

Before Mr. Justice Prinsep and Mr. Justice Beverley.

1887
January 19

KOILASH CHUNDER ROY AND ANOTHER (DECREE-HOLDERS), *v.* JODU
NATH ROY AND OTHERS (JUDGMENT-DEBTORS),^{*}

*Bengal Tenancy Act, s. 148 (h)—Decree for arrears of rent, Assignment of—
Execution of decree by Assignee.*

The fact that an assignment of a decree for arrears of rent was made before the Tenancy Act will not protect from the provisions of s. 148 (h) an assignee who proceeds to execution afterwards; but execution cannot be refused where, before that Act came into operation, the assignment had been recognised by a court of execution under s. 232 of the Civil Procedure Code.

A DECREE for arrears of rent was obtained by Joykali and Srish Chunder Sirkar Chowdry. On the 13th June, 1885, Koilash Chunder Roy obtained an order from the Civil Court in the proceedings in execution of that decree, recognising him as assignee of the rights of Srish Chunder Sirkar Chowdry, to a four-anna share. In September, 1885, Joykali applied to execute the entire decree. In consequence of an informality that application was returned for amendment, and finally it was not presented and granted by the Court until the 10th November. In the meantime the Bengal Tenancy Act came into operation on the 1st November. On the 27th March Koilash petitioned to the Civil Court stating that he and Moti Lall had, in June, 1884, purchased the rights of Joykali, and asked that their names might be substituted in her place so that they might be allowed to execute the decree. The Subordinate Judge disallowed the objections of the judgment-debtors, which were raised under s. 148 (h) of the Bengal Tenancy Act, but the District Judge on appeal held that execution could not proceed in consequence of the assignments which had been made by the original decree-holders. He accordingly ordered the attachment of the property to be withdrawn and the sale to be stayed *sine die*. The decree-holders appealed to the High Court.

* Appeal from Order No. 373 of 1886, against the order of J. Crawford, Esq., District Judge of Nuddea, dated the 14th of August, 1886, reversing the order of Baboo Nuffer Chunder Bhutto, Subordinate Judge of that district, dated the 7th of August, 1886.

Baboo *Bhobani Churn Dutt* for the appellants.

Baboo *Gurudas Banerjee* and Baboo *Girija Sunker Mozumdar*
for the respondents.

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The judgment of the Court (PRENSEP and BEVERLEY, JJ.), after setting out the facts as above, proceeded as follows :—

Section 148 (*h*) declares that, “ notwithstanding anything contained in s. 232 of the Code of Civil Procedure, an application for execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord’s interest in the land has become, and is vested in him.” In this case it is admitted that the exception stated does not exist. We have, therefore, to consider, first, whether the assignment of the rights of Srish Chunder, which was admitted by the Court of execution under s. 232 before the Bengal Tenancy Act became law, entitles the assignee to proceed to execution in respect of the rights of the assignor; next, whether the assignment of the rights of Joykali, said to have been made before the operation of the Bengal Tenancy Act but not notified to, or recognised by, the Civil Courts until after that Act, entitles the assignee to the assistance of the Court in executing the decree; and, lastly, whether the application for execution made by Joykali can proceed.

Now, in respect of the rights of Srish Chunder, we are of opinion that, inasmuch as the Civil Court, by an order regularly passed under s. 232 before the Bengal Tenancy Act came into operation, permitted Koilash Chunder to execute the decree as one of the decree-holders, the Bengal Tenancy Act does not apply. The effect of this order, in our opinion, is to substitute Koilash Chunder as a decree-holder in the place of Srish Chunder, the original decree-holder, and after that order was made under s. 232 it is not for the Court executing the decree to consider any circumstances under which it was made. The application of s. 148 (*h*) is not retrospective so as to affect that order. It contains rather a prohibition to the Courts to abstain from granting any application for execution of a decree for arrears obtained by a landlord which may be made by an assignee unless under exceptional circumstances. But the mere fact that any assignments were made before the Bengal Tenancy Act

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came into operation would not entitle the assignees to ask the Court of execution to recognise them now.

We are next of opinion that the application for execution now before us made by Joykali cannot proceed. We cannot find that that application was ever allowed under s. 231, and therefore we must take it that Joykali had no authority to execute the entire decree. As the matter is not before us we abstain from expressing any opinion whether Joykali and Koilash Chunder jointly, or either of them separately, under permission given under s. 231, can execute the decree. The appeal is therefore dismissed. Each party to pay his own costs.

K. M. C.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

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 January 7.

DOYA CHAND SHAHA (DEFENDANT No. 1) v. ANUND CHUNDER SEN
 MOZUMDAR (PLAINTIFF).³³

Onus of proof—Transferability of tenure—Resumption.

There is no presumption that any tenure held is not a transferable tenure, and a landlord who sues for khas possession on the ground that a tenure sold was not transferable must establish his case as an ordinary plaintiff.

ANANDA CHUNDER SEN brought a suit for khas possession of a plot of land which had been purchased in execution of a decree by Doya Chand Shaha, the principal defendant. Ananda alleged that the other defendants had held the land as his tenants, and inasmuch as their interest in it was not of a transferable nature, Doya Chand as auction-purchaser of that interest was a mere trespasser, and thus liable to be evicted from the land. Doya Chand contended, among other things, that the holding was a *mokurari* one and transferable both by law and custom. Upon the question whether the predecessors in title of Doya Chand had a saleable interest in the disputed land neither party gave any evidence, and the Munsiff was of opinion that the burden of proof lay on the plaintiff in the ordinary

³³Appeal from Order No. 268 of 1886, against the order of Baboo Promotho Nath Banerji, Subordinate Judge of Mymensingh, dated the 23rd of June, 1886, reversing the order of Baboo Rash Bohari Bose, Munsiff of Ghosegaon, dated the 5th of April, 1886.