ORIGINAL CIVIL.

Before Mr. Justice Wilson.

1879
April 8.

MILLER *v.* BRINDABUN.

Fixtures—Goods and Chattels—Sale of Oil and Flour Mills and Engine in Execution of Small Cause Court Decree—Act IX of 1850, *s.* 58.

In a suit for damages for the removal of oil and flour mills and a steam-engine and boiler seized in execution of a decree of the Calcutta Small Cause Court,—*held*, that such things were fixtures, and not goods and chattels, within the meaning of s. 58 of Act IX of 1850, and therefore could not be seized in execution. The question whether fixtures are removable by a tenant as against his landlord has nothing to do with the question whether they are seizable in execution as goods and chattels.

THIS was a suit by the Official Assignee to recover damages for the removal of certain oil and flour mills and a steam-engine and boiler, which had been seized by the defendants in execution of a decree of the Calcutta Small Cause Court, and purchased by them at the execution-sale.

Mr. *Bell* and Mr. *Bonnerjee* for the plaintiff.

Mr. *Hill* and Mr. *Sale* for the defendants.

Mr. *Bell*.—These mills are not trade fixtures. Even admitting that trade fixtures could be taken in execution, they are not "moveable property;" they cannot be moved without an essential change in their actual nature—*Nattu Miah* v. *Nand Rani* (1); and it has been decided that the words "goods and chattels" in s. 58 of Act IX of 1850 mean moveable property, not chattels real, so that it is only that class of property that can be taken in execution.

Mr. *Hill*.—Section 58 of Act IX of 1850 says, that execution may issue against the goods and chattels of the person against whom an order for the payment of money is made. Now, trade

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

fixtures can be seized in execution of a *fi fa* in England, on the principle, that as the lessee can remove them during the term, they may be seized; whereas things that he may not remove, such as hearths and chimney-pieces, are not seizable: *Poole's Case* (1). The case cited on the other side shows that a hut cannot be seized, because if moved, there is an essential change in its nature. [WILSON, J.—If an engine is moved, it ceases to be an engine until it is set up again.] The right of removal is the real test: *Place* v. *Fagg* (2).

Mr. *Bell* in reply.

WILSON, J.—This is a suit brought by the Official Assignee, as assignee of the estate of Hurronath Mozoomdar and others, his partners, to recover damages for the removal by the defendants of flour and oil mills and a steam-engine, boiler and other accessory machinery by which the mills were worked,—all which had belonged to the insolvents.

The defendants justified the removal on the ground that they were purchasers of the things in question at a sale in execution of a decree of the Calcutta Small Cause Court.

Several objections to the validity of the sale and removal were raised. First, it was said that such things are not goods and chattels within the meaning of s. 58 of Act IX of 1850. Now I think it clear, that the things in question, bedded and fixed as they were, were what are called in English law fixtures, that is to say, so annexed to the soil that they could not be severed and removed without substantial disturbance of the soil and a substantial change in the character of the articles themselves. Indeed, this was not seriously disputed. Then the case of *Kally Persaud Sing* v. *Hoolas Chund* (3) is an express decision that the words "goods and chattels" in the section in question are used in their strict sense, and do not include fixtures: as in the earlier case of *Nattu Miah* v. *Nand Rani* (4), it had been held, that fixtures are not "moveable" or

(1) 1 Salk., 368.
(2) 4 Man. & Ry., 277.
(3) 10 B. L. R., 448.
(4) 8 B. L. R., 508.

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"personal property" within the meaning of the Mofussil Small Cause Courts Act. What is said in answer is, that though those were fixtures, they were trade fixtures such as according to English law a tenant might remove as against his landlord, and such as might be taken in execution in England for the tenant's debt, and I think they would be held to be trade fixtures under English law. But the only thing we are concerned with, is the meaning of the words, "goods and chattels" in the Calcutta Small Cause Courts Act, and I can see no reason why the English doctrines as to the difference between trade fixtures and other fixtures should be imported into the matter. Nor am I aware of any authority for doing so. On the other hand, the decision of Macpherson, J., in *Parbutty Bewah* v. *Woomatara Dabee* (1), is an authority for saying that the question whether fixtures are removable by a tenant as against his landlord has nothing to do with the question whether they are seizable in execution as goods and chattels. I think, therefore, that on this ground the plaintiff is entitled to succeed.

The plaintiff further objected to the seizure and sale, on the ground that, on the facts of the case, his title as assignee was a prior title to the defendants under the execution.

The plaintiff also objected to the removal of the goods, on the ground that the judgments of the Small Cause Court were against some of the insolvents only, and that even if the things were in their nature seizable, all that could be sold, would be the interest of the judgment-debtors, which would not justify the removal of the property.

As my opinion is in favor of the plaintiff upon the first question, it is unnecessary to say anything upon these two latter questions.

Attorneys for the plaintiff: Messrs. *Swinhoe and Co.*

Attorney for the defendant: Baboo *G. C. Chunder.*

(1) 14 B. L. R., 201.