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MARCH 15.  
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PRIVY  
COUNCIL.

32 C. 689=9  
C. W. N. 673  
=13 M. L. J.  
267:1 C. L.  
J. 319=32 I.  
A. 80=2 A.  
L. J. 794=8  
Sar. 784.

between her and Banwari Lal is that it was an apportioned rent agreed to between her and the putnidars.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs of it.

*Appeal dismissed.*

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *Watkins & Lempriere.*

32 C. 680.

[680] APPELLATE CIVIL.

*Before Mr. Justice Rampini and Mr. Justice Brett.*

SURBO LAL v. J. M. WILSON.\*

[26th January, 1905.]

*Landlord and tenant—Decree—Execution—Decree for rent—Tenure or holding, sale of—Bengal Tenancy Act (VIII of 1885) s. 65.*

A 16-anna proprietor obtaining a decree for the whole rent due in respect of a *mokarari* tenure in a suit brought against all the tenants is entitled under s. 65 of the Bengal Tenancy Act to sell the tenure in execution of the decree, although he recognized the fact that the tenants had subdivided the tenure and chose to accept a decree making each of them separately liable for his own share of the rent.

*Tarani Prosad Roy v. Narayan Kumari Debi* (1) referred to and explained.

SECOND APPEAL by the decree-holder, Surbo Lal.

Wilson, Baxter and Falkner owned a *mokarari* tenure under the appellant, Surbo Lal, who on the 26th March 1903 obtained a decree for the entire rent due in respect of the tenure against the three tenants. The decree, however, made Wilson and Baxter liable for 11as. 4gs. share of the rent and made Falkner liable for the remaining 4as. 16gs. The decree-holder, who was admittedly the 16-anna proprietor, applied for execution of his decree by the sale of the *mokarari* tenure. The judgment-debtor, Wilson, who subsequently to the decree had purchased the interests of Baxter and Falkner in the tenure, objected to the execution on the grounds *inter alia* that—

(i) there could not be one execution and one sale proclamation in respect of the decree, which showed separate liabilities against him and Baxter and against Falkner, and

(ii) that the decree in question should be treated as a money decree, and that Falkner's share having since been purchased by him, the decree-holder was not entitled to proceed against that share.

[681] The Court of first instance overruled both the objections. On appeal the learned District Judge upheld them and dismissed the application for execution.

The decree-holder then appealed to the High Court.

*Maulvi Mahomed Mustafa Khan* (Babu Baldeo Narain Singh with him), for the appellant.

\* Appeal from Appellate Order No. 247 of 1904, against the Order of A. E. Staley, District Judge of Tirhoot, dated March 22, 1904, reversing the decree of B. B. Sen, Subordinate Judge of Mozufferpore, dated Jan. 19, 1904.

(1) (1889) I. L. R. 17 Cal. 301.

The case of *Tarini Prosad Roy v. Narayan Kumari Debi* (1) relied on by the Court below does not apply. All that it decided is that the landlord has the option either of proceeding against the defaulting tenure or against any other property of the judgment-debtor. The decree here being for rent in favour of the 16-anna landlord, the decree-holder is entitled to sell the tenure.

Babu *Sorashi Charan Mitra*, for the respondent. The landlord had the option of taking a money decree or proceeding against the tenure. In this case having chosen to take a decree which severs the liability of the joint-tenants, he has shown the intention to take only a money decree. *Tarini Prosad Roy v. Narayan Kumari Debi* (1).

RAMPINI and BRETT JJ. The facts of this case are as follows.

The appellant obtained a decree for the rent of a tenure. He is a 16-anna proprietor, and he sued the tenants of the tenure. Those tenants were two in number. Against one, a Mr. Wilson, a decree was given for an 11-anna 4-ganda share; and against the other tenant, a Mr. Falkner, for a 4-anna 16-ganda share. Then he endeavoured to execute his decree by selling the tenure. But the District Judge has decided that he is not entitled to do so, because his decree was one for rent only and did not expressly give him the right to sell the tenure.

The decree-holder appeals; and on his behalf it is contended that since, he is a 16-anna proprietor of the tenure, and since he sued in one suit the tenants of the whole tenure, he is entitled to execute his decree by selling the tenure.

We think that this is so. There seems to us to be no reason why the decree-holder should not sell the tenure in question. He has obtained a decree for the whole of the rent against the tenants; and although he recognized the fact that the tenants have [682] sub-divided the tenure and chose to accept a decree for the rent of the shares, which they are holding, yet he is the 16-anna proprietor and has got a decree for the whole rent. There is therefore no reason why he should not sell the tenure. Under the provisions of section 65 of the Bengal Tenancy Act the rent, for which he has got a decree, is a first charge upon the tenure, and in execution of such decree he is entitled to sell the tenure.

The learned pleader for the Respondent calls attention to the case of *Tarini Prosad Roy v. Narayan Kumari Debi* (1). No doubt, there are in the judgment in that case certain observations by Petheram, C. J., which support the contention of the respondent. But we can only respectfully say that we must dissent from those observations of the learned Chief Justice, and it does not appear to us that we are bound to follow them, as they are *obiter dicta*. The point for decision in that case was, whether the plaintiff was bound under the terms of the *kabuliat* which had been executed between the parties, to proceed against the tenure in the first instance, or whether he could proceed to execute the decree in any way he pleased; and what was decided was that he was not bound by the terms of the *kabuliat*, but was entitled to execute his decree in the ways provided by the Bengal Tenancy Act. That was the point decided; and the observations of the learned Chief Justice with regard to the provisions of section 65 of the Bengal Tenancy Act are *obiter dicta*.

For these reasons we think that we are not bound to follow them.

This appeal is accordingly decreed with costs.

*Appeal allowed.*

(1) (1889) I. L. R. 17 Cal. 301.