

APPELLATE CIVIL.*Before Wort and Varma, JJ.*

KRISHNA PRASAD

v.

PRATAP NARAYAN CHOUDHRY.*

1934.

January, 5.

Attachment—money decree allowed to be paid by instalments—security given by judgment-debtor of a certain property—default in payment—sale of property charged—attachment, whether necessary.

The decree-holder obtained a money decree and the court allowed payment by instalments. The judgment-debtor gave security of a certain property which was charged for the payment of the instalments. Default having been made in the payment, the decree-holder proceeded to sell the property which was charged under the security bond without attaching the same.

Held, that no attachment was necessary.

Tata Iron and Steel Co. Ltd. v. Charles Joseph Smith(1), followed.

Subramanian Chelliar v. Hon. P. Rajarajeswara Sethupathi(2), *Aubhoyessury Dabce v. Gouri Sankar Panday*(3), *Shyam Sundar Lal v. Bajpai Jainarayan*(4), *Ambalal Bapubhai Gujraathi v. Narayan Tatjaba Bhosala*(5) and *Gobinda Chandra Pal v. Kailas Chandra Pal*(6), referred to.

* Appeal from Original Order no. 37 of 1933, from an order of Babu N. N. Baunerjee, Subordinate Judge, Bhagalpur, dated the 14th January, 1933.

(1) (1929) I. L. R. 8 Pat. 801.

(2) (1917) I. L. R. 41 Mad. 327.

(3) (1895) I. L. R. 22 Cal. 859.

(4) (1903) I. L. R. 30 Cal. 1030.

(5) (1919) I. L. R. 43 Bom. 631.

(6) (1917) I. L. R. 45 Cal. 530.

1934.

Appeal by the decree-holder.

KRISHNA
PRASAD
v.
PRATAP
NARAYAN
CHOUDBHRY.

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

Parmeshwar Dayal and *B. B. Saran*, for the appellant.

N. N. Ray, for the respondents.

WORT, J.—The facts of this case so far as they are material are not distinguishable from the case of the *Tata Iron & Steel Co. Ltd. v. Charles Joseph Smith*(¹), a decision to which I was a party.

The question in this appeal before us is whether attachment was necessary before sale. Shortly the facts were that a money decree had been obtained, and payment by instalments was allowed by the court; security was given of a certain property which was charged for the payment of the instalments. The judgment-debtor was in default and the decree-holder, therefore, set about selling the property which was charged under the security bond. Several questions came up for determination by the learned Subordinate Judge in the court below, some of which were decided in favour of the judgment-debtor, others decided in favour of the decree-holder, but the one question which is material was decided against him, that is to say, the learned Subordinate Judge held that attachment was necessary.

Now in the case of the *Tata Iron & Steel Co. Ltd. v. Charles Joseph Smith*(¹) it was decided in precisely similar circumstances that attachment was not necessary and the relevant part of the judgment in that case on this point is to this effect :

“ The second point is that attachment is necessary preliminary to an execution proceeding. This is undoubtedly so; but we must find out a reason for the rule which requires a decree-holder to attach properties as a preliminary to taking execution proceedings”.

(1) (1929) I. L. R. 8 Pat. 801.

Das, J. further states that the reason was "to prevent an alienation and to make a particular fund available to the decree-holder", and then goes on to point out that the property charged as security for the payment of the decree makes the particular property so charged available for that purpose and, therefore, attachment was not necessary.

One of the decisions referred to was the case of *Subramanian Chettiar v. Hon. P. Rajarajeswara Sethupathi*(¹), which incidentally decided that this was a question under section 47 of the Civil Procedure Code. There have been a number of decisions on questions relating to this matter, one of which was in *Aubhoyessury Dabee v. Gouri Sunkur Pandey*(²), the other in *Shyam Sundar Lal v. Bajpai Jainarayan*(³) and in *Ambalal Bapubhai Gujarathi v. Narayan Tatyaba Bhosalle*(⁴). I refer to those decisions because one of the material questions was whether in a case of this kind a separate suit was necessary and in regard to that point there was a very considerable divergence of opinion in the High Courts. That is to be found in the Calcutta High Court as well as in the other High Courts in India. A further decision of the Calcutta High Court is in *Gobinda Chandra Pal v. Kailas Chandra Pal*(⁵). As I have said, I make reference to these decisions merely to point out that there is a divergence of opinion, and had this case been of greater importance it might have been necessary to refer it to a Full Bench, but in the circumstances, in my judgment, it would be sufficient to hold that the decision in the *Tata Iron & Steel Co. Ltd. v. Charles Joseph Smith*(⁶) governs this decision and, therefore, we think that the decision of the learned Subordinate Judge to the effect that the attachment was necessary was wrong.

1934.

KRISHNA
PRASAD
v.
PRATAP
NARAYAN
CHODHRY.

WORT, J.

(1) (1917) I. L. R. 41 Mad. 327.

(2) (1895) I. L. R. 22 Cal. 859.

(3) (1903) I. L. R. 30 Cal. 1060.

(4) (1919) I. L. R. 43 Bom. 631.

(5) (1917) I. L. R. 45 Cal. 530.

(6) (1929) I. L. R. 8 Pat. 801.

1934.

KRISHNA
PRASAD
v.
PRATAP
NARAYAN
CHOUHRY.
WORT, J.

The appeal must, therefore, be allowed with costs.

VARMA, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Agarwala, JJ.

SHEOPRASAD SAHU

v.

DEOCHARAN SAHU.*

1934.

January, 5.

Holding, surrender of—Hindu raiyat, whether competent to surrender joint family holding without consideration and without legal necessity—raiyat having minor sons, whether precluded from surrendering his holding.

A raiyat governed by the Hindu Law is competent, unless otherwise precluded, to surrender the joint family holding without consideration and without legal necessity, and in the absence of fraud or collusion such a surrender is valid and effective.

There is nothing in law which debars a raiyat who has minor sons from surrendering his holding.

A landlord cannot refuse to accept a surrender on the ground that the tenant has minor sons.

Jumra Prasad Singh v. Basdeo Singh(1), *Deonarain Sahu v. Ramanand Sahu*(2) and *Bykuntnath Dass v. Bissonath Majhee*(3), distinguished.

* Appeal from Appellate Decree no. 518 of 1931, from a decision of Maulavi Ali Karim, Additional Subordinate Judge of Ranchi, dated the 7th of January, 1933, reversing a decision of Babu Gopal Chandra De, Munsif of Ranchi, dated the 22nd of January, 1930.

(1) (1919) 4 Pat. L. J 548.

(2) (1921) 68 Ind. Cas. 211.

(3) (1868) 9 W. R. (civil) 268.