for example, allows the flat-owner's right to dispose of his property to be made subject to the consent of other flat-owners, but such consent may be refused only "for a very important reason" [Article 12(1), (2)] and the statute gives the aggrieved flat-owner easy access to the Court if a violation of this provision is alleged (see *ibid.*, page 39). Thus the trend is towards recognition of these rights.

23. Now that attachment and sale have been held to be valid, it will be for the auction-purchaser first to obtain membership of the society and the Court before confirmation of the sale will insist upon his membership of the society which, it would not be unreasonable to assume, will be granted by the Society in the ordinary course unless there are cogent and relevant reasons for not doing so. The fact that at the time of auction-sale the purchaser was not a member of the Society would not in law affect the saleability or prior attachment of the property in execution of the valid decree.

24. The judgment-debtor has a valid decree against him. Ordinarily he has to discharge his liability under the decree. He can pay the decretal amount straightaway or suffer his property to be attached and sold in execution of the decree. As an honest debtor the liability under the decree has to be discharged. Here the Society is not objecting to the attachment and sale of the property, but the judgment-debtor is. We have seen there is no absolute prohibition against transfer of a right to occupation of the flat or even to transfer a share. The auction-purchaser is presumed to know the limitations under which he has purchased the right to occupy the flat in court auction. If ultimately the Society turns down his application for membership (which of course cannot be done except for valid reasons) it is upto him to take such course of action as available under the law. Such a remote contingency, per se, will not make the particular right of the judgment-debtor in the flat non-attachable or non-saleable.

25. It is contended by Mr. Chatterjee that Section 60, Civil Procedure Code, does not specify that this species of property is liable to attachment. The argument, however, fails to take note of Section 60 being not exhaustive as such. It refers also to any other saleable property, movable or immovable, whether the same be held in the name of the judgment-debtor or by another person on his behalf. We have held that the right to occupation of a flat is property both attachable and saleable. Specific non-inclusion of a particular species of property under Section 60 is, therefore, not of any consequence if it is saleable otherwise. In the result the judgment of the High Court is set aside and the judgment-debtor's chamber summons dated March 28, 1972, stands dismissed. The appeal is allowed, but there will be no order as to costs except that the court-fee will be payable by the appellant.

26. We record our appreciation of the assistance rendered by Mr. Chatterjee as amicus curiae and also by Mr. Zaiwala, Counsel for the appellant.

(1975) 2 Supreme Court Cases 114

(Before A. Alagiriswami, P. N. Bhagwati and P. K. Goswami, JJ.)

G. V. GUNAYYA CHETTY AND ANOTHER .. Appellants ;

Versus

V. DESARATHAMIAH AND OTHERS .. Respondents.

Civil Appeal No. 1731 of 1974[†], decided on April 21, 1975

Agricultural Produce — Andhra Pradesh Agricultural Produce and Livestock Markets Act, 1966 — Section 5(1)(iv), proviso — Constitution of market committee after superseding the earlier committee — Whether governed by main part of or proviso thereof

Words and Phrases — “Reconstitute” — Meaning of

By Government notification dated October 30, 1969 the Government consti-

[†]Appeal by special leave from the Judgment and Order, dated August 27, 1974 of the A. P. High Court in W. A. No. 716 of 1973.

1964 SCC OnLine Cal 88 : AIR 1967 Cal 56

Calcutta High Court
(BEFORE P.B. MUKHARJI, J.)

Abdul Khaleque ... Appellant;

Versus


Medaswar Hossain ... Respondent.

A.F.A.O. No. 137 of 1960
Decided on December 18, 1964

JUDGMENT

1. The main and significant question of law raised by this second appeal is, whether the intermediary's right to compensation under the West Bengal Estates Acquisition Act can be sold under a Mortgage decree at the instance of the mortgagee with whom the intermediary mortgaged the three items of properties in suit. The sale proclamation in this case under the mortgage decree relates to three items—items Nos. 1, 2 and 3 valued respectively at Rs. 450, Rs. 325 and Rs. 225 amounting altogether to a sum of Rs. 1000.

2. The facts giving rise to this question of law may be briefly stated at the outset. The mortgage in this case is dated 17th August, 1934. The mortgagor failed to pay the debt and a suit was brought by the mortgagee upon that mortgage. A preliminary mortgage decree was passed on the 20th March, 1950. It was followed by the final decree for sale on the 18th March, 1952. The execution of the mortgage decree started on the 31st July, 1953, and the dues to the mortgagee-decree-holder were calculated to be Rs. 911-5-3 p. Thereafter, the significant event that took place was the nationalisation of lands. On the 15th April, 1955 the estates vested in the State of West Bengal under the West Bengal Estates Acquisition Act, 1953. The result was that the mortgaged properties in this suit could no longer be sold under the mortgage decree. What the mortgagee-decree-holder did was to make an application on the 12th November, 1956 to sell

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the mortgagor's right to compensation that was payable to the mortgagor under that Act. On the 30th November, 1956 the sale proclamation was issued, as I have said, stating that what was to be sold was "sale of the right to compensation" valued at the said three figures of Rs. 450, Rs. 325 and Rs. 225. Then began the legal battles. The present appellant is the 5th judgment-debtor Abdul Khaleque. He filed an application under Section 47 of the CPC taking the point that since the land vested in the State of West Bengal the mortgagee-decree-holder could not put the disputed properties to sale any more and that the decree-holder was not entitled to put to sale the right to the entire compensation. It was also contended in that application that the decree-holder had not adopted the right procedure for sale of the right to compensation. It was contended that the right to compensation could not be sold under the law. The learned Munsif who dealt with that application, under Section 47, rejected it. The judgment-debtor appealed to the District Judge. The learned District Judge dismissed the appeal. From that decision the present appellant filed this Second Appeal raising the question stated above. The learned District Judge records the fact that no specific sum of money has reached the hands of the Collector on account of compensation for

the disputed properties and in fact the amount of compensation has not not been fixed. That was the record of fact on the 30th March, 1960 when the lower appellate Court dismissed the appeal.

3. I do not know of any decided cases which have held or decided that a right to compensation or to get some money can be sold. Reliance has been placed on four decisions of this Court.

4. The first decision is in *Re: Cooch, Behar Bank Ltd.*, 62 Cal WN 911 holding that Section 26(1) of the West Bengal Estates Acquisition Act, 1953, exempts 50 p.c. of the compensation money from being attached in execution of a decree and that Section 26(3) of that Act puts a restriction upon the decree-holder to realise the decretal dues by execution by providing that all sums recoverable under an order of attachment shall be deducted from the amount of compensation money payable in non-negotiable bonds under sub-section (2) of Section 23. In other words, no execution can be levied on the amount of compensation which is paid or payable in cash according to the table laid down in S. 23. It is also held in that decision that ad interim payments made under Sections 12(1) and (2) of the Act are immune from attachment or process of execution. It is observed in that decision that Section 78(2) of the Transfer of Property Act was contrary to the scheme and provisions of the West Bengal states Acquisition Act in certain respects; viz., (1) the latter Act provides for 50 p.c. of the ??? money being available to the ??? for satisfaction of his dues and (2) ??? distinction between a mortgage debt or any debt is made in the latter Act. On appeal, that decision was reversed and the judgment of the appellate Court is reported in 67 Cal WN 498 *Cooch Behar Bank Ltd. v. J.N. Ghosh*. The appeal Court came to the decision that Section 26(1) of the West Bengal Estates Acquisition Act did not prevent the mortgagee decree-holder from recovering the mortgage money out of the compensation money awarded in respect of the mortgaged property. The principle on which the appeal Court proceeded was that when properties were compulsorily acquired and compensation was paid, the mortgage shifted and attached to the compensation money and the mortgagee's right to have recourse to the compensation monies is in no way abrogated or fettered by the provisions of sub-section (1) of Section 26 of the West Bengal Estates Acquisition Act. It is also held by the appeal Court in that case that Section 26(3) of the West Bengal Estates Acquisition Act did not protect an ad interim compensation money from the mortgage claim and the mortgage rights shifted and attached also to the ad interim compensation money and a Receiver might be appointed in respect of such compensation monies.


5. The next case on which reliance is placed is *Dhirendra Nath De v. Naresh Chandra Ray* reported in 62 Cal WN 569 : (AIR 1956 Cal 458). It is held there that

"where property subject to mortgage or charge undergoes transformation, the mortgage or charge attaches to the form it has taken after the transformation. Accordingly where the property, on which charge is sought to be created, has ceased to exist and its place has been taken by the compensation money which is payable, there can be a decree declaring a charge on the compensation money that becomes payable."

6. The other case is another Bench decision of this Court in *Nirmala Sundari Dasi v. Sm. Mrinalini Dasi*, (1959) 68 Cal WN 869. The ratio of that decision is that there is nothing in the Estates Acquisition Act which destroys in any way the charge which the charge-holder now has over the compensation money or which affects the right of the charge-holder to obtain payment of his dues out of such compensation money. It points out that the order for the appointment of a Receiver cited there in that case was not an order of attachment and that the right to obtain payment of the money secured by the mortgage need not follow the process of attachment. In other words, attachment is not the only pro cess by which compensation money can be realised by

the mortgagee. The appeal Court in that case came to the conclusion that the compensation money could be made available to the mortgagee by appointment of a Receiver. It also disapproved the decision reported in (1958) 62 Cal WN 911.

7. Now, all these four decisions do not help the respondent in this case. They do not say that the right to compensation can be sold under a mortgage decree. The consequence

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which follows from the above decisions is that the mortgagee has a right to satisfy the debt from the compensation money. In so doing, he does not need to go through the process of attachment, and can realise his claims by the appointment of a Receiver. That is not saying that the right to compensation can be sold as an ordinary saleable property under a mortgage decree.

8. A recent decision of the Supreme Court seems to me to be against the contention of the respondent and in favour of the appellant. That decision is *Krishna Prasad v. Gouri Kumari Devi*, reported in AIR 1962 SC 1464. That decision arises out of Bihar Land Reforms Act. The Supreme Court there observes at page 1470 as follows:

“In the present case, the mortgaged property cannot be sold because it has vested in the State free of encumbrances, but in lieu of the mortgaged property, the respondent has become entitled to certain compensation amount and the appellants are given the statutory right to receive the amount due to them from the said compensation amount under Section 24(5). This provision is somewhat similar to the provisions of Section 73(2) of the Transfer of Property Act which provides inter alia, that where the mortgaged property is acquired under the Land Acquisition Act, or any other enactment for the time being in force providing for the compulsory acquisition of immovable property the mortgagee shall be entitled to claim payment of the mortgage money, in whole or in part, out of the amount due to the mortgagor as compensation in a sense, the compensation amount payable to the respondent may prima facie be treated to be like a security substituted in the place of the original mortgaged property under Section 73(2) of the Transfer of Property Act. However, that may be, the terms of the decree require that the appellants must first seek their remedy from the said compensation amount before they can proceed against the non-mortgaged property of the respondent. The relevant directions in the decree do not justify the appellant's contention that because the mortgaged property has vested in the State, they are entitled to execute the personal decree without taking recourse to the remedy available to them under Section 24(5) of the Act.”

9. Now the remedy to which reference was made by the Supreme Court under Section 24(5) of the Bihar Land Reforms Act, may now be seen. That statutory provision reads, inter alia, as follows:

“In the case where the interest of a proprietor or tenure-holder is subject to a mortgage or charge, the compensation shall first be payable to the creditor holding such mortgage or charge and the balance, if any, shall be payable to the proprietor or tenure-holder concerned.”


10. That is the reason why this provision was described by the Supreme Court as somewhat similar to Section 73 of the Transfer of Property Act. Section 78 of the Transfer of Property Act deals with the right to proceeds of compensation on acquisition. Section 73(2) of the Transfer of Property Act provides as follows:

“Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force, providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage money in whole or in part out of the amount due to the mortgagor as compensation.”

11. Now it is plain that the West Bengal Estates Acquisition Act certainly answers the description of “any other enactment for the time being in force providing for the compulsory acquisition of immovable property” as mentioned in Section 73(2) of the Transfer of Property Act. That means that the mortgagee shall be entitled to claim payment of the mortgage money in whole or in part out of the amount due to the mortgagor as compensation. That means that the mortgagee has a right to look to the compensation money for the satisfaction of his mortgage. It also says in sub-section (3) of Section 73 of the Transfer Property Act that “such claims shall prevail against all other claims except those of prior encumbrances, and may be enforced notwithstanding that the principal money on the mortgage has not become due”. In other words, what sub-sections (2) and (3) of Section 73 of the Transfer Property Act do is (1) to give the mortgagee a right to satisfy his claim out of the compensation money and (2) to preserve his priority. But then the right to the compensation money to satisfy the mortgage does not mean that such right can be sold. It is a right to get money and nothing else. The question here is “Is such right to get that money saleable under a mortgage decree?”

12. In my opinion the right to compensation cannot be sold under a mortgage decree. The mortgagor's right is preserved, but it is a new right to proceeds or to the compensation. In my view that is clearly recognised and established under Section 73 (2) and (3) of the Transfer of Property Act. A sale under the mortgage-decree is held under Order 34 of the CPC which concerns “suits relating to mortgage of immovable property”. Order 34. Rule 4 dealing with the preliminary decree in a suit for sale makes it clear expressly that

“the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect subsequent costs, charges, expenses and inter ???

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and the balance, if any, be paid to the defendant or other persons entitled to receive the same”.

13. That means, in my judgment, that the property is being sold under the mortgage decree only with a view to realise the proceeds of the sale of that mortgaged property out of which the mortgage debt has to be discharged. When there is no question of any sale of the mortgaged property but by operation of law the proceeds or compensation are available on compulsory acquisition of the mortgaged property, then no further question of sale of “immovable property” arises in terms of Order 34, Rule 4. Where the net proceeds of any sale are insufficient to pay the amount due to the plaintiff it is then only that the Court, on an application by the mortgagee, may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance as provided in O. 34, R. 6. No question of passing a personal decree for the balance arises here in this case. The charge for the mortgage has shifted to the compensation money and it is to that money that the mortgagee

has to look for the satisfaction of his mortgage-debt. A Bench decision of this Court in *Jatuni Chowdhurani v. Amar. Krishna*, (1907) 6 Cal LJ 745 clearly lays down the principle that when the property covered by the mortgage was under the Land Acquisition proceedings converted into money, the lien which was attached to the property was transferred to the compensation standing to the credit of the mortgagor in the Collectorate and the mortgagee is entitled to get in execution of a decree for sale of the mortgaged property, the money standing to the credit of the mortgagor in the Collectorate and it was there held that it was not necessary for the mortgagee to obtain a further decree under Section 90 of the Transfer of Property Act Brett, J. who delivered the judgment of the Division Bench observed as follows at pages 747-48:


“In our opinion, this contention is not sound. The suggestion seems to be that, as the mortgagor executed a mortgage after the declaration was made by Government for the acquisition of the property, he can now take advantage of his own fraud and compel the mortgagee to seek to recover the amount of the mortgage-debt from property other than that hypothecated under the mortgage-bond. In our opinion, when the property covered by the mortgage was, under the Land Acquisition proceedings, converted into money, the lien which was attached to the property was transferred to that which then represented the property, viz., the compensation standing to the credit of the mortgagor in the Collectorate; and, we can see no reason why the mortgagee in satisfaction of his decree should not be allowed to take out execution against the money in the Collectorate. The obvious object of section 88 of the Transfer of Property Act is ??? secure the payment of the mortgage debt transforming the mortgaged property into ??? and the mere fact that the mortgaged property has been changed into money by some authority other than the Court, would not, in our opinion, disentitle the mortgagee from recovering the amount of his debt out of that money, or compel him, in order to obtain satisfaction of his debt, to obtain a further decree under section 90 of the Transfer of Property Act.”

14. This also is an authority which does not suggest that the right to the compensation money is itself saleable.

15. The Allahabad High Court Full Bench in *Girdhar Lal v. Aiay Hasan Musanna*, AIR 1938 All 221 decides that where a portion of the mortgaged land is acquired by the Government under the Land Acquisition Act and compensation is awarded to the mortgagor, the principle of substituted security applies to the compensation money and the mortgagee is entitled to recover the same from the mortgagor. It is pointed out there that sub-sections (2) and (3) of section 73 of the Transfer of Property Act are intended to give the mortgagee a charge on the compensation money and the priority. In fact, the Allahabad Full Bench decided that the mere fact that mortgagee did not exercise his right to claim compensation money, before it was withdrawn by the mortgagor, did not deprive him of his original rights as mortgagee and he can even bring a suit and enforce his security as against the compensation money withdrawn by the mortgagor provided of course his suit was not barred by limitation under Article 132 of the Limitation Act. The Allahabad Full Bench also did not suggest that the right to the compensation money can itself be sold. In *Kunj Behari v. Bendudhar Panda*, AIR 1942 Pat 185(2) it is observed at p. 187 as follows:

“Particularly, in the case of a final decree for sale the Court must not direct the sale of any mortgaged property which is no longer liable to be sold under the mortgage. Lot No. 2 having already been sold for arrears of revenue free from the mortgage, there will be no sense in passing a final decree directing the sale of that property. If the property had been sold for arrears of revenue subsequent to the preliminary decree, it could not be reasonably said that the Court in passing the final decree should follow the exact terms of the preliminary decree.”

16. This much is certain that an estate which has vested under the West Bengal Estates Acquisition Act in the State free from all encumbrances cannot be sold under this mortgage decree. The right to compensation cannot itself be sold under this mortgage decree because the right is to get satisfaction from the compensation money under section 73 of the Transfer of Property Act and which independently of the procedure for attachment and Receiver mentioned in the four Calcutta cases discussed above, can also be enforced through the well-recognised procedure under Order 21, Rule 46 of the CPC. It lays down how a debt or share and other property not in possession of a judgment-debtor can be attached in execution of a decree and

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that attachment is made by a written order prohibiting, in the case of a movable property other than a debt, or share, the person in possession of the same from giving it over to the judgment-debtor. The terms of the Calcutta Amendment in Rule 46-A are in addition to the provisions of Order 21, Rule 46 and therefore, the non-applicability of Rule 46-A to a debt secured by a mortgage is no obstacle. The prohibitory order on the Collector in this case preventing him from paying over the compensation money to the intermediary-mortgagor without leaving sufficient to satisfy the charge of the mortgagee decree-holder appears to be a sensible and practical remedy.

17. The Land Acquisition Act and some other statutes also make the express provision for preserving the mortgagee's rights. In fact, section 24(5) of the Bihar Land Reforms Act, 1950 to which reference was made by the Supreme Court in the decision quoted above made the express provision for the mortgagee-tenure-holder to claim satisfaction of the mortgage-debt from the compensation money. An argument was advanced on behalf of the appellant that as there is no such provision in the West Bengal Estates Acquisition Act, therefore, the mortgagee cannot claim his right as against the compensation money. I am unable to accept that contention of the appellant because section 78(2) and (3) of the Transfer of Property Act applies and the West Bengal Estates Acquisition Act does not exclude the operation of Section 78 of the Transfer of Property Act to a situation like this. The appellant's argument that by section 3 of the West Bengal Estates Acquisition Act it is intended that, that Act shall have the effect, notwithstanding anything to the contrary contained in any other law, overrides section 78 of the Transfer of Property Act, appears to be untenable. The West Bengal Estates Acquisition Act as it expressly says shall certainly have the effect notwithstanding anything to the contrary contained in any other law. But section 73 deals with the rights of a mortgagee and transferring such rights to the compensation money and it does not in my view, deal with anything which is contrary to the West Bengal Estates Acquisition Act.


18. It is necessary also all this stage to notice another argument advanced on behalf of the appellant by Mr. Ghosh. That contention is that the right to compensation is entirely personal and individual to the intermediary under the West Bengal Estates Acquisition Act. Therefore, it is argued that as between the State and the intermediary no creditor or any right can intervene for any wrangle over the compensation money. In support of this argument reference is made by Mr. Ghosh to the definition of intermediary in section 2(1) to show that it does not include a mortgagee from an intermediary. Mr. Ghosh has taken me through the entire scheme of the West Bengal Land Acquisition Act and especially through Chapter III of the Act dealing with 'Assessment and payment of compensation' to show from such provisions as sections 16, 17 and 26 that the mortgagee is not recognised. That argument seems also to be

unsound and I am unable to accept it. Again Section 73 of the Transfer of Property Act is against this argument.

19. The appellant's argument on Section 26 of the West Bengal Estates Acquisition Act need not be considered in this appeal, first because there are Bench decisions of this Court to which reference has already been made and secondly because this is not a case of extent of the recovery of compensation money by attachment. Section 26 of the West Bengal Estates Acquisition Act is only concerned with the extent of recovery of compensation money by attachment. The point which this appeal raises is whether the right to compensation under this Act can itself be sold under a mortgage decree. On that point S. 26 gives no guidance.

20. Mr. Ghosh for the appellant has also contended before me that this right to compensation is similar to a kind of right to recover mesne profits and, therefore, is not transferable. He relies in this branch of his argument on the decision of this Court in *Durga Chandra Roy v. Koilash Chunder Roy*, (1898) 2 Cal WN 43. That decision turns on Section 6 of the Transfer of Property Act dealing with what properties can be transferred. It is not necessary in my view to deal with Section 6 of the Transfer of Property Act and its various clauses and their interpretation in respect of what properties can and what properties cannot be transferred having regard to the express provision in section 73 of the Transfer of Property Act giving the mortgagee the right to the compensation money which are the proceeds of the mortgaged property by compulsory acquisition by the State. Where there is an express provision as in section 73 of the Transfer of Property Act it is unnecessary and irrelevant to consider the effect of section 6 in that context.

21. From the practical point of view I cannot see how a right to proceed against compensation money can itself be sold. There are enormous practical difficulties. A right to compensation is a total right under the West Bengal Estates Acquisition Act. In the first place the final publication of the Compensation Assessment Roll under section 21 read with the manner of payment of compensation under Section 23 and Sections 16 and 17 of the Act dealing with the gross and nett income with its particular tables, appears to indicate that this compensation depends ultimately on two major factors: (1) deduction of dues and (2) gross and nett income. Now, it may just be possible that in a particular case an intermediary who has his own dues to the State under sections 7, 8, and 9 of the Act may actually have no particular sum of money to his credit as compensation after deduction of the debts. What then is the concrete and tangible content of the so-called right to compensation which has been advertised in the sale proclamation in the mortgage decree in this case? The attempt to put a valuation on this right to compensation by valuing the three items of properties

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which were mortgaged is both illogical and unauthorized by the statute because the compensation is not relatable to separate items of properties, as such a person's right to compensation in respect of one item of property may be considerably influenced by his possessing the income from other items of properties.

22. In that event the other items of properties and their incomes and their shares come into the picture of the calculation of the compensation money that the intermediary gets. That being so, it is not possible to separate the compensation only in respect of the mortgaged items of property. It would be grossly unfair and illegal to include the right to compensation in respect of other properties while selling the so-called right to compensation in respect of the mortgaged property. No such separation can be made in the scheme of compensation and its computation as envisaged and

laid down in sections 14, 15, 16, 17, 19, 23 and 25 of the Act. To permit in such a case and in such a context, sale of the mere right to compensation which on the facts of this case itself is indeterminate, and when at the time the sale proclamation in 1956 was made, no compensation roll had even been prepared, would be to encourage speculation and trafficking in a new species of gambling. Such a right to compensation due to its vagueness may be bought up by a handful of persons throughout the State to promote rampant speculation and the purchasers would not know what actually they are buying nor the sellers would get the value which has any relation to the reality.

23. On the authority, therefore, of the decisions noticed above and specially of the Supreme Court and for reasons stated both legal and practical, I am of the opinion that this appeal must succeed.

24. The appeal is, therefore, allowed. The order and judgment of the lower appellate Court are set aside and I hold that the right to the compensation money cannot be sold under the mortgage decree. This is without prejudice to the rights of the respondent to proceed and take appropriate legal steps for satisfaction of his mortgage-debt from the compensation money.

25. There will be no order as to costs. Let the records be sent down expeditiously.

JI/CWM/R.G.D.

26. *Appeal allowed.*

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