

Before Mr. Justice Norris and Mr. Justice Ghose.

1886
August 28

LALIT MOHUN ROY (JUDGMENT-DEBTOR) *v.* BINODAI DABEE, MINOR,
MOHARANI OF BURDWAN, BY HER NEXT FRIENDS LALLA BUNI-
BEHARI KARPUR AND ANOTHER, MANAGERS UNDER THE COURT
OF WARDS (DECREE-HOLDER.)*

*Sale for arrears of rent—Under-tenure—Bengal Act (VIII of 1869),
ss. 34, 59—61 and 65—Sale of property other than under-tenure.*

Where a decree had been obtained for arrears of rent of an under-tenure, and in execution thereof application was made for the attachment and sale of a certain property of the judgment-debtor, other than the tenure for which the arrears were due—objection was taken that the *kabuliat* stipulated that the tenure itself should be first sold in execution of the decree: *Held*, that the *kabuliat* not being referred to, or incorporated with, the terms of the decree, it was not open to the judgment-debtor to go behind the decree, as to the mode in which it was to be executed. But, *held*, on the construction of Bengal Act VIII of 1869, ss. 59—61 and 65, that the under-tenure should first be sold before any other immoveable property could be made available. Section 34 of that Act (introducing the procedure laid down in the Civil Procedure Code into rent suits, “save as is in Act VIII of 1869 otherwise provided”) made no alteration in this respect, ss. 59—61 and s. 65 specially providing for such mode of execution.

In this case a decree was obtained by the managers, under the Court of Wards, of the Burdwan Raj, against the appellant for arrears of rent, and an application was made for execution of that decree by the attachment and sale of a certain property, other than the tenure for which the arrears of rent were due. The judgment-debtor objected to the attachment, on the ground that it was stipulated in the *kabuliat* that the tenure itself should be first attached, and sold, in satisfaction of a decree for arrears of rent, and that such a decree could only be otherwise executed should the tenure fetch less than the amount due.

The first Court allowed the objection, and refused the application for the attachment and sale of the property other than the tenure itself.

*Appeal from Order No. 425 of 1885, against the order of A. Gillon, Esq., Officiating Judge of Hooghly, dated the 9th of November 1885, reversing the order of Baboo Sarola Prosad Chatterji, Subordinate Judge of that District, dated the 1st of August 1885.

On appeal the Judge reversed this decision, holding, in accordance with the case of *Kristo Ram Roy v. Janokee Nath Roy* (1), that the decree-holder was not ordinarily bound to proceed first against the tenure, for arrears of rent of which the decree had been obtained; and that if he had bound himself by any agreement, that agreement should have been incorporated in the terms of the decree. The judgment-debtor appealed to the High Court.

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Mr. Woodroffe, Dr. Rashbehari Ghose, Baboo Amarendra Nath Chatterjee and Baboo Jogendra Nath Ghose, for the appellant.

The Senior Government Pleader (Baboo Annoda Prosad Banerji) for the respondent.

The judgment of the Court (NORRIS and GHOSE, JJ.) after shortly stating the facts, proceeded as follows:—

Two questions have been raised before us by the learned counsel for the appellant: 1st, that under the terms of the *kabuliat*, creating the tenancy between the parties, the landlord is bound to sell the tenure itself in the first instance; 2nd, that under the provisions of the Rent Law (Bengal Act VIII of 1869) the decree-holder is not entitled to sell any other immoveable property before bringing to sale the tenure itself.

As regards the first of these two contentions we are of opinion that it cannot be sustained. The decree was an ordinary decree for rent; and no reference whatever was made in it to the *kabuliat* or to the terms thereof, and it does not appear that the *kabuliat* was even filed in the rent suit. That being so, it is not open to the judgment-debtor to go behind the decree, and to insist that the terms of the *kabuliat* should regulate the rights and liabilities of the parties as regards the mode in which the decree should be realized.

The second point is by no means free from difficulty. Under the provisions of Act X of 1859, there seems to have been no doubt that such a proceeding as the decree-holder now desires to adopt was unauthorized—see *Desarotulla v. Nazim Nazar Ally* (2),

(1) I. L. R., 7 Calc., 748.

(2) 1 B. L. R., A. C., 216.

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and *Jokee Lall v. Nursing Narain* (1). But then the question arises whether under Bengal Act VIII of 1869 it is authorized.

The learned Government pleader who appeared for the decree-holder contended that, under Act VIII of 1869, the decree-holder was entitled to sell either the tenure or any other immoveable property as he pleased; and in support of his contention he relied upon the decision of the Judicial Committee in the case of *Doolar Chand Sahoo v. Lalla Chabil Chand* (2), and upon the case of *Kristo Ram Roy v. Junokee Nath Roy* (3) decided by a Divisional Bench of this Court.

The Divisional Bench which decided that case has put a certain construction upon the abovementioned decision of the Judicial Committee, and it is a construction which is certainly favorable to the decree-holder; and if we were prepared to adopt the same construction, there would be no difficulty in holding that the judgment-debtor's contention must fail. But we entertain doubts whether the result of the Judicial Committee's decision is what it has been held to be by the Divisional Bench. It will be observed from an examination of the case before the Privy Council that the only question that came before it for consideration was what passed under the sale held by the Court on the 25th of July 1872, whether it was the tenure or simply the right, title and interest of the judgment-debtor therein; and their Lordships held that what the decree-holder intended to sell, and what was in fact sold by the Court, was not the former, but the latter. In arriving at this decision they referred, among other matters, to the petition of the decree-holder, and the inventory attached to it, describing the property which he requested to be sold, and also the provisions of ss. 59 and 34 of Act VIII of 1869; and then they observed—"that although the Maharaja (the decree-holder) might, if he had pleased, have applied to sell the tenure in execution of his decree, he had also the power to proceed against the property of the judgment-debtor." The words "the property of the judgment-debtor" as used by the Judicial Committee in this passage, evidently refer to the property described in the decree-holder's petition and

(1) 4 W. R., Act X, 5.

(2) L. R., 6 I. A., 47; 3 C. L. R., 561. (3) I. L. R., 7 Cal., 748.

inventory, and were not used by them, as we understand, as denoting *any* property other than the tenure. And we are inclined to think that the question whether it was competent to the decree-holder to sell any *other* immoveable property than the tenure in the first instance, was not considered by the Judicial Committee, and that it is still an open question.

Upon an examination of Bengal Act VIII of 1869, and comparing the several sections thereof, so far they bear upon the matter before us, with the corresponding sections of Act X of 1859, it would appear that, barring the provisions of s. 34 of Act VIII of 1869, the law on the subject was substantially the same under both the Acts; and the question that arises is, whether by reason of that section the decree-holder has the right that is now claimed for him.

Section 34 of the Act runs as follows :—

“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 passed by the Governor-General in Council in relation to Civil Procedure as now are, or from time to time may be in force; and all the provisions of the said Act and of such other enactments shall apply to such suits.”

The matters for consideration upon this section are: (1st), whether there is any provision in the Act itself regulating the order in which the under-tenure and other immoveable properties belonging to the judgment-debtor should be sold; (2nd), whether the words “all proceedings therein shall be regulated by the Code of Civil Procedure” confer upon the decree-holder the right of electing to sell, in the first instance, the tenure, or any other property, as he pleases.

Upon the two matters indicated above, we are of opinion that there is distinct provision in ss. 59 to 61 and 65 of Act VIII of 1869 indicating that, in the case of a decree for rent accruing upon an under-tenure, the under-tenure should be sold in the first instance before any *other immoveable* property can be sold; and that, therefore, notwithstanding that it is optional with the decree-holder either to sell the whole tenure under the Rent Law, or simply the interest of the judgment-debtor, as it may exist upon

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1886 the day of sale, under the Civil Procedure Code, he is bound to follow the order in which the property, upon which the rent has accrued, and other properties belonging to the tenant, may be brought to sale, as indicated in the above sections.

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In view of the opinion expressed by the Divisional Bench in the case referred to above, we should, had we considered the question raised in this appeal one of general importance and likely to recur, have thought it proper to refer this case to a Full Bench. But Act VIII of 1869 has been repealed, and an entirely new Act has come into operation, and so we think a reference to a Full Bench is unnecessary.

We direct that the order of the District Judge, so far as the sale of the immoveable properties is concerned, be set aside, and that of the Sub-Judge restored.

The appellant must have his costs in all Courts.

J. V. W.

Appeal allowed.

PRIVY COUNCIL.

P. C.*
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July 9.

REWA MAHTON (DEFENDANT) v. RAM KISHEN SINGH (PLAINTIFF).

[On appeal from the High Court at Calcutta.]

Civil Procedure Code, 1877, s. 246 (1)—Execution of cross-decrees—Jurisdiction—Bond fide purchaser—Presumption of validity of order for sale.

If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues. Notwithstanding anything in s. 246 of the Code of Civil Procedure, he is not bound to inquire whether the judgment-debtor holds a cross-decree of higher amount against the decree-holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued, has been satisfied or not. These are questions to be determined by the Court issuing execution.

Where property, sold in execution of a valid decree, under the order of a competent Court, was purchased *bond fide*, and for fair value: *Held*, that the mere existence of a cross-decree for a higher amount in favor of the judgment-debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale.

“ *Present*: LORD WATSON, LORD HOBHOUSE, SIR B. PEACOCK, AND SIR R. COUCH.

(1) Section 246 of Act XIV of 1882,