his opinion the accused should have been convicted, was section 482 of the Indian Penal Code.

1905 JUNE 2.

In my opinion no offence was committed either under section 482 of the Indian Penal Code or under section 486.

CRIMINAL REVISION.

Accordingly the conviction must be set aside and the Rule will be made absolute. The fine, if paid, will be refunded.

32 C. 969=3 Cr. L. J. 106.

PARGITER, J. I agree with the judgment of my learned brother. I must add that this is not a case of a false trade-mark, because it does not come within the definition of section 480 of the Indian Penal Code.

Rule absolute.

---

32 C. 972.

[972] APPELLATE CIVIL.

Before Mr. Justice Henderson and Mr. Justice Geidt.

JNANADA SUNDARI CHOWDHRANI *v.* ATUL CHANDRA CHAKRAVARTI.*

[29th June, 1905.]

Decree, execution of—Rent—Payment to prevent sale—Bengal Tenancy Act (VIII of 1885), ss. 3, 171.

Where a decree made in a suit for rent was in the main one for rent although it included other sums which were not strictly rent within the meaning of the Bengal Tenancy Act, and in execution thereof the tenure in arrear was ordered to be sold under Chapter XIV of the Act and advertised.

***Held* that the holder of an undertenure liable to be avoided would be justified in making a payment to prevent the sale of the superior tenure, and having made the payment, would be entitled to the rights, which are given to a person, who makes a payment under s. 171 of the Bengal Tenancy Act.**

A lease provided that a certain sum was payable by the tenant direct to the landlord as *malikana* and certain other sums were payable by the tenant for Government revenue and other demands, which the landlord was himself bound to pay:

***Held* that the latter sums, though not actually payable to the landlord were payable for the use and occupation of the land held by the tenant, and might have been made payable to the landlord direct, although for convenience it was arranged that the tenant should pay them for the landlord, and came within the definition of rent in section 3 of the Bengal Tenancy Act.**

APPEAL by the plaintiff Jnanada Sundari Chowdhrani.

The suit out of which the appeal arose was brought on the following allegations.

One Mrs. Catherine Arathoon had on the 10th Falgun 1264 granted a putni lease in respect of certain properties to J. P. Wise according to the terms of which the sum of Rs. 8,500 was payable as the annual permanent malikana rent and the putnidar was bound to pay the Government revenue, the rent of the superior landlord, cesses and dak tax payable in respect of the properties comprised in the putni.

[973] The representatives of Mrs. Catherine Arathoon instituted a rent suit, No. 21 of 1889, against the representatives of the original putnidar and certain purchasers of shares in the putni, for the recovery of the malikana of the putni, &c., and obtained a decree in execution of which the putni property was advertised for sale and the 20th August 1889 was fixed for the sale.

---

* Appeal from Original Decree No. 245 of 1903, against the decree of Hari Prasad Das, Subordinate Judge of Mymensingh, dated the 28th March 1903.

1905
JUNE 29.

APPELLATE CIVIL.

32 C. 972.

The plaintiff's husband Mahima Chandra Roy Chowdhry, who was the owner of a four annas share of the putni, had on the 28th Aswin 1293 granted her a *miras* lease in respect of certain lands included in the putni. To protect her *miras* talook, which was not a registered and notified incumbrance, she on the 20th August 1889 applied to the Court, and having obtained an order permitting her to put in the balance of the amount due under the decree, paid into Court the sum of Rs. 2,221-15 as being the amount of the balance on the 21st August 1889 and prevented the sale of the putni from taking place. Deducting the sum of Rs. 153 odd, which was paid to her by one of the co-sharers in the putni, the balance of Rs. 2,068 was due to her from the defendants. To realise the said sum with interest she, along with her husband, had instituted a suit, which was objected to on the ground of misjoinder of plaintiffs; to avoid the difficulty she had, during the pendency of that suit, executed a deed of gift assigning her claim in the suit to her husband notwithstanding which, however, her claim in the suit was finally dismissed on the 14th January 1897 on the ground of misjoinder of plaintiffs and causes of action. She accordingly brought the present suit against the defendants, who were the owners in possession of the putni, for the recovery of the said sum of Rs. 2,068 with interest and prayed *inter alia* that the putni talook may be declared to be liable for the realisation of the amount claimed and that the same may be realised by the sale of the putni. The suit was instituted on the 14th August 1901. The defendant No. 22 in the suit was the plaintiff herself in her capacity as executrix to the estate of her deceased husband.

The main grounds of defence were that the *miras* lease set up by the plaintiff was a *benami* transaction; that the money was really paid by the plaintiff's husband in her name, that the decree in respect of the money, for which the suit was brought by the [974] plaintiff, not having been passed in a suit against the registered tenant nor against all the tenants, was not a decree in accordance with the Bengal Tenancy Act and in execution of that decree there could be no sale with power to annul incumbrances and that consequently sec. 171 of the Act would not apply; that the plaintiff not having prayed to be put into possession of the putni talook, her claim in the present suit could not be maintained; that under s. 171, the amount claimed could not be realised by the sale of the putni; that the plaintiff having in the course of the previous suit assigned her right to the money to her husband, was not entitled to maintain the suit; that the suit for contribution was not maintainable without setting out the extent of the liability of each defendant; that the claim was barred by limitation; that the suit was barred by sec. 43 of the Civil Procedure Code; and that the plaintiff was not entitled to sue against herself as executrix to her husband's estate.

The putni lease granted by Mrs. Catherine Arathoon was not produced. The decree obtained by her representatives, which was passed on the 27th June 1889, was for Rs. 12,039 for *malikana* rent with interest Rs. 4,015-11-7 for cesses, which the plaintiffs in the suit had paid and interest, and Rs. 424-4-6 for Government revenue, which the plaintiffs had paid and interest, in all for Rs. 16,479-0-1 for total *malikana*, cesses and Government revenue. In execution of the decree the Court ordered the writ of attachment and the sale proclamation "to be served together upon property of the judgment-debtors, whereof the arrears are due." The writ of attachment was in the following terms: "It is therefore ordered that you be and you are hereby prohibited and restrained, until the further

order of this Court from alienating the properties specified in the schedule annexed to this writ " and then followed a schedule containing 21 items of property which comprised the putni.

It appeared that a portion of the decretal amount due under the decree of the 27th June 1889 was paid by the plaintiff's husband and the plaintiff applied under sec. 171 of the Bengal Tenancy Act for permission to pay the balance and having obtained the permission of the Court she put in the balance. She and her husband then joined in a suit against the remaining co-sharers **[975]** in the putni to recover the amounts paid by them respectively. On objection being taken to the suit on the ground of misjoinder of plaintiffs, she by a deed of gift dated the 7th Falgun 1299 assigned her claim to her husband, who applied in the suit to be substituted in her place. This application was refused and by the final decree of the High Court made on the 14th January 1897 her husband's claim was decreed, while her claim was dismissed on the ground of misjoinder.

At the trial of the suit the defendants urged another objection, namely that the decree of the 27th June 1889 was not a decree for rent, inasmuch as it included cess and Government revenue in addition to the *malikana* rent. The Subordinate Judge overruled this objection, but he held that the plaintiff having previously transferred her claim to her husband had no right to maintain the suit and the application presented by her as executrix to her husband's estate disclaiming all right to the money and intimating that she had no objection to a decree for the claim being passed in favour of herself as plaintiff was of no effect. He also held that what was advertised for sale in execution of the decree of the 27th June 1889 was not the putni itself, but the several items of property, which comprised the putni and that the plaintiff's case did not therefore come within sec. 171 of the Bengal Tenancy Act and that she was not entitled to any charge on the putni taluk, and as her claim but for such charge was barred by limitation, he dismissed the suit without deciding the other points raised.

The plaintiff appealed to the High Court.

Babu *Dwarka Nath Chakravarti* (Mr. *S. P. Sinha*, Babu *Govinda Chandra Das* and Babu *Chandra Kanta Ghose* with him) for the appellant.

Two questions arise in this appeal:—

(1) Was the execution taken out for the sale of the putni or was it a mere execution against the right, title and interest of the judgment-debtors; and

(2) what was the effect of the deed of gift.

On the second point, the property, the subject matter of the gift, could be retransferred without any deed, and both the donee and the donor say that no effect was given to the deed.

[976] On the first point, the proceedings in execution show that the execution was under the Bengal Tenancy Act. The simultaneous issue of the writ of attachment and the sale proclamation could be orderd only under that Act: sections 162, 163 (*a*). 2. The plaintiff's interest not being a registered and notified incumbrance could have been avoided, if the sale had taken place, and when she made the payment she would be entitled to the benefit of the provisions of s. 171.

Babu *Jogesh Chandra Roy* for the respondents. The sale proclamation shows that the putni was not put up for sale. The Subordinate Judge in his judgment says that the proclamation neither described the putni nor did it state the rent payable in respect of the putni. The decree, which

1905 JUNE 29.

APPELLATE CIVIL.

32 C. 972.

was being executed, was not a decree for rent; the Rs. 8,000 was rent, but the rest of the amount could not be claimed as rent, but could be claimed as damages: *Hemendra Nath Mukerjee* v. *Kumar Nath Roy* (1), and a decree for the entire amount is not a decree for rent; a sale in execution of such a decree would not be a sale under the Bengal Tenancy Act, and the plaintiff would not be entitled to the benefits of s. 171 of that Act; if s. 171 does not apply the plaintiff's claim will be barred by limitation. Even if s. 171 applies to the case the only course open to the person paying is to apply to the Court of execution to be put into possession. She cannot sue for sale. Section 171 says that she is to be a mortgagee, but all mortgagees are not entitled to sue for sale.

The plaintiff having parted with her right by executing the deed of gift in favour of her husband cannot maintain the suit. The disclaimer of the executrix is of no avail: *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (2): in the absence of a reconveyance the right would remain in the husband or his legal representative: a retransfer could only be effected by a registered deed, as there could be no delivery: Transfer of Property Act, s. 123.

Babu *Dwarka Nath Chakravarti* in reply.

HENDERSON AND GEIDT JJ. In rent suit No. 21 of 1889, a decree was obtained by the plaintiff for Rs. 16,479 upon the basis [977] of a putni pottah, which was dated the 21st *Choitro* 1266, against the putnidars. From the judgment it would appear that the putnidar was to pay Rs. 8,500 per annum as *malikana* and to pay Government revenue cesses and other public demands, which his immediate landlord was liable to pay. It was found that Rs. 12,039 was due for arrears of *malikana* and interest, Rs. 4,015-11-7 for cesses and Rs. 424-4-6 for Government revenue, making in all the amount for which the decree was given. The decree was made on the 27th June 1889 and, apparently with advertence to the terms of the provisions of the Bengal Tenancy Act, it was directed that the amount should be realized by sale of the patni taluk. On the 2nd of July an application was made for execution, the decree being described and treated as a decree for arrears of rent, and in the form of an application it was asked that the taluk might be attached and sold. The 20th of August was fixed for the sale and an order was made that the attachment and sale proclamation should be served together on the property of the judgment-debtor, in accordance with the provisions of section 163 of the Bengal Tenancy Act. On the 20th of August on the return of the report of the Nazir, it was ordered that the sale should take place on the following day—the 21st. On the 21st the money due upon the decree was deposited partly by the present plaintiff, who is the appellant before us and who claimed to be an undertenure-holder and partly by her husband. The appellant and her husband brought a suit together to recover the amount, which they had paid, in order to prevent the sale from taking place and it appears that the husband obtained a decree for the amount claimed by him, but owing to a defect in the procedure the claim of the appellant was disallowed—the Court suggesting that a fresh suit might be brought by her to recover the amount, which she had paid. Acting upon that order the appellant now brought the present suit.

The sale proclamation and the writ of attachment have not been produced, but the order on the Nazir directed him to serve the sale pro-

(1) (1904) I. L. R. 32 Cal. 169. (2) (1889) I. L. R. 16 Cal. 364.
2 C. W. N. 96.

clamation on each of the 21 properties which, it appears, were comprised in the putni taluk. In the absence of the sale proclamation, it has been contended, that this order shows that what was intended to be sold was the zamindari interest in those 21 properties. The zamindari interest was certainly not the property [978] of the judgment-debtor and as it was the putni taluk that was sought to be sold we see no ground for this contention. Section 163, sub-section (3) of the Bengal Tenancy Act directs that the proclamation should be published by fixing a copy in a conspicuous place on the land comprised in the tenure or holding ordered to be sold; and, it seems to us, that the publication on each of the properties comprised in the putni taluk cannot be otherwise than good service in a case where a putni taluk has to be sold. In the plaint it was alleged that the putni taluk had been advertised for sale and that the 20th August 1889 was the date fixed for the sale. The allegation was not denied in the written statement of any of the parties and certainly not in the written statement of Maharajah Surja Kant Acharjya, the only party who has contested this appeal. It may therefore be taken that it was admitted that the putni taluk had been advertised for sale; and, that being so, the appellant in our opinion was relieved (more specially as no question was raised in the Lower Court with regard to this point) from giving any further evidence as to the taluk having been advertised. Section 163 of the Bengal Tenancy Act provides that "in addition to stating and specifying certain particulars, the proclamation shall announce in the case of a tenure or holding of a raiyat holding at fixed rates, that the tenure or holding will first be put up to auction subject to the registered and notified incumbrances, and will be sold subject to those incumbrances, if the sum bid is sufficient to liquidate the amount of the decree and costs, and that otherwise it will, if the decree-holder so desires, be sold on a subsequent day, of which due notice will be given, with a power to annul all incumbrances." In this case it is admitted that there were no registered and notified incumbrances. The appellant's undertenure, so far as it appears, was therefore liable to be avoided and, if the tenure was a valid tenure, she was a person entitled under section 171 to pay into Court the amount requisite to prevent the sale of the tenure superior to hers. Under that section, if a person makes such a payment, then the amount so paid is to be deemed to be a debt bearing interest at twelve per centum per annum and secured by a mortgage and the person in this position is entitled to all the rights of a mortgagee. Accordingly, if the case is covered by section 171, then [979] the appellant is entitled to be treated as a mortgagee and to sue upon that basis to recover the money secured by the mortgage given to her by the law. It is said however, that the decree was not a decree for arrears of rent and that the procedure, therefore, was bad. The terms of the putni have not been placed before us, but, from the decree, to which reference has already been made, it appears that the amount decreed was made up of various sums, so much for the *malikana* payable direct to the landlord and so much for Government revenue and other demands which the landlord was himself liable to pay, and not actually made payable to the landlord. By the contract creating the putni taluk the latter sums were not actually payable to the landlord. They were however, payable for the use and occupation of the land held by the tenant and while for convenience's sake it was arranged that the tenant should pay them for the landlord, they might have been made payable to the landlord direct. It is perhaps not necessary for us to go so far as to hold that the decree

1905 JUNE 29.

APPELLATE CIVIL.

32 C. 972.

in its entirety is a decree for rent, but in our opinion all the sums included really come within the definition of rent in section 3 of the Bengal Tenancy Act. In that view the decree is a decree for arrears of rent, and the taluk, having, as we have found, been advertised for sale, the case is covered by section 171.

Even if the decree included sums, which were not strictly rent within the meaning of the Bengal Tenancy Act, what was the position? The decree certainly was a decree made in a rent suit, no objection being made to the whole claim being recovered in that form of suit. In the execution proceedings it was never suggested that it was not a decree for rent. Even in the Court below no objection was made that the decree was not a decree for rent. The application for execution described the decree as one for rent, and, there can be no doubt whatever that the sale which, upon that application was fixed to take place on the 21st August, was a sale under Chapter XIV of the Bengal Tenancy Act and it was a sale of the taluk under that chapter which was, as we have found, advertised. Under these circumstances what was the appellant to do in order to save her under-tenure? Was she to go behind the decree and make enquiries as to whether the decree was really a decree for rent or not, while in the meantime the sale of the [980] superior tenure might take place and her own under-tenure be avoided? Whether the whole decree may be taken as a decree for rent—the decree was certainly in the main, if not entirely one for rent, and the taluk having been advertised and the sale being about to take place, we think the appellant was justified in making the payment and that having made it she was entitled to the rights, which are given to a person, who makes a payment under section 171 of the Bengal Tenancy Act in order to prevent the sale of a superior tenure. The importance of this question is due to the fact that, if the appellant's suit is to be treated as a suit merely to recover the amount she paid and not a suit based upon her character as a mortgagee given to her by the provisions of section 171, her suit would be barred. The present suit was really a suit on the basis of the mortgage which the law gives her under section 171 of the Bengal Tenancy Act and in our opinion is not barred.

Another question was raised by the respondents as to whether the plaintiff was entitled to institute this suit in consequence of her having made a gift of her right to recover the money in suit in favour of her husband. In this connection it appears that in the previous suit in which the plaintiff sued as plaintiff along with her husband it was found that there was some difficulty in allowing the two plaintiffs to join together in one suit. This difficulty was raised in consequence of the husband being one of the persons entitled to the superior tenure; and after the suit had been commenced an attempt was made to get over this difficulty by the appellant executing a deed of gift in favour of her husband. The deed of gift is referred to by her in the plaint in paragraph 11 in which she says—"that during the pending of the above suit in the lower Court, the plaintiff executed a deed of gift in favour of her husband, the predecessor of defendant No. 22 (the defendant No. 22 being herself as executrix of the will of her husband who had meanwhile died) for the amount claimed in order to meet the defendant's objection as to misjoinder; but nothing has been done nor could anything have been done under the said deed of gift"—and that now, she respresenting her husband's estate as executrix of his will, and as a defendant in the suit, had no objection to the

amount claimed being realized by herself as plaintiff. We have [981] no doubt at all that the object of the gift was merely to get over the technical difficulty, which was raised in the previous suit and that there never was any intention to utilize that gift except for that particular purpose. The deed of gift is not before us, but that this is so seems clear from all the circumstances of the case. Having regard to the fact that the husband's estate is represented in this suit, and that no other party to the suit has any real interest in raising the purely technical objection now put forward, we do not consider the objection sound.

Under these circumstances we think that the Subordinate Judge was wrong in dismissing the suit and we accordingly direct that the judgment and decree of the Lower Court be set aside with the costs of this Court, and that the case be remanded to the Lower Court in order that the other issues, which have not yet been tried, may now be tried.

Appeal allowed, Case remanded.

---

32 C. 982 (=9 C. W. N. 826.)

[982] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Caspersz.

JOG DEB SINGH *v.* MAHOMED AFZAL.*

[17th and 27th April, 1905.]

Mahomedan Law—Pre-emption—Shiah vendor—Hindu purchaser—Right of Sunni co-sharer to pre-empt in the case of a Shiah vendor and Hindu purchasers—Sunni law—Talab-i-ishtish-had—Names of all the purchasers not specified at the time.

The law applicable to a suit for pre-emption by a Sunni co-sharer against a Shiah vendor and Hindu purchasers is the Sunni law.

Poorno Singh v. ***Hurrychurn Surmah*** **(1),** ***Dwarka Das*** v. ***Husain Bakhsh*** **(2),** ***Abbas Ali*** v. ***Maya Ram*** **(3),** ***Qurban Husain*** v. ***Chote*** **(4) referred to.**

No particular formula is necessary for the assertion of the pre-emptor's claim on the occasion of the performance of the preliminary formalities, so long as the claim is unequivocally made.

Where, therefore, the vakil of the pre-emptor proclaimed in the presence of two of the purchasers and at the empty doors of the other three that "J. S. and others have "purchased," without specifying the names of the others:—

Held **that there was nothing equivocal in the formulation of the claim and that the *talab-i-ishtish-had* was duly performed in this respect.**

[Ref. 36 All. 438; Not appl. 16 I. C. 109=9 A. L. J. 769.]

SECOND APPEAL by the Hindu defendants.

The plaintiff, Sunni Mahomedan, was the proprietor of an eight annas odd share in mouza Majahedpore, the remaining share in which belonged to other co-sharers and was sold at a revenue sale and purchased by Akbar Ali Khan, the first defendant, and Muhammad Ibrâhim, both of the Shiah sect, in equal shares. On the 30th March 1901 the first defendant sold his interest in the mauza by a registered deed for Rs. 1,495, in equal shares, to defendants Nos. 2 to 6, who were *babhan* Hindus living in mouza

* Appeal from Appellate Decree No. 1133 of 1903, against the decree of H. Holmwood, District Judge of Patna, dated the 30th March 1903, affirming the decree of M. Hamiduddin, Munsiff of that district, dated the 29th of September 1902.

(1) (1872) 10 B. L. R. 117.
(2) (1878) I. L. R. 1 All. 564.
(3) (1888) I. L. R. 12 All. 229.
(4) (1899) I. L. R. 22 All. 102.