

Before Mr. Justice Prinsep and Mr. Justice Field.

1881
July 27.

KRISTO RAM ROY (JUDGMENT-DEBTOR) v. JANOKEE NATH ROY
AND OTHERS (DECREE-HOLDERS).*

*Execution of Decree — Sale of Undertenure — Sale of other Immoveable
Property of Judgment-Debtor—Beng. Act VIII of 1869, ss. 59—61.*

A judgment-creditor, who has obtained a decree for arrears of rent due in respect of an undertenure transferable by its own title-deeds or by the custom of the country, is not bound to bring that undertenure to sale in execution before he can proceed against other immoveable property belonging to his judgment-debtor.

The case of *Desaratulla v. Nawab Nazim Nazar Ali Khan* (1), which was decided upon s. 105 of Act X of 1859, is not applicable to ss. 59—61 of Beng. Act VIII of 1869.

Doolar Chand Sahoo v. Lall Chabul Chand (2) followed.

Baboo *Gopinath Mukerjee* for the appellant.

Baboo *Gurudas Banerjee* and Baboo *Golap Chand Sircar* for the respondents.

The facts of this case sufficiently appear from the following judgments of the Court (PRINSEP and FIELD, JJ.):—

FIELD, J.—The question raised in these appeals is, whether a judgment-creditor, who has obtained a decree for arrears of rent due in respect of an undertenure transferable by its own title-deeds or by the custom of the country, is bound to bring that undertenure to sale in execution before he can proceed against the other immoveable property belonging to his judgment-debtor. There can be no doubt that if this question had to be answered under the old law, it must have been answered in the affirmative. Such is the effect of the decision in the case

* Appeals from Appellate Orders, Nos. 128, 150, 151, and 152 of 1881, against the order of Baboo Radha Krishna Sen, Additional Subordinate Judge of Hooghly, dated the 10th March 1881, affirming the order of Baboo Behari Lall Mullick, Munsif of Haripal, dated the 24th April 1880.

(1) 1 B. L. R., A. C., 217.

(2) 3 C. L. R., 564.

of *Desaratulla v. Nawab Nazim Nazar Ali Khan* (1). It is contended that this decision is still applicable. Section 61 of Beng. Act VIII of 1869 enacts as follows in its last paragraph:—

“If, after sale of any such undertenure in execution of such decree, any portion of the amount decreed remains due, process may be applied for and issue against any other property, moveable or immoveable, belonging to the debtor.” Now, this is the first provision contained in the Act which allows execution to be taken out against immoveable property, and having regard to the point of time at which the judgment-creditor is here allowed to proceed against the debtor’s immoveable property, it may well seem that it was not the intention of the Legislature to allow him to proceed against immoveable property until after the sale of the undertenure. This was in fact the construction placed upon s. 105 of Act X of 1859 by the decision to which I have just referred. But although, as I have said, the provision above quoted is the first specific provision in Beng. Act VIII of 1869 which allows process of execution to be taken out against immoveable property, there is another section in the Act which appears to have a very important bearing upon the question, that is s. 34, which enacts:—“Save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the Code of Civil Procedure.” The effect of the decision of their Lordships of the Privy Council in the case of *Doolar Chand Sahoo v. Lall Chabul Chand* (2) is, that that section extends to rent-suits the provisions of the Code of Civil Procedure concerning execution and the property which may be taken in execution; and that the result of this extension is, that a judgment-creditor, in a case such as that with which I am now dealing, has the option of proceeding either against the undertenure or against the other moveable or immoveable property of his judgment-debtor. In that case the question before their Lordships was, whether what had been sold in execution of a rent-decree was the undertenure itself or merely the right, title, and interest of the judgment-debtor. Their Lordships refer to s. 59 of Beng. Act VIII of 1869, and say:—

(1) 1 B. L. R., A. C., 217.

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“The Maharaja, if he had pleased, was authorized to apply for the sale of the tenure.” They then quote the words of that section, and proceed as follows:—“It appears, therefore, that although the Maharaja might, if he had pleased, have applied to sell the tenure in execution of his decree, he had also a power to proceed against other property of the defendant.” From this it appears to have been the opinion of their Lordships of the Privy Council, that the effect of s. 34 was, as I have already said, to give the judgment-creditor the option of proceeding to sell the under-tenure or proceeding against any other property of the judgment-debtor. It is deserving of notice that Sir Barnes Peacock, who was the Chief Justice of this Court, and who delivered the judgment in the case of *Desaratulla* (1), was one of the Lords of the Privy Council who heard the case to which I have just referred; and this fact is strong to show that the old law, as settled by *Desaratulla's* case (1), was not overlooked in putting a construction upon the new Act of 1869, which incorporated, by reference, the provisions of the Code of Civil Procedure. It, therefore, appears to us that, as the law now stands, we must take it that the decision in the case quoted upon the old s. 105 of Act X of 1859, is not applicable to ss. 59 to 61 of Beng. Act VIII of 1869. The appeals will be dismissed with costs.

PRINSEP, J.—I am of the same opinion. It appears to me that their Lordships of the Privy Council, in the judgment in *Doolar Chand Shahoo v. Lall Chabul Chand* (2) (the passage I refer to is to be found at page 564) held, that s. 34 of the Rent Act gave the Civil Courts a concurrent jurisdiction under the Code of Civil Procedure, and enabled a decree-holder, in a suit for arrears of rent, to proceed either under the general powers conferred under the Code or under the Rent Law. We must now accept the law as thus laid down. The appeals will be dismissed with costs.

Appeals dismissed.

(1) 1 B. L. R., A. C., 217.

(2) 3 C. L. R., 561.