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May 23.

## FULL BENCH.

Before Sir Robert Stuart, *Kt.*, Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

UMED RAM (DECREE-HOLDER) v. DAULAT RAM (JUDGMENT-DEBTOR).<sup>†</sup>

Trees—"Immoveable" property—"Moveable" property—Act XI of 1865, s. 19—Act III of 1877 (*Registration Act*), s. 3—Act IV of 1882 (*Transfer of Property Act*), s. 3—Act I of 1868 (*General Clauses Act*), s. 2 (5), (6).

Held that, for the purposes of the Mufassal Small Cause Court Act, standing timber is not "moveable" property.

*Nasir Khan v. Karamat Khan* (1) referred to.

THIS was a reference to the High Court under s. 617 of the Civil Procedure Code by the Judge of the Court of Small Causes at Agra. The Judge stated the facts of the case and the point on which he entertained doubt as follows:—

"In this case the decree-holder has applied for the attachment of certain trees as the property of the judgment-debtor. It is objected that standing trees are not moveable property, and a Court of Small Causes is not competent to attach them. According to the definition of immoveable property as given in the Penal Code and the Indian Succession Act, standing trees come within the category of such property. But the Indian Registration Act, 1877, and the Transfer of Property Act, 1882, define moveable property to include standing timber and growing crops.

The rulings of the High Court on the point are conflicting. In the case of *Chowdhry Roostum Ali v. Dhandoo* (2), it was held that trees were to be regarded as moveable property for the special purposes of the Registration Act only, and that ordinarily they were to be considered as immoveable property. In the case of *Nasir Khan v. Karamat Khan* (1), on the other hand, trees were held to be moveable property, but it appears that the ruling in the case of *Roostum Ali v. Dhandoo* (2) was not brought to the notice of the Hon'ble Judges.

As the point is thus a doubtful one, and there is a conflict of authority in regard to it, and as several other applications have been

\* Reference No. 42 of 1883, under s. 617 of the Code of Civil Procedure, by Babu Promoda Charan Banarji, Judge of the Court of Small Causes at Agra, dated the 9th February, 1883.

(1) I. L. R., 3 All., 168. (2) N.-W. P. H. C. Rep., 1838, p. 157.

made, some for the attachment of standing trees and growing crops, I deem it desirable to refer to the Hon'ble High Court the question whether standing timber and growing crops are to be regarded as moveable property, and whether a Court of Small Causes is competent to order their attachment and sale.

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My own opinion on the matter is that the definition of immoveable property contained in the Transfer of Property Act, which excludes standing timber and growing crops, should be taken as a guide, and that trees and growing crops should be regarded as moveable property. But as the rulings of the High Court on the point are conflicting, I refer the question to the Hon'ble Court for an authoritative decision."

The Divisional Bench before whom the reference was laid (OLDFIELD, J., and BRODHURST, J.) referred the question raised to the Full Bench.

The parties did not appear.

The following opinion was delivered by the Full Bench:—

STUART, C. J., STRAIGHT, J., OLDFIELD, J., BRODHURST, J., and TYRRELL, J.—The question referred is whether standing timber is moveable property within the meaning of s. 19, Act XI of 1865, against which a Court of Small Causes can direct execution of its decree.

The Mufassal Small Cause Court Act (XI of 1865) contains no definition of the words "moveable" and "immoveable" property, and these words have been differently defined in different Acts. In the Registration Act and the Transfer of Property Act, standing timber, growing crops and grass are included in "moveable" property. In the General Clauses Act (I of 1863), however "immoveable" property includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth; and "moveable" property means property of every description except "immoveable" property; and under these definitions standing timber will be "immoveable" property. The interpretation clause of the General Clauses Act is made applicable to that Act and all Acts made by the Governor-General in Council after that Act shall come into operation, unless

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there be something repugnant in the subject or context. It therefore does not apply to the Mufassal Small Cause Court Act; but we are of opinion that the definitions of "immoveable" and "moveable" property which it contains may appropriately be applied to the Small Cause Court Act, as being in accord with the spirit of that Act, and the scope of the powers intended to be exercised under it by a Judge of a Small Cause Court. We are of opinion therefore that standing timber must be classed as immoveable property, and this view appears to be in accord with the current of rulings on the subject.

We may add that the case of *Nasir Khan v. Karamat Khan* (1) to which the Subordinate Judge directs our attention, has been misread by him, for it was there held, not that the trees themselves, but that the fruit on them was of the nature of moveable property.

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## APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Brodhurst.*

JAGAT NARAIN RAI AND ANOTHER (DEFENDANTS) v. DHUNDHEY RAI (PLAINTIFF).\*

*Civil Procedure Code, s. 295—Mortgage—First and second mortgagees—Sale of mortgaged property in execution of decree of second mortgagee—Suit by first mortgagee for re-sale of property in execution of his decree.*

On the 22nd March, 1878, the first mortgagee of certain property obtained a decree enforcing his mortgage. On the 25th March, 1878, the second mortgagee obtained a decree enforcing his mortgage. Both decrees were made by the same Court. On the 20th June, 1878, the property was put up for sale in execution of the second mortgagee's decree. The first mortgagee subsequently brought a suit for a resale of the property in satisfaction of his decree. *Held* that this was the only course open to him, and he could not have enforced satisfaction of his decree in accordance with the provisions of s. 295 of the Civil Procedure Code, inasmuch as the provisions of the first and second provisos to that section refer only to sales in execution of simple money-decrees, whereas the property in question had been sold in execution of a decree ordering its sale, and the provisions of the third proviso relate to subsequent and not prior incumbrances.

THE facts of this case were as follows:—The owners of a one-anna six-pie share of a certain village gave the plaintiff in this suit

\* Second Appeal No. 437 of 1882, from a decree of R. J. Leeds, Esq., Judge of Gorakhpur, dated the 23rd January, 1882, affirming a decree of Maulvi Munim-ud-din, Munsif of Basti, dated the 3rd September, 1881.

(1) I. L. R., 3 All., 168.