

ORIGINAL CIVIL.

Before Lord-Williams J.

KUNJABIHARI BASAK

v.

PULINKRISHNA RAY.*

1931

Dec. 17, 21 ;

1932

Jan. 5.

Title—Tiled hut—Execution of decree—Value of subject matter—Small Cause Court, jurisdiction of—Presidency Small Cause Courts Act (XV of 1882), ss. 18, 28, as amended by Act IV of 1906.

The Small Cause Court is competent to adjudicate on a question of title to tiled huts, arising in the execution of its decree, under section 28 of the Presidency Small Cause Courts Act, but its jurisdiction is limited by section 18 of the Act to cases where the value of the subject matter does not exceed Rs. 2,000.

Further, section 28 of the Act applies only when the judgment-debtor is, at the time of such execution, a tenant of the immoveable property to which the huts are attached.

Gunaputty Roy Agarwalla v. Thakurdye Thakurani (1) and *Khetra v. Muntaz Begam* (2) distinguished.

Ramaswami Chettiar v. Mallappa Reddiar (3) followed.

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The facts appear fully in the judgment.

H. D. Bose and *J. C. Sett* for the petitioner.

S. M. Bose, Jr. and *T. Chatterjee* for the respondent in Suit No. 10325 of 1931.

J. N. Majumdar for the respondent in Suit No. 10324 of 1931.

Cur. adv. vult.

LORT-WILLIAMS J. The petitioner has presented two petitions under section 115, Civil Procedure Code, with regard to two suits decided in the Court of Small Causes.

**In re* Small Cause Court Suits, Nos. 10324 and 10325 of 1931.

(1) (1907) I. L. R. 34 Calc. 823.

(2) (1915) I. L. R. 38 All. 72.

(3) (1920) I. L. R. 43 Mad. 760.

The petitioner holds certain lands at 28, Chittaranjan Avenue, upon which certain huts were erected. One Ata Mahomed was his tenant of the land and owned the huts erected thereon. It is stated in the petition that he was the petitioner's tenant at all material times. Prior to the 15th September, 1930, a sum of money became due to the petitioner from his tenant on account of rent and taxes. The tenant was unable to pay and it was agreed between them in writing, on the 15th September, 1930, that the tenant would not alienate the huts without the consent of the petitioner until the arrears were paid off. On the 17th December, 1930, the petitioner purchased the huts from Ata Mahomed for Rs. 3,200, made up of Rs. 1,503-14-6 on account of rent and taxes and Rs. 1,694-1-6 paid in cash. A receipt was given, but there was no conveyance. Subsequently, the huts were attached and the petitioner preferred a claim. His claim was dismissed on the ground that the huts could not be transferred without a properly registered conveyance. Thereupon, he paid off the creditor and got rid of the attachment, and Ata Mahomed agreed to execute a formal conveyance for a total sum of Rs. 3,300, the extra Rs. 100 being the amount paid to the creditor.

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Subsequently, the huts were again attached in execution of decrees passed in the two suits, which are the subject matter of the present proceedings. The petitioner preferred a claim in both suits and he alleges that the value of the huts is Rs. 3,300 or thereabout. The learned judge disallowed the claim on the ground that the conveyance was a colourable transaction meant to defraud the creditors of the judgment-debtor. The petitioner made an application for a new trial on the ground *inter alia* that the court had no jurisdiction, but this application was dismissed. The main ground of the present application is that the huts, being of the value of over Rs. 2,000, the Small Cause Court had no jurisdiction to deal with the matter.

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In accordance with the procedure in the Small Cause Court, the petitioner did not make his application for execution in the two suits, to which I have referred, but himself instituted two suits making the two decree-holders defendants. His cause of action was stated to be that the defendant had wrongfully attached the huts in execution of a decree obtained by him against Ata Mahomed, that the huts together with the land upon it belonged exclusively to the plaintiff and that the said Ata Mahomed had no interest therein, that the plaintiff is the owner of the huts by virtue of a registered conveyance, dated 25th April, 1931, from Ata Mahomed, and has been in possession by paying both owner's and occupier's share of taxes and by accepting a tenant (that is to say, a tenant other than Ata Mahomed) and receiving rent from him, that Ata Mahomed had left possession of the huts, that the plaintiff was the owner and in possession thereof in his own right, and that Ata Mahomed had no interest in the huts at the time when the attachment was effected. It will be observed that this claim in terms contradicts the statement in the petition that Ata Mahomed was the petitioner's tenant at all material times.

The memorandum of appearance, which, under the procedure of the Small Cause Court, is also a written statement, puts in issue all the allegations of the plaintiff and alleges that the conveyance, if made, was made in fraud of creditors. I can find nothing in the record to show that the attention of the court was directed to the question whether Ata Mahomed was still the tenant of the plaintiff, either of the land or of the huts or both, at the time of the attachment.

The learned judge, in his judgment, states that the only questions for decision were whether there was consideration for the conveyance and whether the conveyance was *bona fide*. Before deciding this issue, the learned judge dealt with certain points of law, which had been raised by the learned advocate for the plaintiff. He had contended that, in a claim case, all

that the court could determine was the question of possession, and ought not to go into the question of title. The learned judge said that the obvious reply to that argument was that the proceedings before him were not under Order XXI, rule 58 of the Code, but a regular suit to establish the claimant's title to the property attached, and it was upon that footing that the learned judge proceeded to deal with the case. He observed that section 28 of the Presidency Small Cause Courts Act invests the court with power to decide all questions arising in execution of decrees against tiled huts and he referred to the case of *Gunaputty Roy Agarwalla v. Thakurdye Thakurani* (1). In that case it was decided that a Small Cause Court had jurisdiction to try the question of title in tiled hut cases, and that, in executing the decree of another court transferred to it, it had the same power as it possessed in regard to its own decrees. In that case the value of the property in suit is not given, nor did the judgment turn upon any question of value. It is not an authority for the proposition that the Small Cause Court has jurisdiction to try questions of title in tiled hut cases regardless altogether of the value of the tiled huts in question. The learned judge then referred to the contention that the question whether the conveyance was in fraud of creditors cannot be investigated in a claim case but must be the subject of a separate suit. The learned judge decided against this contention and the case of *Ramaswami Chettiar v. Mallappa Reddiar* (2) is sufficient authority for his decision on this point.

At the time, apparently, no specific evidence was given about the value of the huts, nor was there any specific finding on the point, but the learned judge found that the plaintiff did pay the sum alleged to Ata Mahomed and that Ata Mahomed did owe him the balance, which, with the sum paid, amounted to the total sum of Rs. 3,300, and it is clear, in my opinion, from the judgment, that he accepted this

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figure as being approximately the value of the property in question. This view is confirmed by the judgment of the Full Bench in which they say that the debtor by selling the benefit for Rs. 3,300 against a debt of Rs. 1,500 clearly retained Rs. 1,800 for his own benefit. After coming to the conclusion, for the reasons given by him, that the conveyance was made in fraud of creditors, the learned judge held that the transfer of the huts to the plaintiff was a mere colourable transaction and did not pass a good title to the plaintiff.

The Presidency Small Cause Courts Act provides in section 18 that the court shall have jurisdiction to try all suits of a civil nature when the amount or value of the subject matter does not exceed Rs. 2,000. Section 19 (g) provides that the court shall have no jurisdiction to try suits for the determination of any right to or interest in immoveable property. There is no question that a tiled hut is immoveable property except for the purposes of section 28. Section 20 provides that the parties to a suit, in which the subject matter exceeds Rs. 2,000, may enter into an agreement in writing that the Small Cause Court shall have jurisdiction to try such suit and, if that is done, the court shall have such jurisdiction, although the subject matter exceeds the limit. Every such agreement must be filed in court and, when so filed, the parties shall be subject to the jurisdiction of the court. There is no question that no such agreement was signed or filed in this case. In my opinion, the fact that the plaintiff brought this claim in the court and that neither he nor the defendant objected to the jurisdiction and may, in a sense, be said to have waived any objection thereto, cannot give jurisdiction to the court which it had not otherwise got. The cases to which Mr. S. M. Bose referred me were cases in which the court had inherent jurisdiction, but that jurisdiction had not been assumed in a regular manner nor in the particular way laid down in the statute giving jurisdiction.

In the present case, the court has no jurisdiction, where it is a suit for the determination of any right or interest in immoveable property, nor in any suit of a civil nature where the subject matter thereof exceeds Rs. 2,000. Such jurisdiction, so far as the question of value is concerned, can only be given to it by the parties under section 20, and in the manner therein provided, and, unless and until there exists such an agreement in writing, the court has no jurisdiction, nor until it is filed can the parties be made subject to the jurisdiction of the court.

Section 28 provides that when the judgment-debtor under any decree of the court is a tenant of immoveable property, anything attached to such property, which he might before the termination of his tenancy lawfully remove without the permission of the landlord, shall for the purpose of execution of such decree, and for the purpose of deciding all questions arising in execution of such decree, be deemed to be moveable property. It is clear that this section only applies when the judgment-debtor is a tenant of immoveable property at the time of the attachment. No question of removing anything attached to such property, within the meaning of the section, could arise if he had ceased to be the tenant, and I am satisfied from the facts disclosed in the records that he had ceased to be a tenant at the time of attachment. In any case, there was no finding that he still remained a tenant at that time.

Therefore, for this reason alone, section 28 had no application to these cases, but, in my opinion, the section is further restricted, and applies only where the property attached to the immoveable property is of value not exceeding Rs. 2,000. The amendment, which gave the court jurisdiction to decide all questions arising in execution of a decree, even though the subject matter was a tiled hut, and, therefore, immoveable property, simply removed the bar contained in section 19 (g) and did not purport to remove the bar contained in section

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18. In my opinion, therefore, the court had no jurisdiction to deal with the claims put forward by the petitioner.

There only remains for me to deal with one further contention made by Mr. S. M. Bose. He referred to a decision in *Khetra v. Mumtaz Begam* (1), his argument being that the value of the subject matter, in such a case as this, is not the value of the tiled hut itself, but the value of that part of the tiled hut which would have to be sold for the purpose of satisfying the attachment. The answer to that contention is that, in the case referred to, the form of the claim was different to that in the present case. The plaintiff therein asked for a declaration that the property in suit was not liable to attachment and sale in satisfaction of the amount due to the defendant. She also prayed that her right to the property be declared. I can conceive that the difficulty which has arisen in this case might have been avoided, and the real point in issue might have been decided, if the form of the suits had been different, and if the learned judge had limited his decision to a question similar to that which was raised in the Allahabad case, but as I have pointed out both he and the litigants have gone much further. The claims, as the learned judge himself points out, amount to regular suits to establish the claimants' title to the property attached, and the form of the judgment is to declare that the petitioner had no title whatever to any part of the property in question.

For these reasons I have come to the conclusion that the decisions of the Small Cause Court cannot stand, being made without jurisdiction and must be set aside with costs.

Application allowed.

G. K. D.

(1) (1915) I. L. R. 38 All. 72.