

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, and Mr. Justice Gokaran Nath Misra.

THAKURAIN SRI RAM KUNWAR (PLAINTIFF-APPELLANT)
BABU RAM PRASAD GHOSH AND OTHERS. (DEFENDANTS-RESPONDENTS).*

1928
November,
9.

Provincial Insolvency Act (V of 1920), section 28(6)—Secured creditor—Holder of a decree for arrears of rent, whether a secured creditor—Adjudication of judgment-debtor as insolvent—Decree-holder applying for execution more than three years after the decree—Execution application if time-barred—Exclusion of the period of insolvency.

The holder of a decree for arrears of rent is a secured creditor under the Insolvency Act. Under section 28, sub-section 6 of that Act insolvency proceedings are not to affect the power of any secured creditor to realize or otherwise deal with his security and, therefore, if a secured decree-holder applied for execution of his decree against an insolvent more than three years after the passing of the decree the application for execution is time-barred and no question of exclusion of any period of limitation arises on the ground that the judgment-debtor was an insolvent.

Mr. P. N. Chaudhri; for the appellant.

Mr. Gopal Chandra Sinha, for the respondents.

HASAN and MISRA, JJ. :—These two appeals arise out of the two orders of the District Judge of Fyzabad, both dated the 30th of April, 1928, holding that the applications for execution of decree filed by the appellant are time-barred. The facts of the case are that the appellant Thakurain Sri Ram Kuar holds two decrees against the respondents Gur Prasad and Lachhmi Nath

*Execution of Decree Appeal No. 53 of 1928, against the decree of Thakur Rachhpal Singh, District Judge of Fyzabad, dated the 30th of April, 1928, confirming the order of C. Thomas, Assistant Collector, 1st class, Sultanpur, dated the 10th of March, 1928.

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for arrears of rent. One of these decrees was passed on the 23rd of May, 1921, and the other was passed on the 4th of August, 1921. The respondents Gur Prasad and Lachhmi Nath were adjudged insolvents in 1917 prior to the date when the two aforesaid decrees were obtained by the appellant against them. The first application for execution was filed by the appellant on the 21st of March, 1927, but it was dismissed for want of prosecution on the 7th of September, 1927. Subsequently on the 1st of October, 1927, the appellant filed the present applications for execution from which the present appeals arise.

Both courts below have held that the two execution applications filed by the appellant are time-barred since they were made more than three years after the date of the passing of the decree.

In appeal it is contended on behalf of the appellant that the decision of the courts below is wrong and the execution applications now filed by the appellant are within limitation inasmuch as the execution of these decrees must be considered to have been stopped, since the respondents were insolvents. We regret we cannot accept this contention. It is admitted on behalf of the appellant that she is a secured creditor. Under section 28, sub-section (6), the insolvency proceedings are not to affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if no order of adjudication had been made. It is, therefore, clear that the fact that the respondents were adjudged insolvents could not have prevented the appellant from obtaining the decree or putting it into execution and under these circumstances no question of exclusion of any period of limitation at all arises. The learned Advocate for the appellant admits that the applications for execution which have given rise to the

present appeals were made more than three years from the date of the passing of those decrees.

We are, therefore, of opinion that the execution of the two decrees is time-barred and the courts below were correct in dismissing those applications on the ground of limitation.

The appeals, therefore, fail and are dismissed with costs.

'Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra.

RAMAN SINGH AND ANOTHER (DEFENDANTS-APPELLANTS) v. DILLA SINGH AND ANOTHER, (PLAINTIFFS-RESPONDENTS).*

1928

November, 8.

Oudh Rent Act (XXII of 1886), section 5—Occupancy tenure in Oudh, division or partition of—Division of occupancy tenure among members of deceased occupancy tenant's family, whether a transfer—"Transfer", meaning of.

It cannot be held that an occupancy tenure in Oudh, which is non-transferable under section 5 of the Oudh Rent Act (XXII of 1886), cannot be divided or partitioned amongst the members of the family of a deceased occupancy tenant or amongst several persons who may claim to be the heirs of such a tenant. A division of such a tenure cannot be treated as a transfer. A "transfer" in law must be deemed to imply a transfer by a person entitled to that property in favour of a person having no title otherwise. Such a transaction relating to an occupancy tenure must, therefore, be deemed to be inoperative. Where, however, the holding is claimed by different heirs of a deceased occupancy tenant or where the occupancy tenure forms part of the property of a joint family or of co-tenants and a division takes place among such persons, it cannot be held that the transaction

*Second Civil Appeal No. 108 of 1928, against the decree of Syed Khurshed Hasan, Subordinate Judge of Hardoi, dated the 22nd of December, 1927, setting aside the decree of Syed Abid Raza, Munsif of Bilgram, dated the 6th of August, 1927, dismissing the plaintiffs' suit.

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