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into Court, the attorney might present a petition for taxation of his bill and for payment of it out of the fund. Under these circumstances I can make no such order as is asked for now. The decree directs that the defendant Heeralall Seal shall pay to the plaintiff the Nawab Nazim a certain sum. How can the plaintiff now come in and ask that the decree shall be as it were split up into parts, and that as to part an order may be made that it shall be paid to the plaintiff's attorneys ?

All I can do at present is to order that Heeralall Seal do not pay the fund attached to any body without giving due notice to Mr. Pearson, to Mr. Linton, and to Mr. Leslie. The sooner those gentlemen tax their bills and ascertain their true position, the better will it be for them.

There will be no costs of this motion.

Application refused without costs.

Attorney for the plaintiff : Mr. *Pearson.*

Attorneys for the attaching creditor : Messrs. *Beebee* and *Rutter.*

Attorney for the defendant : Mr. *Wigley.*

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Pontifex.

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Small Cause Court Act (IX of 1850), *ss,* 58, 88—*Jurisdiction—Goods and Chattels—Moveable Property—Tiled Huts.*

See also 14 B L R 202

Tiled huts are not "goods and chattels" within the meaning of s. 58, Act IX 1850, and therefore cannot be taken in execution under that section.

Where tiled huts had been seized under a decree of the Small Cause Court, and a third party interpleaded under s. 88 of Act IX of 1850, and claimed the huts, *held* that the Court, having no power to seize the huts, was right in dismissing the claim.

CASE stated for the opinion of the High Court by the first Judge of the Calcutta Small Cause Court, under s. 7 of Act XXVI of 1864 :—

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"The plaintiff interpleaded under s. 88 of Act IX of 1850 for two tiled huts, valued at Rs. 1,000, which had been seized by the defendant (judgment-creditor in a previous suit,) and which the plaintiff claimed as goods and chattels belonging to himself. The huts were proved to be of the following construction :—The posts are very large, made of small (*sic.*) wood, the ceiling is made of planks covered with mortar and chunam, the floor of the second story of mortar like houses, and the walls of split bamboos and gurran posts covered with mud ; there are wooden steps nailed on to the pillars, the ground floor is made of bricks covered with tiles.

I held that these huts were not moveable without change of form, and that they were clearly not moveable property, under the Act for the Regulation of Mofussil Small Cause Courts and the Full Bench decision *Nattu Miah* v. *Nand Rani*" (1).

The first Judge, after referring to the words of the Mofussil Small Cause Court Act (XI of 1865) and Stephen's Commentaries, Vol. I, 286 and 172, held that the huts claimed were not goods and chattels, and were consequently not the proper subject of a claim under s. 88 of Act IX of 1850, but should be made the subject of an action of trespass for a seizure not justifiable under the terms of the warrant. He dismissed the claim under s. 88 of Act IX of 1850.

The following were the questions referred :—

1. Whether the Judge was right in considering that the tiled huts claimed were not goods and chattels?

2. Whether, if he was right, he was also right in dismissing the plaintiff's claim under s. 88 ?

The first question was referred by the Judge himself with the remark that " the practice of the Court has, for years previous to my tenure of this office, been to treat tiled huts as goods and chattels, though it seems from Mr. Temple's work on the practice of the Court that they were not always treated as such " (2). The second question was referred at the request of the plaintiff's Counsel.

(1) 8 B. L. R., 508.

(2) See Temple's Small Cause Court Practice, 116.

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Mr. *Apcar* for the plaintiff.—The words in s. 88, Act IX of 1850, and in the schedule to the Act are "goods and chattels," and the same words are used in s. 58 of the same Act. In s. 69 of the same Act, only the word "goods" is used. It is submitted that the word "chattels" is synonymous with the word "goods." In s. 19 of Act XI of 1865, the words "moveable property" are used. On these words it was held in *Nattu Miah* v. *Nand Rani* (1) that huts are not "moveable property" under that Act. On the principle of that decision, it is submitted they are not "goods and chattels." For the definition of "goods and chattels," see Wharton's Law Lexicon, 3rd edition, 401; Williams' Personal Property, 7. Huts cannot be moved without an essential change in their nature. In Act VIII of 1859, ss. 233—235, there is a distinction between "goods and chattels" and "immoveable property."

On the second question referred, it is submitted the claim to the huts was not rightly dismissed under s. 88. [PONTIFEX, J.—Your contention is that the Small Cause Court could not attach them. COUCH C. J.,—S. 88 only applies if the bailiff is justified in seizing the huts.] The claim ought to have been allowed, or the bailiff ordered to release the huts. [COUCH, C. J.—It has long been the practice of the Small Cause Court to attach huts such as these.] The issuing of short date summonses was a practice of long standing, yet this Court decided it was illegal—see *Bhairabdan Ram Chand* v. *Bassantlal Bhagat* (2).

The opinion of the High Court was delivered by

COUCH, C. J.—The first question put to us by the learned Judge of the Small Cause Court is "whether I am right in considering that the tiled huts claimed are not goods and chattels." He does not say "within the meaning of s. 58 of Act IX of 1850," but that is what he must have intended, and the question which we should answer.

What is meant by goods and chattels by s. 58 appears from the subsequent sections. It is one of a series of sections relating to the execution of an order of the Court, and we find

(1) 8 B. L. R., 5 8. (2) 9 B. L. R., 256.

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it said in s. 69 that "every bailiff executing any process of execution issuing out of the said Court against the goods of any person may, by virtue thereof, seize and take any of the goods of such person except, &c." The word "chattels" does not occur there. I think this shows that, in s. 58, chattels was used as synonymous with goods, and not as having a more extensive meaning. Then in s. 73, the previous sections containing provisions in regard to the sale of the property taken in execution, it is said:—"Until such sale the goods shall be deposited by the bailiff by whom they were taken in some fit place, or they may remain in the custody of a fit person approved by the Judges to be put in possession by the bailiff." That is a provision consistent with goods and moveables being taken in execution, but not with a hut or house being taken. Then s. 80 provides for what is called the goods and chattels of the party being discharged and set at liberty which, I take it, means being restored to the owner, or freed from the execution. All these provisions seem to show that what was intended to be taken in execution of the order of the Small Cause Court were goods and chattels, or what are moveables, and not what in English law are known as chattels real. This construction of s. 58 is supported by the opinion of all the Judges in the case of *Nattu Miah* v. *Nand Rani* (1). The ground upon which Macpherson, J., put his judgment shows that the huts are not goods and chattels, equally with the opinion of myself and the two Judges who concurred with me. Macpherson J., said he considered that a hut was a house, and certainly a house cannot be properly described as goods and chattels. I think, therefore, that what have been described in this case by the Judge of the Small Cause Court are not goods and chattels that might be taken in execution under s. 58.

The second question submitted to us is whether, if they are not goods and chattels, the learned Judge was right in dismissing the plaintiff's claim under s. 88.

Now s. 88 provides that, "if a claim is made to or in respect of any goods or chattels taken in execution under the process of any

(1) 8 B. L. R., 508.

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Court, &c." If these are not goods and chattels taken in execution under the process of the Court, they do not come within the words of that section. What it was intended for is that, when the bailiff had, in execution of the order of the Small Cause Court, seized property which, if it were the property of the defendant in the suit, might be taken in execution, a nd another person had put in a claim to it, the claim should be summarily dealt with by the Small Cause Court. But here the bailiff has taken in execution that which even if it were the property of the debtor, he would not be at liberty to take, and though it may seem hard that the claimant should be obliged to resort to a suit in order to establish his right, and to prevent his property being sold, that is the proper remedy. The bailift, by seizing what the warrant of the Small Cause Court could not authorize him to seize, has been guilty of an illegal act, a trespass for which he is liable to be sued, and for which he may have to pay such damages as the owner of the huts may have suffered in consequence. Seeing what is stated in the case by the Judge of the Small Cause Court, he will probably not suffer any serious injury. An order will be made which will set matters right.

I think we must answer both the questions, which have been put to us, as the learned Judge has decided, that huts are not goods and chattels within the meaning of the Act, and that the Judge was right in dismissing the claim.

Attorney for the plaintiff: Mr. *Vertannes*.