

1924.

 GAYANI
 DAS
 v.
 DWARAKA
 MANDAR.

possession by the landlords; and to such a suit Article 3, Schedule III of the Bengal Tenancy Act applies. Mr. *Varma*, on behalf of the appellant, argues before us that his client is not a *raiyat*, and, therefore, Article 3 has no application to the suit; but the *hukumnama* upon which he relies shows that he is a *raiyat*. The critical words in that document are as follows :

"I permit you under this *parwana* to cultivate the said lands—boundaries whereof are given below—for this year."

It is contended before us that there is evidence that the plaintiff settled tenants upon the land. That may be so; but the test is not the use which the tenant has made of the land but the purpose for which the land is leased. Clearly under the *hukumnama* the land was let to the plaintiff to enable him to cultivate it. That being so, Article 3, Schedule III of the Bengal Tenancy Act clearly applies.

It is unnecessary to go into the other points raised in the appeal, because, in our opinion, the learned Subordinate Judge was right in dismissing the suit on the ground of limitation.

The appeal is dismissed with costs. There will be two sets of costs payable to the defendants first party and the defendants second party.

Appeal dismissed.

REVISIONAL CIVIL.

Before Adami and Bucknill, J.J.

NAND LAL

v.

NATH MULL SRINIWAS.*

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Feb., 29.

Provincial Insolvency Act, 1920 (Act V of 1920), section 23—Protection order—arrest of judgment-debtor under

*Civil Revision No. 473 of 1923, from an order of J. F. W. James, Esqr., I. C. S. District Judge of Patna, dated the 12th December, 1923.

1924. *a money decree—petition of insolvency, whether Court bound to release, petitioner on security—rejection of petition, reasons for, to be recorded.*

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The court is not bound, on admitting a petition for insolvency made under section 23 of the Provincial Insolvency Act, 1920, by a person who has been arrested under a money decree, to release the petitioner on security. But where the court rejects the petition it must record its reasons for doing so under clause (3).

Application by the judgment-debtor.

This application was directed against an order of the District Judge of Patna regarding the issue of a protection order in favour of the petitioner.

It appeared that the opposite party obtained a decree for a considerable sum of money against the petitioner. A notice was issued against him under Order XXI, rule 37, Civil Procedure Code, in September and was duly served, but no attention was paid to the summons, and on a representation of the decree-holder that the judgment-debtor had disappeared, a warrant was issued for his arrest and he was duly arrested and brought before the District Judge. Before the District Judge he applied for his release from arrest. The District Judge passed an order that he should file a petition for insolvency without delay and that he would be detained in the civil jail meanwhile. That same day the petitioner filed his insolvency petition and asked that he might be released. The District Judge admitted the insolvency petition but ordered that the question of granting a protection order would not be considered until the petitioner should be adjudicated an insolvent. It was against this order that this application was made.

P. C. Rai and *Nitai Chandra Ghosh*, for the petitioner.

Sambhu Saran, for the opposite party.

ADAMI, J. (after stating the facts, as set out above, proceeded as follows) :—

Mr. Rai on behalf of the petitioner contends that the procedure laid down in section 23 of the Provincial Insolvency Act (V of 1920) is mandatory and that the Judge was bound on admitting the petition for insolvency to release the petitioner on such terms as to security as might be reasonable and necessary. It is clear that under the terms of that section the District Judge was empowered to exercise his discretion as to whether the person brought up under arrest under a money decree should be released or not. I do not think that Mr. Rai's contention that the provisions are mandatory can be upheld. The learned District Judge, however, has given no reasons for refusing to release the petitioner under section 23; he has merely said that the matter will be considered when an adjudication order is passed. Sub-section (3) of section 23 directs that at the time of making any order under the section, the Court shall record in writing its reasons therefor. In the present case the provisions of sub-section (3) have not been complied with. It seems that in this the learned District Judge has not fulfilled the requirements of the section. The best course for us to pursue is to direct that the learned District Judge should again consider the application of the petitioner and should record his reasons for either granting or refusing the petition. The petitioner at present has had an *ad interim* release on giving security. It is open to the learned District Judge under sub-section (2) of section 23 to order his re-arrest and recommitment to custody but reasons must be given. Of course the procedure under section 23 is a temporary procedure pending the adjudication order under section 31. That section will give the District Judge again the discretion as to the release or re-arrest of the petitioner.

There will be no order as to costs.

BUCKNILL, J.—I agree.

Order set aside.

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ADAMI, J.