1868

BENI MADHAB DAS v. RAMJAY KOKH.

before a Court of equity and good conscience. It has been held that, if a person builds upon land jointly belonging to himself and his co-sharers, and these co-sharers stand by and allow him to do so without objection, an action subsequently brought by them to put down the building, would not be allowed by a Court of justice. The principle of this decision is applicable *à fortiori* to the circumstances of the present case. A right of easement is much weaker than a right of proprietorship; and, if a co-sharer cannot maintain the action referred to above, I do not see any reason why the plaintiff should be permitted to maintain such a suit. I would, therefore, decree this special appeal with costs.

---

1868
*Sept.* 5.

*Before Sir Barnes Peacock, Kt. Chief Justice, and Mr. Justice Mitter.*

DESARATULLA *v.* NAWAB NAZIM NAZIR ALI KHAN.*

*Execution of Decree under Act X. of* 1859—*Jurisdiction of Revenue Courts.*

A obtained a decree against B. for arrears of rent, in respect of a saleable tenure. In execution of the decree, the Deputy Collector of Basirhat requested the Collector of the 24-Pergunnas to attach and sell any movable property belonging to B. He, accordingly, caused "certain houses and buildings and some movable properties" belonging to B. to be attached. On an application by B. to the High Court, to set aside the attachment, *held*, the Collector had no jurisdiction to attach the property. The decree could not be executed by the attachment of any immovable property except the tenure, before it was shewn that satisfaction of the decree could not be obtained by execution against the person or movable property of the debtor.

Baboo *Bhawani Charan Dutt*, on behalf of Desaratulla and others, moved to make absolute a rule *nisi* granted on the following petition:

"That Nawab Nazim Sidhi Nazar Ali Khan instituted a suit, for arrears of rent, against the petitioners, in the Deputy Collector's Court of Chauki Basirhat, in the district of 24-Pergunnas; and obtained a decree on the 25th of November 1867.

"That long before the institution of the present suit, the petitioners had sold the tenure, for the arrears of which the

* Rule *Nisi* on Motion, No. 956 of 1868.

1868

DESARATULLA v. NAWAB NAZIM NAZAR ALI KHAN.

decree was passed, to one Samidunnisa Bibi, on the 16th of Falgun 1270 (27th March 1867); and, therefore, they pleaded their non-liability, and prayed that the purchaser, Samidunnisa might be made a party to the suit, and a decree passed against her

"That although the zemindar, on several occasions, received rent from the said Samidunnisa, yet as her name was not legally registered in the serista of the zemindar, a decree was passed against the petitioners.

"That, subsequently, in execution of the said decree, the Deputy Collector of Basirhat, on the 8th May 1868, requested the Collector of 24-Pergunnas to attach and sell any movable property belonging to the petitioners.

"That, accordingly, certain houses and buildings and some movable properties belonging to the petitioners have been attached, and the Collector of the 24-Pergunnas has fixed the 27th July1868 for the sale thereof.

"That the petitioners, therefore, submit that the Collector before selling the tenure, for the arrears of which the decree was passed, had no jurisdiction to attach the buildings and kancha houses which are immovable and not movable properties, as has been supposed by the Collector."

Upon this application, a rule *nisi* had been issued, on the 25th July 1868, against the decree-holder, Nawab Nazim, "to show cause why the attachment of the property and all subsequent proceedings in respect of that property should not be set aside."

Baboo *Ashutosh Dhur* showed cause on behalf of the Nawab Nazim.

The judgment of the Court was delivered by

PEACOCK, C. J.—We are of opinion that this rule ought to be made absolute, and that the attachment of the pucka houses, that is to say, the brick-built houses, and of the doors and windows belonging to the same should be set aside, and the order directing the sale and all subsequent proceedings thereon.

This is a case in which the Collector had no jurisdiction to

1868

DESARATULLA v. NAWAB NAZIM NAZAR ALI KHAN.

attach the property, and in which this Court, under its general power of control, ought to prevent the lower Court from doing that which it has no jurisdiction to do. The attachment and sale was not in the exercise of a power which belong to the Collector, but in the exercise of a power which was not at all within his jurisdiction. The Revenue Courts have merely a limited jurisdiction conferred upon them by Act X. of 1859; and this Court, under its general power of control, has the right to prevent them exceeding that jurisdiction. The full Bench Ruling, *Gobindakumar Chowdhry* v. *Krishnakumar Chowdhry*(1), which was cited, was a case in which the High Court ordered a Revenue Court to exercise a jurisdiction which belong to it and which that Court had refused to exercise. The present is a converse case, in which the High Court is asked to prevent the Revenue Court from exercising a power which is not within its jurisdiction. The property has been attached by the Collector of the 24-Pergunnas under an order from the Deputy Collector of Basirhat in that Zilla. A decree had been obtained by the plaintiff against the defendant, in the Court of the Deputy Collector of Basirhat, for arrears of rent payable in respect of a saleable under-tenure; and in execution of that decree the Deputy Collector requested the Collector of the 24-Pergunnas to sell any movable property belonging to the plaintiff. The decree itself, as I understand, was not sent by the Deputy Collector to the Collector to be executed, but there was a mere request from the Deputy Collector to the Collector to execute the decree by seizing the movable property. If the Collector acquired jurisdiction in consequence of that request, it was merely a jurisdiction to attach movable property, and not to attach and sell immovable property. But independently of that, I am of opinion that the decree of the Deputy Collector could not be executed by the attachment of any immovable property except the tenure, before it was shewn that satisfaction of the decree could not be obtained by execution against the person or movable property of the debtor. Section 86 of Act X. of 1859 enacts that process of execution may be issued against either the person or the property of a judgment-debtor; but

(1) No. 530 of 1866; 31st May 1867.

process shall not be issued simultaneously against both person and property That section has been repealed, but substantially re-enacted by section 17 of Act VI. of 1862 of the Bengal Council Having laid down that general rule, section 109 enacts that, "in the execution of any decree for the payment of money under this Act, not being money due as arrears of rent of a saleable under-tenure, the judgment-creditor may apply for execution against any immovable property belonging to his debtor, if satisfaction of the judgment cannot be obtained by execution against the person or movable property of the debtor within the district in which the suit was instituted. This decree being for money due for arrears of rent of a saleable under-tenure, falls within the exception in section 109, and we must, therefore, ascertain how the money may be obtained by execution. Section 109 shews clearly, that, as a general rule, process of execution for a money-decree under Act X., is not to be levied in the first instance by attachment of immovable property. The Legislature seems to have been anxious to guard against the sale of immovable property in execution of decrees of the Revenue Courts, under Act X. of 1859, until the movable property should have been first exhausted. Section 105, however, forms an exception to that rule, and provides that, "if the decree be for an arrear of rent in respect of an under-tenure, which, by the title-deeds or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof, contained in any law for the time being in force." But then it provides that "no such application shall be received when a warrant of execution has been previously issued against the person or movable property of the judgment-debtor, so long as such warrant remains in force," from which I infer that the Legislature considered that, under the provisions of Act X. of 1859, no other execution could be issued before the application to sell the under-tenure except an execution against the person or movable property of the debtor. I can scarcely conceive that the Legislature, if they had considered that an

1868

DESARATULLA v. NAWAB NAZIM NAZAR ALI KHAN.

attachment of the general immovable property of the debtor might be made in the first instance, would not have provided that the under-tenure should not be sold so long as a warrant should remain in force against the other immovable property, as well as when a warrant should remain in force against the movable property. I, therefore, think that even for arrear of rent of a saleable under-tenure, the other immovable property of the debtor cannot be attached in the first instance.

The Legislature then proceeds in section 105: "If after sale of an under-tenure any portion of the amount decreed remains, due process may be applied for against any other property, movable or immovable, belonging to the debtor; and any such immovable property may be brought to sale in the manner provided in section 110 of this Act."

The only exception, then, which the Legislature intended to make to the general provisions contained in section 109, was that in the case of arrears of rent in respect of a saleable under-tenure, the under-tenure itself might be sold in the first instance, although it was immovable property; and that if after the sale of the under-tenure any portion of the debt might remain due, execution might issue gainst other property, movable or immovable. It did not prevent, even in the case of arrears of rent due in respect of a saleable under-tenure, execution against the person or movable property of the debtor, in the first instance. It appears to me, therefore, that the Collector not having been satisfied that the decree could not be levied upon the movable property of the debtor or by execution against his person, had no jurisdiction to attach the debtor's immovable property.

It was contended, that there was a proviso in the under-tenure that the tenure would become void upon a decree for rent being obtained and remaining unsatisfied for 15 days; and that, consequently, at the end of the 15 days, the under-tenure ceased to exist, and was not saleable. I am of opinion, however, that the under-tenure did not become absolutely void and at an end, at the expiration of 15 days, but that it was only voidable at the election of the grantor. But even if it were at an end, that would not justify an attachment of the general immovable

1868

DESARATULLA v. NAWAB NAZIM NAZAR ALI KHAN.

property of the debtor, because it is only after a sale of the under-tenure that the immovable property, by virtue of section 105, becomes attachable. If the immovable property cannot be attached by virtue of section 105, it cannot be attached except under the provision of section 109, and then it can only be attached if satisfaction of the debt cannot be obtained against the person or the movable property of the debtor. If, therefore, the Collector had been acting under a decree of his own Court, and not in pursuance of the request of the Deputy Collector to attach the movable property, it appears to me that he had no jurisdiction in the first instance to proceed against immovable property other than the tenure itself.

The rule will be made absolute with costs.

---

*Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.*

RAJA UPENDRA LAL ROY *v.* SRIMATI RANI PRASANNAMAYI.*

1868
*Sept.* 9.

*Hindu Law—Adoption of an Only Son.*

The adoption of an only son is invalid according to Hindu Law.

THIS was a suit for establishing the title of the plaintiff as the adopted son of the late Raja Nanda Lal Roy, and for possession of the property left by him.

The plaintiff alleged that the deceased Raja having had no issue, had adopted him as his son, in due form, on the 19th Baisakh 1259 (May 1852), and made him the heir to all his property; that, on the death of the Rajah in Bhadra 1269 (August 1862), his widow, the defendant, falsely declared the minor defendant, Jogendra Narayan, to be his adopted son, and did not allow the plaintiff to take possession of his adoptive father's property; that the plaintiff having attained his majority in Baisakh 1273, (April 1866) instituted this suit for the establishment of his right.

The widow, defendant, Rani Brahmamayi, contended that the plaintiff being a minor was not entitled to bring this suit;

* Regular Appeal No. 75 of 1868, from a decree of the Officiating Judge of Midnapore.