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the latter, then the agreement rested on the limitation of liability as expressed in the bills of lading. A ship-owner insures his vessel against perils of the sea, but the destruction inflicted by winds and the waves does not include the at times equally disastrous losses brought by the carelessness or ignorance of his servants.'

"The costs of the reference have been deposited by the plaintiffs."

Mr. *Barrow* appeared for the defendant Company.

No one appeared for the plaintiffs.

The opinion of the Court (GARTH, C.J., and CUNNINGHAM, J.) was as follows:—

The Small Cause Court Judge having found as a fact that the plaintiffs in this case accepted the terms of the bill of lading, we think that we cannot do otherwise than confirm his judgment.

The defendants of course are not subject to the provisions of the Carriers Act; and they have a right to impose upon shippers any terms, however unreasonable, which the latter think proper to accept. They may thus free themselves from the consequences of their own negligence or default, however gross or wilful.

So long as the law allows one class of carriers to insist upon contracts of this kind, and the public submit to have their goods carried upon such terms, Courts of Justice are quite powerless to protect them.

Judgment affirmed.

Attorneys for the defendants: Messrs. *Barrow & Orr.*

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

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February 12.

PANYE CHUNDER SIRCAR AND OTHERS (PLAINTIFFS) *v.* HURCHUNDER CHOWDHRY AND ANOTHER (DEFENDANTS.)*

Right of Suit—Sale in Execution of Decree—Right of purchaser under previous private sale—Notice of transfer—Landlord and Tenant—Bengal Act VIII of 1869, *s.* 26.

The plaintiff purchased under a private conveyance from the registered tenant of a permanent transferable interest in land such as is described in s. 26 of Bengal Act VIII of 1869, but no notice of the transfer was

* Appeal from Appellate Decree No. 1127 of 1882, against the decree of J. M. Kirkwood, Esq., Judge of Mymensingh, dated the 31st March 1882, affirming the decree of Baboo Jogendra Nath Mukherji, Munsiff of Ghosegaon, dated the 28th February 1881.

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given to the zemindar. The zemindar subsequently brought a suit against the tenant for arrears of rent, and obtained a decree in execution, of which he caused the tenure to be sold, and himself became the purchaser. The plaintiff took proceedings under s. 311 of the Civil Procedure Code to set aside the sale, but his application was rejected on the ground, an erroneous one, that he was not a proper party to take such proceedings, and he did not appeal against the order rejecting it. *Held*, in a suit brought against the zemindar and the tenant to set aside the sale, that in the absence of fraud the suit was not maintainable. The plaintiff might have satisfied the rent decree and so prevented the sale, or he might have appealed against the order rejecting his application to set it aside; but having done neither, and the zemindar having had no notice of the transfer, the plaintiff was not entitled to treat the proceedings in the rent suit as a nullity on the ground that he was not a party to that suit.

THE plaintiffs sued for a declaration of their title as proprietors of a taluq, of which they alleged they became possessed by purchase partly from one Runa Bhina in the 12th Bhadro 1280 (27th August 1873) by private conveyance, and partly by purchase at an auction sale in execution of a decree against Lala Mahomed Mondul, and the second defendant Sher Mahomed Mondul on the 20th March 1877.

The plaintiffs alleged that the first defendant, who was the proprietor of the zemindari to which the taluq appertained, had on the allegation that it constituted the jama of the second defendant, and acting in collusion with that defendant, who had, the plaintiffs alleged, never been in possession, obtained against the second defendant, without the knowledge of the plaintiffs, an *ex-parte* decree for arrears of rent of the taluq in execution, of which decree he had fraudulently, and in an irregular manner, brought the taluq to sale on the 27th December 1879, and had himself become the purchaser. The irregularity complained of was the omission to issue any *purwana* of attachment, or notification of sale, either when the sale was originally fixed or after a postponement which took place; in consequence of which omission there had been a small attendance of purchasers, and the first defendant had purchased the property much below its value.

The plaintiffs took proceedings under s. 311 of the Civil Procedure Code, to set aside the sale, but their petition was rejected on the 23rd January 1880. They therefore brought this suit to

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have the sale declared void on the ground of fraud and irregularity, and for a declaration of their right to possession of the taluq.

The first defendant alone appeared to defend the suit. His allegations were, that the property was not worth so much as stated by the plaintiffs, and the suit had been greatly over-valued; that the order rejecting the plaintiffs' application under s. 311 was final, and the plaintiffs themselves were not the judgment-debtors, and the suit therefore not maintainable; that the plaintiffs' vendors had no right to the property, and therefore could convey none to the plaintiffs, whose names, moreover, were not registered in the *serishta* of the zemindari; that the taluq was sold for arrears of rent of the entire mahal due to the first defendant, and therefore the plaintiffs' right was extinguished.

The defendant denied that there had been any irregularity, illegality, or fraud, in the conduct of the sale at which he had purchased the taluq, which he alleged was registered in the *serishta* in the names of the second defendant and his brother Lahu Mahmud, against whom the decree, in execution of which the taluq had been sold, had been obtained.

The Munsiff found there had been no fraud by the first defendant in the proceedings against the second defendant; that the first defendant had no notice of the plaintiffs' purchase, and their names were not entered in the *serishta*; that whatever right the plaintiffs might have had was extinguished by the sale in execution for arrears of rent; and that the plaintiffs, having applied to set aside the sale under s. 311, and that application having been rejected, could not now sue to set aside the sale on the ground of irregularity. He therefore dismissed the suit, and an appeal by the plaintiffs was dismissed by the Judge.

The plaintiffs appealed to the High Court.

Baboo *Umakali Mookerjee* for the appellants.

No one appeared for the respondents.

The following judgments were delivered by the Court (McDONELL and FIELD, JJ.):—

FIELD, J.—In this case the appellant is the purchaser under a private conveyance of a taluq or tenure such as that defined in

s. 26 of Bengal Act VIII of 1869, that is, a permanent transferable interest in land intermediate between the zemindar and the cultivator. The zemindar, defendant No. 1, brought a suit for rent against defendant No. 2, who was the tenant of the tenure whose name was registered in the zemindari *serishta*. He obtained a decree, brought the tenure to sale, and himself became the purchaser. The plaintiff in this suit seeks to assert his right to the tenure, setting up a title based upon a private conveyance from defendant No. 2 alleged to have been executed before the proceedings in the rent suit. No intimation of this transfer was formally given to the landlord; and it has not been shown,—I may say attempted to be shown—that he was aware of it.

There can be no doubt that the execution sale, under which defendant No. 1 purchased, was not a sale of the tenure itself under the provisions of the rent law, but that it was a sale in execution under the provisions of the Code of Civil Procedure (Act X of 1877), and in this respect the present case differs from the Full Bench case of *Sham Chand Koondoo* v. *Brojo Nath Pal Chowdhry* (1). It is contended that all that passed by that sale was the right, title and interest of defendant No. 2; that inasmuch as the defendant No. 2 had, before the rent suit, conveyed away his interest to the plaintiff, there was no right, title or interest in him which could pass by the sale; that the title to the tenure is therefore in the plaintiff, who purchased *bonâ fide* a transferable tenure and that he must succeed in the present suit.

I may first observe that an execution sale under the provisions of Act X of 1877 is something different from an execution sale under the old Code (Act VIII of 1859). What was sold under Act VIII was "the right, title and interest of the judgment-debtor." These words were omitted from the Code of 1877, and what was sold under that Code was the property of the judgment-debtor, that is, the thing itself was sold and not the judgment-debtor's right, title and interest in that thing. The Code of 1877 contain provisions for ascertaining and defining the judgment-debtor's interest in the property about to be sold, and there was one section (313) in that Code which allowed the purchaser to have

(1). 21 W. R., 94.

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the sale set aside, if it were shown that the judgment-debtor had no saleable interest in the property. I no not think it necessary on the present occasion to determine what may be the effect of these provisions as compared with the provisions of the Code of 1859 in connection with the questions of what passes to a purchaser at an execution sale. I think that the present case must be dealt with upon its own grounds. The plaintiff, notwithstanding his own *laches*, had two courses open to him in order to save the tenure from sale. When the landlord obtained a decree for rent, he could have satisfied that decree and thus prevented the sale. He had a second course under the provisions of the Code of 1877. Section 311 of that Code provides: "The decree-holder or *any person whose immoveable property has been sold may apply to the Court*," &c., and it has been decided (see *Bhagabuti Charn Bhuttacharjee Chowdry* v. *Bisheshwar Sen* (1) and the cases there quoted) that the words "*any person whose immoveable property has been sold*" include persons other than the judgment-debtor. In the present case the plaintiff did make an application under s. 311. That application was rejected on the ground that he had no *locus standi*. It was open to him to have appealed against the order rejecting his application. There being thus two courses open to the plaintiff to prevent the sale of the tenure which he is alleged to have purchased, he did not avail himself of one of them, and by a wrong decision of an inferior Court, upon the construction of the Code, he was prevented from availing himself of the other. He has now brought a regular suit, and the question is, whether he is entitled to treat the proceedings in the rent suit, and the sale in execution as a nullity so far as he is concerned, on the ground that he was not a party to that suit. It appears to me that he is not so entitled. According to the common law, quite apart from any statutory provisions, when a tenant transfers his interest to a third person, in order to discharge himself from future liability for rent, and in order that the transferee may have the advantages of the tenancy, one or both of them must give notice to the landlord. In this country s. 26 of the Rent Law expressly imposes the duty of giving notice upon all transferees of tenures, such as are described in

(1) I. L. R. 8 Calc., 367; 10 C. L. R., 441.

that section, and the tenure in the present case is one of those tenures. The tenant, the transferror, gave no information of the transfer to his landlord, and the plaintiff, the transferee, gave no intimation of his purchase. This being so, the latter has by his own *laches* placed himself in the disadvantageous position which he now occupies. In the course of the argument the case was put to us of a decree-holder who attaches and sells in execution of his decree property which belongs not to his judgment-debtor, but to a third person, and we were asked whether it could be contended that such a sale would convey a good title. I think it could not be so contended, but that is a very different case from the case which we have now before us. When a decree-holder seeks to execute his decree against property, moveable or immoveable, it is his duty to make sure that the property which he brings to sale in execution is the property of his judgment-debtor, and, if he makes any mistake, he does so at his own peril. The circumstances of the present case are, I think, an exception to this general rule. The landlord, the decree-holder, knew that the person whom he sued was his tenant. No doubt that tenant had by law the right to transfer his tenure, but the same law cast upon the transferee the duty of giving the landlord due notice of the transfer, and unless the transferee discharged the duty so cast upon him, the landlord was not in my opinion bound to look beyond the information contained in his *serishta*, and cannot be affected with knowledge of a fact not communicated to him by the person whose duty it was to communicate it. It will be borne in mind that he had not this knowledge from any other source, and no case of fraud has been made out. In this exceptional case, therefore, the duty was, not upon the decree-holder, but upon the person who now comes into Court, and asks for redress. That person has been guilty of neglect in the transaction itself—neglect of a duty expressly imposed on him by the law—whilst the landlord, against whom he seeks redress, has committed no wrongful act, and has been guilty of no omission of duty. It appears to me, therefore, that the plaintiff is estopped by his own omission from saying in this suit as against the landlord that he had acquired a good title to the tenure. Then, there is another consideration. Section 316 of the Code provides that the sale certificate shall, so

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far as regards the parties to the suit and persons claiming through or under them, vest the title to the property in the purchaser. In the case now before us, the plaintiff claims under one of the parties to the rent suit, that is, the defendant, and I think that the provisions of this section are therefore applicable to him.

I am therefore of opinion that, although the tenure in this case was sold under the provisions of the Code of Civil Procedure and not under the special provisions of Bengal Act VIII of 1869, the plaintiff is not entitled to succeed in this suit.

We dismiss this appeal, but without costs, no one appearing for the respondent.

McDONELL, J.—In this case it is found by the Court below that the zemindar was entitled to sell the whole tenure, and the sole question we have to decide is, whether he actually sold it. Both the Courts below have found as a fact that the whole tenure was sold, that the tenure was proceeded against and regarded as liable, and that the sale proclamation and sale certificate show that the tenure was sold. Under these circumstances I do not think that we ought to interfere, although there may have been irregularities in the sale proceedings, and I would therefore dismiss this appeal.

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice Norris.

1884
March 6.

ARUT SAHOO AND ANOTHER (DEFENDANTS) *v.* PRANDHONE PYKURA (PLAINTIFF.)*

Landlord and Tenant—Occupancy of homestead land—Right of landlord to determine tenancy.

The mere record of the name of a tenant, who is found in occupation of a particular piece of land, in Settlement proceedings, and of the rent payable by him, does not invest him with any permanent title to hold it.

Where an estate, at one time the property of the Government, was as a *khas* mehal settled ryotwari for a period of 30 years from 1247, and where in such Settlement *A* was recorded as tenant of the land at a stated rent, *Held* that the Court was not bound to presume that the origin of *A's* title was a grant to continue in permanent possession.

* Appeal from Appellate Decree No. 589 of 1883, against the decree of W. Wright, Esq., Subordinate Judge of Cuttack, dated 29th of December 1882, reversing the decree of Baboo Hurrey Kishto Chatterjee, Munsiff of Jajpur, dated the 31st of August 1881.