

1886 After the death of Asmedh Koer, he became the owner of the properties as heir-at-law of Asmedh Koer's husband.

KAMESHWAR  
PRESHAD  
v.  
RUN BAHADUR  
SINGH.

Then as regards the contention that the present case comes within cl. (c) of s. 244, because the respondent Run Bahadur was a party to the suit, it seems to us that it is not well founded, because, although Run Bahadur was a party to the suit, no decree was passed against him. He was successful. The claim against him was that the property in his hands was liable as having been previously hypothecated. That was the only claim brought against him in that suit, and so far as that claim was concerned, the plaintiff's suit was dismissed, and therefore, although he was a party to the suit, still the question that has arisen is not a question relating to the execution of the decree which was passed in the suit in favor of the plaintiff.

Upon these grounds we are of opinion that the lower Court is right in the view which it has taken of the meaning of cl. (c) of s. 244.

With reference to the ground which was urged under s. 561 against the order of the lower Court, it is sufficient to say that there is a clear admission on the part of Run Bahadur that he inherited properties to the extent of Rs. 5,000.

H. T. H.

*Appeal dismissed.*

*Before Mr. Justice Mitter and Mr. Justice Macpherson.*

1885  
August 27.

ASHANULLA KHAN BAHADUR (PLAINTIFF) v. RAJENDRA CHANDRA RAI, FOR SELF AND AS EXECUTOR TO THE ESTATE OF THE LATE DEBENDRA CHANDRA RAI (DEFENDANT.)\*

*Beng. Act VIII of 1869, s. 64—Landlord and Tenant—Sale of portion of under-tenure—Suit for arrears of rent.*

There is nothing in s. 64, Beng. Act. VIII of 1869, which necessarily leads to the conclusion that under that section a share of an under-tenure cannot be sold, so as to render the sale binding upon the judgment-debtor; and there is no substantial difference between the sale of a portion of an under-tenure under that section and under the Civil Procedure Code.

\* Appeals from Appellate Decrees No. 1764 and other analogous appeals of 1884, against the decree of Baboo Beni Madhub Mitter, First Subordinate Judge of Backergunge, dated the 28th of June 1884, affirming the decrees of Baboo Apurba Krishna Sen, Munsiff of Potuakhali, dated the 19th of December 1883.

Where, therefore, a plaintiff, who was the owner of a share in a zemindari, had obtained a decree against X, who held a taluk in such zemindari, for arrears of rent due in respect of such share, and in execution of such decree brought a share of such taluk to sale, corresponding with his share in the zemindari and himself became the purchaser; and where such plaintiff subsequently instituted a suit against X, who was also the owner of a *howla* and *nim-howla* under the said taluk for arrears of rent due in respect of the share of the taluk so purchased by him; and where it appeared that the sale at which the plaintiff became the purchaser was afterwards confirmed, and that he had obtained a sale certificate:

*Held*, that such suit was not liable to be dismissed, merely on the ground that the plaintiff had brought a share of an under-tenure to sale, in execution of a decree for arrears of rent under s. 64 of Beng. Act VIII of 1869 and had thereby acquired nothing by such purchase, there being nothing in that section to support such a conclusion. *Gobind Chunder Roy Chowdhry v. Ram Chunder Chowdhry* (1), and *Beily v. Hur Chunder Ghose* (2) discussed and explained.

THE suits out of which these appeals arose were suits for arrears of rent, and the facts in all being substantially the same they were tried together.

The plaintiff was the owner of a 7 annas 10½ gundas 1½ krant share of a zemindari called Tuppah Sultanabad. Under the 16-anna share of that zemindari there was a taluk named Gungadhur Siddhanto. The plaintiff alleged that one Thunda Bibi had become owner of 1½ anna share of that taluk by a *hibanama* from one Karimuddi; that another 4 annas share of the taluk belonged to Modun Narain Bhuttacharji and Tara Moni Debi and that Thunda Bibi and Haran Chandra Gungopadhya had acquired this 4-anna share by purchase and inheritance respectively; that the plaintiff having obtained decrees for arrears of rent in respect of the 1½ anna and 4 annas share of the said taluk respectively, brought those shares to sale and himself purchased the 5½ annas share of the taluk, which was situated within the 7 annas 10½ gundas 1½ krant share of the zemindari Tuppah Sultanabad belonging to him, or in other words that he had purchased the 7 annas 10½ gundas 1½ krant share of the 5½-anna share of Thunda Bibi and Haran Chandra Gungopadhya treating it as 16 annas; that the defendants held under-tenures under the said taluk, and as the rents

1835

ASHANULLA  
KHAN  
BAHADUR  
v.  
RAJENDRA  
CHANDRA  
RAI.

(1) 22 W. R., 421.

(2) I. L. R., 9 Calo., 722.

1885

ASHANULLA  
KHAN  
BAHADUR  
v.  
RAJENDRA  
CHANDRA  
BAL.

due to the plaintiff's share in respect of those under-tenures were not paid these suits were instituted for recovering those arrears of rent.

The defendants in all the suits contended that the suits could not be maintained, inasmuch as the rent in respect of the plaintiff's alleged share were never collected separately, and the plaintiff's co-sharers in the taluk were not made parties, and that the plaintiff had obtained no right to the taluk mentioned in the plaints, inasmuch as his purchase was invalid; they also raised several other defences to the suits which were immaterial for the purpose of this report and which were not gone into by the lower Courts.

The Munsiff held that the plaintiff's purchase of the share in the taluk was invalid, and that the suits could not be maintained as the plaintiff's co-sharers had not been made parties, and he accordingly dismissed the suits.

The Subordinate Judge confirmed the decrees of the lower Court upon grounds which sufficiently appear in the judgment of the High Court.

The plaintiff now appealed against those decrees.

The *Advocate General* (The Hon. G. C. Paul), Baboo *Rasbehari Ghose*, Baboo *Srinath Banerjee*, Baboo *Basunt Cooman Bose* and Baboo *Kuloda Kinkar Roy*, for the appellant.

Baboo *Durga Mohan Das* and Baboo *Bhobun Mohan Das*, for the respondents.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows :

These appeals will be governed by one judgment. It is alleged in the plaint that the plaintiff is the owner of a zemindari to the extent of seven annas and odd gundas; that within that zemindari there is an ousut taluk called Gungadhur Siddhanto; that the defendant Thunda Bibi and another person held one anna five gundas, and four annas respectively of this ousut taluk; that the plaintiff brought two suits for rent due on account of his share in the zemindari from the holders of the two aforesaid shares respectively; that he obtained decrees, and in execution

of those decrees he brought to sale the share of the ousut taluk corresponding with his share in the zemindari, and himself became the purchaser. The plaint further alleges that, subordinate to this ousut taluk Gungadhur Siddhanto, is a *howla*, and there is also a *nim-howla*, subordinate to the *howla*, both belonging to Thunda Bibi. It is further alleged in the plaint that the whole rent payable on account of the *nim-howla* was Rs. 112, and the plaintiff's share out of it is Rs. 17-6; but this share of the rent, the plaintiff has been collecting separately, and that the defendant Thunda Bibi having defaulted to pay the aforesaid rent in the years 1287, 1288 and 1289, the present suit was brought to recover the same.

Various objections were taken in the written statement, but it is not necessary to refer to them in detail now.

The Subordinate Judge has dismissed the appeals preferred against the Munsiff's judgment dismissing the plaintiff's suits, upon the ground that, as the plaintiff brought a share of the ousut taluk to sale, in execution of his decrees for arrears of rent, under s. 64 of Beng. Act VIII of 1869, and as under that section a share of a tenure could not be brought to sale, the plaintiff's purchase is invalid. The Subordinate Judge therefore dismissed the plaintiff's suit on the ground that by his purchase he has acquired no title to any share of the ousut taluk, and in support of his decision has referred to the two cases of *Gobind Chunder Roy Chowdhry v. Ram Chunder Chowdhry* (1), and *Reily v. Hur Chunder Ghose* (2). He has further relied upon the language of s. 64 of the Rent Act which runs as follows: "If a decree is given in favor of a sharer in a joint undivided estate, dependent taluk, or other similar tenure, for money due to him on account of his share of the rent of an under-tenure situate in such undivided estate, taluk, or tenure, no order for the sale of such under-tenure in execution of such decree shall be made unless and until all moveable property (if any) which such judgment-debtor may possess within the jurisdiction of the Court in which the suit was instituted, shall have been seized and sold in execution of such decree, and the sale of such property, if any, shall have proved insufficient to satisfy the

1885

ASHANULLA  
KHAN  
BAHADUR  
v.  
RAJENDRA  
CHANDRA  
RAI.

(1) 22 W. R., 421.

(2) I. L. R., 9 Calc., 722.

1885

ASHANULLA  
KHAN  
BAHADUR  
v.  
RAJENDRA  
CHANDRA  
RAI.

judgment. In such case such under-tenure, if of the nature described in s. 59, may be seized and sold in execution of such decree, according to the ordinary procedure of the Court and not in the manner provided in the said section, and every such sale shall have such and the same effect as the sale of any immoveable property sold in execution of a decree not being for arrears of rent payable in respect thereof."

In this case the plaintiff, after the sale was confirmed under the provisions of the Code of Civil Procedure, obtained a sale-certificate. According to that sale-certificate, he has a valid title as regards the share sold, against the judgment-debtor whose property was sold. Although s. 64 speaks of the sale of the whole under-tenure, it does not appear to us to follow from it that the sale of a portion of an under-tenure would not be binding between the purchaser and the judgment-debtor, whose property is sold under that section. There is no question that if this sale had taken place under the provisions of the Code of Civil Procedure, and if no reference had been made to s. 64, the sale would have been valid. But we fail to see any substantial distinction between the sale of a portion of an under-tenure under the Code of Civil Procedure and under s. 64 of the Rent Act. In both cases the same formalities have to be gone through. It appears to us that there is nothing in the language of s. 64 which necessarily leads to the conclusion that under that section a share of an under-tenure could not be sold so as to render the sale binding upon the judgment-debtor. The cases cited do not support the view of the Subordinate Judge. In the case of *Gobind Chunder Roy Chowdhry v. Ram Chunder Chowdhry* (1), the question at issue between the parties was whether the purchaser of a certain share of an under-tenure acquired such a right under his purchase as would entitle him to hold that share free from the payment of rent to the superior holder. The plaintiff in that case was the purchaser of a fractional share, and it is stated in the judgment that the defendant having obtained a decree against him, (that is the plaintiff) for rent, the latter brought that suit in order to have it declared that he was not liable to pay any rent. Couch, C.J., in delivering the judgment of the Court, says: "If

(1) 22 W. R., 421.

a person chooses to purchase part of an under-tenure he must take his position as being jointly liable for the rent with the other under-tenants." So what was decided in that case was not that the purchase was invalid as between the purchaser and the judgment-debtor, but that by his purchase the plaintiff was not entitled to hold the share purchased, rent-free.

1885

ASHANULLA  
KHAN  
BAHADUR  
E.  
RAJENDRA  
CHANDRA  
RAI.

In the case of *Reily v. Hur Chunder Ghose* (1), it was decided that the purchaser of a share of a tenure does not acquire the property free from encumbrances. The words used are: "It has been established by a number of decisions in this Court that a purchaser under s. 108, Act X of 1859, which corresponds to s. 64, Bengal Act VIII of 1869, acquires the judgment-debtor's rights and interests only."

This case, far from being an authority in support of the view of the law taken by the Subordinate Judge, seems to us to lay down that a purchaser of a portion of a tenure acquires the judgment-debtor's rights and interests only. We are unable to agree with the Subordinate Judge that under the purchase mentioned in the plaint, the plaintiff has acquired no title in the ousut taluk. That being the sole ground of the decision of the lower Courts, we think that these cases must go back to the Munsiff in order that all the other points arising in the cases may be disposed of.

We think it right to notice an objection that was taken on behalf of the respondent. It was urged that in this case the rent was payable not only to Thunda Bibi, whose rights and interests the plaintiff has purchased in the ousut taluk, but also to other persons not parties to the suit, that is to say that the rent of the *howla* and *nim-howla* was payable to Thunda Bibi and her co-sharers in the ousut taluk. We find that an objection was taken in the written statement to this effect. With reference to the facts stated above the allegations in the plaint are not clear. In certain analogous cases the finding of the Subordinate Judge upon the evidence is that there was no separate payment of rent in respect of that share of Thunda Bibi which was sold, and in respect of the share of the same lady which was not sold. If that finding is correct, it would

(1) I. L. R., 9 Calc., 722.

1885  
 ASHANULLA  
 KHAN  
 BAHADUR  
 v.  
 RAJENDRA  
 CHANDRA  
 RAI.

be in conflict with the statement made by the defendants in these cases. In their written statement they say that their share of rent was payable not only to Thunda Bibi but also to other persons her co-sharers in the ousut taluk. This point will have to be gone into on remand, if it really arises between the parties. If the Court finds that there is no other co-sharer to whom the rent of the *howla* and *nim-howla* was payable, but that the entire rent was payable to Thunda Bibi, then the plaintiff's suit would not be liable to any objection. But it would be necessary to apportion the rent of the subordinate tenure between the purchaser and Thunda Bibi, and after apportionment of the rent, the plaintiff would be entitled to his proportionate share. But if the Munsiff finds that the rent of the *howla* and *nim-howla* was payable not only to Thunda Bibi but also to other persons, then the cases would be open to the objection of defect of parties.

Costs will abide the result.

H. T. H.

*Appeal allowed and case remanded.*

*Before Mr. Justice Cunningham and Mr. Justice O'Kinsaly.*

RAJANIKANTH NAG RAI CHOWDHURI (PLAINTIFF) v. HARI  
 MOHAN GUHA AND OTHERS (DEFENDANTS.)\*

1885  
 December 22.

*Transfer of Property Act (IV of 1882), s. 135—Right of Suit—Suit to set aside a document—Actionable claim.*

The co-sharers of a Hindu family, one of whom was a minor, owned certain immoveable property in Munshigunge near Dacca. In 1873 a perpetual lease of this property, executed by all the co-sharers except the minor, was granted to certain persons hereinafter called the lessees. On the minor's behalf the lease was executed by his elder brother as guardian of the minor. In May 1882, the minor, who had previously attained his majority, sued the lessees and his co-sharers for a declaration of his right to and for possession of his share in the said property, alleging that the perpetual lease was not binding on him. On the day after the institution of the suit the plaintiff sold all his interest therein to A for Rs. 600.

*Held*, that A's purchase was an actionable claim within the meaning of s. 135 of the Transfer of Property Act (IV of 1882.)

\* Appeal from Appellate Decree No. 2369 of 1884, against the decree of Baboo Mati Lal Sirkar, Second Subordinate Judge of Dacca, dated the 11th of September 1884, affirming the decree of Baboo Chandra Mohan Mockerkji Munsiff of Munshigunge, dated the 24th of September 1883.