them, nor had they ever agreed to pay him rent. They paid rent to the zemindar.

The Moonsiff held these parties liable for the land in their possession, but the Judge reversed that order.

It is contended in this special appeal that Magun and his brothers sold all their rights to the plaintiff, and that these included their right to hold the 3 beeghas 2 cottahs on payment of rent to the zemindar, and the plaintiffs are willing to pay rent to him.

This appears to us a fallacy. The utmost right that Magun and his brothers had in these 3 beeghas 2 cottahs after the resumption-suit was the right to settlement. This was a personal right which could not have been transferred to a third party except with the consent of the zemindar. Moreover, the deed of sale executed by Magun did not pass any mâl land at all; it only conveyed lakheraj land, and at the time the sale was made the only lakheraj land in the vendor's possession was 6 beeghas 18 cottahs. The giving of this deed of sale so soon after the resumption-decree appears to have been a trick on the part of Magun to get rid of the effect of the order declaring 3 beeghas 2 cottahs of his land to be liable to pay rent.

But in any case, the plaintiff cannot succeed in this suit. He claims rent on a kubooleut executed by Magun, and there has been neither agreement nor contract on the part of the defendants Romanath and Pitambur to pay him rent. No relation of landlord and tenant exists between the parties, and the execution-purchasers ought not to have been made defendants.

They hold the land as purchasers of Magun's right to a settlement with the zemindar at a sale held with the zemindar's consent, and the only person to whom they have attorned as tenants is the zemindar. They cannot in this suit be made liable to pay rent to the plaintiff.

We confirm the decision of the Judge, and dismiss the special appeal with costs.

The 29th April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble C. Pontifex, *Judge*.

Small Cause Courts—Act IX. of 1850, ss. 58, 88—Jurisdiction—Sale of Moveable Property in execution of Decree—Huts—Goods and Chattels.

Kallypersaud Sing, *Plaintiff*,

versus

Hoolaschund, *Defendant*.

Mr. Apcar for the Plaintiff.

Huts are not goods and chattels, and cannot be taken in execution of a decree of the Court of Small Causes under s. 58, Act IX. of 1850.

THIS was a reference by the First Judge of the Court of Small Causes at Calcutta for the opinion of the High Court under section 7, Act XXVI. of 1864. The reference was as follows:—

The plaintiff interpleaded under section 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 were very large, made of saul wood: the ceiling is made of planks covered with mortar and chunam; the floor of the second storey 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 in Natu Miah *vs.* Nand Ranee (8 Bengal Law Reports, page 504).*

The Presidency Small Cause Courts, in reference to English law, use the phrase 'goods and chattels' in lieu of the phrase 'moveable property;' but I apprehend the two terms are convertible. English law considers as goods and chattels whatever amounts not to freehold (Stephen, page 286), and things real consist of things substantial and immoveable and of the rights and profits arising out of these (*Ibid*, page 172). Immoveability is consequently one essential characteristic of realty; and moveability one essential characteristic of goods and chattels; and the definition of things immoveable given in the Full Bench decision above referred to will apply to goods and chattels also. It is true that the term 'goods' may be considered to refer to such things as have no concern with realty, and are mere moveables and are

*17 W. R. 309.

often described as chattels personal; and the term 'chattels' to chattels real or estates in lands and tenements not amounting to freehold. But these latter are scarcely seizable by a bailiff, and the term in this sense would certainly not include the huts which are the subject of the present seizure.

On these grounds I have held that the huts claimed are not goods and chattels, and are consequently not the proper subject of a claim under section 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 my warrant.

This decision is given subject to the opinion of the High Court on two points, *viz.*:—

1st.—Whether I am right in considering that the tiled huts claimed are not goods and chattels?

2nd.—Whether, if I am, I am also right in dismissing the plaintiff's claim under section 88?

I submit the first question myself, as 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.

The second question I submit at the request of the plaintiff's counsel.

It is to be understood that, notwithstanding the dismissal of the plaintiff's claim, the bailiff will of course, should the High Court concur in my view of the legal character of tiled huts in question, at once, as a matter of course, release them.

The judgment of the High Court was delivered as follows 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 section 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 section 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 it said in section 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 (excepting the necessary wearing apparel and bedding of such person or his family, and the tools and implements of his trade), and may also seize and take any money or bank-notes, and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money belonging to any such person against whom any execution shall have issued as aforesaid." The word "chattels" does not occur there. I think this shows that in section 58 chattels was used as synonymous with goods, and not as having a more extensive meaning. Then in section 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 section 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 section 58 is supported by the opinion of all the Judges in the case in 8 Bengal Law Reports, page 508.* The ground upon which Mr. Justice Macpherson 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. Mr. Justice Macpherson 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 section 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 section 88.

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

* 17 W. R. 311

process of any 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, and 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 bailiff, by seizing what the warrant of the Small Cause Court could not authorize him to seize, has been guilty of an illegal act, 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.

The 1st May 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Act VIII. (B.C.), 1869—Postponement of Execution-sale—Jurisdiction—High Courts Act, s. 15.

In the Matter of
J. G. Bagram, *Petitioner*.

Mr. M. P. Gasper for Petitioner.

Where, in a case under Act VIII. (B.C.) of 1869, a Moonsiff, on a claim being preferred to property attached in execution, postponed the sale of it without taking security, or having the amount of the decree deposited:

HELD that his proceeding, though erroneous, was in a case in which he had and exercised jurisdiction, and that his decision ought not to be set aside under the 15th section of the High Courts Act.

Couch, C.J.—IN this case, according to the statement of the petitioner, the property was attached in execution of a decree under Act VIII. of 1869 (B.C.), and a claim was preferred to it. The Moonsiff received the claim, and has, after an investigation of it, ordered that the claim be admitted, and the property be released, and the claimant's pleader's fees be paid by the decree-holder.

It is now objected that the decision of the Moonsiff was without jurisdiction on the ground that the amount of the decree was not deposited in Court, or security given for it.

The jurisdiction of the Moonsiff is given by section 246 of Act VIII. of 1859, which authorizes the Court, when a claim is preferred to attached property, to investigate it with the like powers as if the claimant had been originally made a defendant to the suit. Section 247 enables the Court, if it appears necessary, to postpone the sale for the purpose of making the investigation. In cases under Act VIII. of 1869 (B.C.), the power is subject to a further qualification; the Court is not to postpone the sale unless the amount of the decree is deposited or security given for it. But the jurisdiction to investigate the claim does not depend upon that. The jurisdiction is founded upon a claim being made. The Moonsiff cannot deal with the question of postponing the sale until he has acquired jurisdiction, and is proceeding to investigate the claim by virtue of it; and his postponing the sale without taking security, or having the amount of the decree deposited, is not an act, either without jurisdiction over the subject-matter or in the proceeding, or in excess of his jurisdiction. It is an erroneous proceeding in a case in which he has jurisdiction, and is exercising it. He may have acted erroneously in this case in postponing the sale without requiring the deposit or the security, but his decision allowing the claim is a decision within his jurisdiction. I do not think that we ought, under section 15 of the High Courts Act, to interfere and set the decision aside, because, in the course of his proceeding, he has erroneously postponed the sale. The result shows that the sale ought not to be made, nor would the decree-holder be entitled to receive the money which, it is contended, ought to have been deposited. The application is rejected.

Glover, J.—I concur.
