

Before Mr. Justice Birch and Mr. Justice Mitter.

1879
April 16.

GRISH CHUNDER MUNDUL AND ANOTHER (DEPENDANTS) v.
DOORGA DOSS AND ANOTHER (PLAINTIFFS).*

Priority of Decrees—Surplus Proceeds of Sale under s. 59 of Beng. Act VIII of 1869—Durpatnidar, Decree against, after Sale of his Tenure under s. 59 of Beng. Act VIII of 1869—Suit for refund of Money paid under an Order of Court not cognizable by Small Cause Court.

A patnidar ousted to be sold the tenure of his durpatnidar, under s. 59 of Beng. Act VIII of 1869, for the arrears of rent due up to 12th April 1876. This sale took place on the 7th November 1876, and after satisfaction of the decree the surplus proceeds remained in the Collectorate to the credit of the durpatnidar. Afterwards, in December 1876, the patnidar brought another suit for the durpatni rent due in respect of the period between April and October 1876, and having obtained a decree, attached the surplus proceeds in the Collectorate, which were at the same time attached by two other holders of ordinary decrees.

Held, that the decree of the patnidar, although for rents of the current year, had no priority over the other decrees; and that the surplus proceeds of the sale of the durpatni tenure formed part of the assets of the late durpatnidar, and were not hypothecated to the patnidar for the rent of the year current.

Held also, that a suit to recover a refund of monies paid under an order of Court is not cognizable by a Court of Small Causes.

In this case, two brothers, the plaintiffs Doorga Doss Baboo and Modun Mohun Baboo, were the patnidars of a certain taluk, of which, till the auction-sale afterwards mentioned, the defendant Nobin Chunder Adhicari was the durpatnidar.

In execution of a decree obtained by the plaintiffs for arrears of the durpatni rent up to the end of Choitro 1282 (or the 12th April 1876), the durpatni tenure of Nobin Chunder Adhicari was sold at auction on the 7th November 1876 for Rs. 1,471 at an execution-sale held under s. 59 of Beng. Act VIII of 1869;

From the sale-proceeds at this sale, the decretal amount, Rs. 211-1-6, was realized by the plaintiffs, and the surplus,

* Appeal from Appellate Decree, No. 1699 of 1878, against the decree of Baboo Kally Prosunno Mookhopadhy, Officiating Second Subordinate Judge of East Burdwan, dated the 10th August 1878, reversing the decree of Baboo Chunder Coomar Doss, Munsif of Bood-Bood, dated the 11th March 1878.

amounting to Rs. 1,259-14-6, remained in deposit in the Collectorate to the credit of the defendant Nobin Chunder Adhicari.

Afterwards, on the 5th December 1876, the plaintiffs obtained another decree for Rs. 929-6 against the defendant Nobin Chunder Adhicari, in a suit for the durpatni rent due in respect of the period between April and October 1876, and, in execution of this decree, attached the surplus proceeds of the sale of the 7th November 1876, which was then still lying in the Collectorate.

Simultaneously with this attachment the defendants Grish Chunder Mundul and Pran Krishna Mundul caused the same surplus proceeds to be attached in execution of two money-decrees held by them.

On the 13th April 1877, the Court distributed the entire surplus proceeds rateably among the three decree-holders, namely, the plaintiffs and the defendants Grish Chunder Mundul and Pran Krishna Mundul, giving the plaintiffs Rs. 556-9-6 as the sum due to them, and the remainder, in proportion to the amounts of their decrees, to the defendants Grish Chunder Mundul and Pran Krishna Mundul. The plaintiffs, being dissatisfied with the principle of distribution that had been adopted by the Court, instituted the present suit to recover Rs. 372-12-6, being the difference between Rs. 929-6, the amount of their decree, and Rs. 556-9-6, the amount that had been adjudged to them by the Court. The basis of the plaintiffs' suit was, that they, as holders of a decree in a suit for the rents of the durpatni for the current year, were entitled to be paid in full out of the surplus sale-proceeds of the tenure, which, if it had not been sold, would by law have been hypothecated to them to secure the rents for which they had obtained a decree.

The Court of first instance dismissed the plaintiffs' suit. The lower Court of appeal gave the plaintiffs a decree.

From this decision the defendants appealed to the High Court.

Baboo *Rash Behary Ghose* and Baboo *Saroda Churn Mitter* for the appellants.

Baboo *Chunder Madhub Ghose* and Baboo *Nullit Chunder Sen* for the respondents.

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The judgment of the Court (BIRCH and MITTER, JJ.) was delivered by

BIRCH, J.—The facts found in this case are, that the plaintiffs obtained a decree against the defendant No. 3 for arrears of rent of a durpatni tenure due up to Choitro 1282 (April 1876), and in execution of that decree brought the tenure to sale on the 7th November 1876. The sale-proceeds amounted to Rs. 1,471, and the plaintiffs' decree for Rs. 211-1-6 was satisfied from the sale-proceeds, the surplus of Rs. 1,259-14-6 being left in deposit in the Court. Subsequently the plaintiffs obtained another decree for the rent of the tenure from Bysack to Assin 1283 (April to October 1876) against the same defendant for the first half of 1283, and in taking out execution of that decree, caused the surplus sale-proceeds standing to defendant's credit to be attached. The defendants 1 and 2 held two decrees against the same defendant, and they also attached the surplus sale-proceeds in execution of their decrees. A rateable distribution of the sum in deposit was made by the Court between the three attaching creditors, and under that distribution the plaintiffs obtained Rs. 556-9-6 as their share. They now brought this suit to recover from the other attaching creditors Rs. 372-12-6, being the difference between the amount of their decree and what was assigned to them by the rateable distribution. The Munsif dismissed the suit, holding that the plaintiffs' decree against the defendant No. 3, after the tenure had been sold at their instance, was a mere money-decree, which could give the plaintiffs no priority over other attaching creditors. In appeal, the Subordinate Judge has given the plaintiffs a decree. He says that the tenure was hypothecated for the rent payable to the plaintiffs, and that the surplus sale-proceeds of that tenure are in like manner hypothecated to the plaintiffs; that the same lien exists over the surplus value of the tenure as over the tenure itself; and that, consequently, the plaintiffs' decree for rent gives him priority over other decree-holders. By his order the defendants 2 and 3 are required to refund to the plaintiffs the amount claimed. A preliminary objection has been taken before us to the hearing of the special appeal. It is

contended, that the present suit being cognizable by a Court of Small Causes, no special appeal lies. We do not think that this contention is valid. The suit is for obtaining a refund of money taken by the defendants under an order of Court which the plaintiffs contend to be erroneous. Such a suit as this is not cognizable by a Court of Small Causes. It seems to us that the Subordinate Judge is quite wrong in saying that the tenure was hypothecated for the rent due thereon, and also in saying that upon the sale-proceeds the same lien exists as upon the tenure itself. After the tenure had been sold for the arrears accruing up to 1282 (1875), the plaintiffs could have no further lien upon it for arrears accruing subsequently. Such arrears must be regarded as a personal debt against the defaulter, to be realized from him by the usual process for the execution of decrees. The surplus sale-proceeds stand to the credit of the defaulter, and like any other assets of his are liable to be attached in execution of outstanding decrees, and to be divided rateably amongst the judgment-creditors, who have taken out execution of decrees against the same defendant and not obtained satisfaction thereof. The plaintiffs' claim to priority over other judgment-creditors, by reason of their holding a decree for arrears of rent against the person in whose name the surplus proceeds are held in deposit, is not recognised by law; they stand in no better position than others who may hold personal decrees against the judgment-debtor. The decision of the Subordinate Judge must be set aside, and the order of the Munsif, dismissing the suit, be restored, the special appeal being decreed with costs.

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GRISH CHUN-
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DOORGA Doss*Appeal allowed.*