

## APPELLATE CIVIL.

*Before Das and Ross, JJ.*

PURNENDU NARAIN SINGH

v.

MAKHAN LAL MARWARI.\*

1928.

Feb. 28.

*Chota Nagpur Encumbered Estates Act, 1876 (Beng. Act VI of 1876), section 3, scope of—“ such debts and liabilities ” and “ process as aforesaid ”, meaning of.*

Section 3(a), Chota Nagpur Encumbered Estate Act, 1876, provides :

“ On the publication of an order under section 2, the following consequences shall ensue:—first, all proceeding which may then be pending in any Court in British India.....in respect to such debts and liabilities shall be barred, and all processes, executions and attachment for or in respect of such debts and liabilities shall become null and void.”

Section 3(b) then lays down :

“ Such property shall be exempt from attachment or sale under such process as aforesaid, except for or in respect of debts due or liabilities incurred, to Government.”

*Held*, (1) that the word “ such debts or liabilities ” in section 3(a) mean “ all debts and liabilities to which the holder is subject ” irrespective of whether they were included in the statement in writing of the proprietor or not;

(ii) that the words in section 3(b), “ process as aforesaid ”, mean “ process for or in respect of such debts and liabilities,” and that the effect of the section is that the court is incompetent to execute a decree in respect of debts or liabilities of the defaulting proprietor except debts due or liabilities incurred, to Government.

*W. H. Burton v. Midnapore Zamindari Co.* (1) distinguished.

Appeal by the judgment-debtor.

The facts of the case material to this report are stated in the judgment of Das, J.

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\* Appeal from Original Order no. 53 of 1927, from an order of Babu Ram Chandra Chaudhury, Subordinate Judge of Dhanbad, dated the 22nd January, 1927.

(1) (1921) 61 Ind. Cas. 902.

*Abani Bhusan Mukherji*, for the appellant.

*S. P. Sen* (with him *S. M. Mullick* and *N. N. Roy*), for the respondents.

DAS, J.—In my opinion this appeal must succeed.

The respondents instituted a suit on the 15th of January 1925 against Purnendu Narayan Singh on the basis of a hand-note executed by his father on the 17th of February, 1922 for Rs. 10,100. On the 26th of February, 1926, the estate of which Purnendu Narayan Singh was proprietor was attached under the provisions of the Encumbered Estates Act. The suit was heard on the 26th of April, 1926, when the learned Subordinate Judge gave the plaintiff an ex parte decree for the full amount claimed by him. The learned Subordinate Judge took the view that as the debt in respect of which the action was brought was not included in the statement in writing of the proprietor as showing all debts and liabilities to which the holder was subject, he was competent to proceed with the hearing of the suit. I have no doubt whatever that the learned Subordinate Judge took an erroneous view of the law on the subject. Section 3 provides :

“ On the publication of an order under section 2, the following consequences shall ensue:—first, all proceeding which may then be pending in any Civil Court in British India or in any Revenue Court in Bengal, in respect to such debts or liabilities, shall be barred; and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void.”

The words ‘ such debts or liabilities ’ no doubt refer to the debts and liabilities mentioned in section 2A of the Act; but the Act contemplates that the holder should disclose all debts and liabilities to which the holder is subject and, in my opinion, “ such debts and liabilities ” must mean “ all debts and liabilities to which the holder is subject.”

But the learned Subordinate Judge was competent to decide the question. It is quite true that in deciding it he misunderstood the effect of section 3 of the Encumbered Estates Act; but it cannot be urged that the decree itself was a void decree.

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The proceedings which have given rise to this appeal were taken by the respondents to enforce the decree of the 26th of April, 1926, and the question arises whether such proceedings are maintainable in view of the provisions of the Encumbered Estates Act. The learned Subordinate Judge has allowed execution to proceed and he professes to base his decision on a decision of this Court [*W. H. Burton v. Midnapur Zemindary Co., Ltd.*,<sup>(1)</sup>]. I shall deal with the case to which the learned Subordinate Judge refers at once; but it seems to me that the provisions of the Act are clear on the point. Paragraph (b) of section 3 provides as follows :

“ Such property shall be exempt from attachment or sale under such process as aforesaid, except for or in respect of debts due, or liabilities incurred, to Government.”

Mr. Sen, on behalf of the respondents, contends that the words ‘ such process as aforesaid ’ must refer to the word ‘ process ’ as mentioned in the first clause of section 3 and must mean ‘ all process existing at the date of the publication of the order under section 2.’

Mr. Sen’s contention is to the effect that paragraph (b) of section 3 deals with such executions as were pending at the date of the publication of the order under section 2. With this contention I am unable to agree. The words ‘ process as aforesaid ’ must in my opinion mean ‘ process for or in respect of such debts and liabilities ’ and the words that follow, namely, ‘ except for or in respect of debts due, or liabilities incurred to Government ’ support the view which I take. Paragraph (b) if read as it should be read, would run as follows :

“ Such property shall be exempt from attachment or sale under such process in respect to such debts or liabilities except for or in respect of debts due to liabilities incurred to Government.”

In my opinion on a construction of paragraph (b) of section 3 it should be held that the Court is incompetent to execute a decree in respect of debts or liabilities of the defaulting proprietor except debts due or liabilities incurred to Government.

I will now deal with the decision of this Court in *W. H. Burton v. Midnapur Zemindary Co., Ltd.*, (1) which appears to have been completely misunderstood by the learned Subordinate Judge. In that case the manager of the Encumbered estate representing a defaulting proprietor had granted a patni lease to the Midnapur Zemindary Co. The estate was released and the proprietor brought a suit to set aside the lease. The suit was dismissed with costs both in the Court of first instance as also in the High Court. Thereafter the estate was again brought under management as an encumbered estate. The judgment of this Court shows very clearly that the manager of the Encumbered Estate thereupon appealed to the Privy Council in his own name and the Privy Council dismissed the appeal with costs. Thereupon the Midnapur Zemindary Co. applied for execution against the manager of the Encumbered Estate. This Court pointed out that the decree obtained by the Midnapur Zemindary Co. was not against the proprietor of the estate but against the manager of the estate and that therefore the decree could be executed against him. In dealing with the facts of that case the Court pointed out as follows: "The manager appointed under the Act was added as a party appellant to the appeal pending in the Privy Council which appeal was dismissed by the Privy Council with costs on the 9th June, 1915.....". It is a decree, not against the proprietor of the estate, but against the manager of the estate. It would indeed be remarkable if the manager of the estate could carry on an expensive litigation and then say, when defeated, "you cannot execute your decree for costs against the estate."

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Now the fundamental difference between the case upon which the learned Subordinate Judge relied and this case is this that in the case to which the learned Subordinate Judge refers, the manager was a party to the appeal and there was a decree as against the

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manager. In the case before us the manager is not a party. He no doubt represents the minor in the litigation but it cannot be urged that he is a party to the litigation itself. In my opinion, therefore, the decision upon which the learned Subordinate Judge relies has no application to the facts of this case.

I would allow this appeal, set aside the order passed by the Court below and dismiss the execution case. The appellant is entitled to his costs of this appeal.

Ross, J.—I agree.

S. A. K.

*Appeal allowed.*

## REVISIONAL CRIMINAL.

*Before Adami and Wort, JJ.*

RAMASRAY AHIR

v.

KING-EMPEROR.\*

1928.

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*Penal Code, 1860 (Act XLV of 1860), section 149—whether creates a substantive offence—failure to mention the section in the charge, whether fatal.*

Where the accused persons were originally charged with, and convicted for offences under sections 147 and 353, Penal Code, 1860, but on appeal convictions under sections 323 read with section 149, and section 353 read with section 149 were substituted for the original convictions.

*Held*, that section 149 does not create a definite offence and that, therefore, omission to mention the section in the charge did not vitiate the convictions.

*Queen Empress v. Bisheshar* (1) and *Theethumalai Gounder v. King-Emperor* (2), followed.

\* Criminal Revision no. 73 of 1928, from an order of A. Davies, Esq., i.c.s., Sessions Judge of Shahabad, dated the 20th January, 1928, modifying the order of Babu S. P. Sahai, Deputy Magistrate, 1st Class of Arrah, dated the 22nd December, 1927.

(1) (1887) I. L. R. 9 All. 653.

(2) (1924) I. L. R. 47 Mad. 747, F. B.