

of the Civil Court in respect of the alteration of a tenant's rent. [It, therefore, seems to us that if a landlord seeks to enhance his tenant's rent when no settlement proceedings are going on, he must institute a suit for the purpose, and cannot do so by means of an application under section 158.

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We accordingly dismiss this appeal with costs.

Appeal dismissed.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

PROSONOMOYI DASSI v. SREENAOUTH ROY AND OTHERS.
 SREENAOUTH ROY AND OTHERS v. MUDDOOSOODUN DUTT.*

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Civil Procedure Code, section 295—Sale in execution of decree—Distribution of sale proceeds—Realization of proceeds of sale—Sale under agreement sanctioned by Court—Sale not of the right or interest of judgment-debtor in property.

P., the plaintiff in a suit No. 369 of 1886, obtained a decree for Rs. 2,14,728, in execution of which certain immoveable property was attached, including the premises 22 Strand Road, which was subject to certain trusts created by a deed, dated 2nd February 1858, executed by the father of the judgment-debtors, who with one M. were trustees of the deed. At the time of the attachment a suit No. 448 of 1883 was pending, in which the judgment-debtors as plaintiffs sought to have it declared what were the valid trusts under the deed, and that, subject to such trusts, they were absolutely entitled to the premises 22 Strand Road and the other properties; in that suit on 26th March 1888 a decree was made declaring the valid trusts, and charging the premises 22 Strand Road, with the payment of certain specific sums. In 1891, the judgment-debtors brought a suit No. 441 of 1891 to have the premises 22 Strand Road sold freed from the trusts, to provide for the trusts by setting apart a sufficient sum out of the purchase-money, and to have the balance divided between the judgment-debtors; and by the decree in that suit, dated 2nd September 1892, the trustees of the deed were authorised to sell the premises 22 Strand Road, and were directed out of the proceeds of sale to set aside Rs. 45,000 to provide for the trusts, next to pay the costs therein directed, and then to apply the balance for the purposes in the plaint mentioned. In pursuance of this authority the trustees on 25th February 1893 entered into an agreement with one J. L. for sale to him of the premises 22 Strand Road for Rs. 1,43,000. On 8th August 1893 a notice was issued at the instance of P. calling on the judgment-debtors to

* Application in Original Civil Suits Nos. 369 of 1886 and 441 of 1891.

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show cause why the premises 22 Strand Road, should not be sold in execution under her attachment. On 29th August 1893 the trustees of the deed of 2nd February 1858 gave notice to *P.* of an application to be made in the suits Nos. 369 of 1856 and 441 of 1891 for the removal of her attachment, or in the alternative for an order that the agreement for sale entered into by the trustees with *J. L.* be carried out; that the proceeds of sale be applied to certain purposes specified in the notice, as having priority over the claim of *P.*; that the balance be paid to the credit of suit No. 369, "as subject to the said attachment," and that the premises 22 Strand Road be thereupon released from attachment. These applications were heard together, and on the 14th September 1893 a consent order was made, by which it was ordered that the trustees be at liberty to carry out the agreement for sale with *J. L.*; that the sale proceeds be paid to *W.*, a member of the firm of the attorneys for *P.*, who out of such proceeds was to pay Rs. 45,000 to the trustees, and make other payments directed by the order, and pay the balance into Court to the credit of suits Nos. 369 of 1856 and 441 of 1891, "the said *P.* retaining her lien under her attachment upon the said balance in the same way as the same then subsisted upon the said property." The property was sold by the trustees in accordance with this order, and the purchase-money was paid to *W.*, who after making the payments directed paid the balance into Court. Whilst in the hands of *W.* the balance was attached by other creditors who had obtained decrees against the judgment-debtors, and it was paid into Court with notice of these attachments: *Held*, on an application by *P.* to have the money paid out to her in part satisfaction of her decree, that it could not be treated as "assets realised by sale or otherwise in execution of a decree" within the meaning of section 295 of the Code of Civil Procedure. The sale of the property under the order of 14th September 1893 was not a sale in execution, but a sale in pursuance of a private agreement entered into by the trustees under a liberty reserved to them by the Court, and the fact that the Court sanctioned it made no difference in this respect. It did not purport to be a sale of any right, title or interest of the judgment-debtors or of any property belonging to them.

To constitute a "realization" within the meaning of section 295 there must be either a realization by a sale in execution under the process of the Court, or a realization in one of the other modes expressly prescribed by the sections of the Code. If the money paid into Court had exceeded the amount due to *B* in respect of her lien, the amount of such excess might perhaps have been treated as a "realization in execution" within the meaning of section 295, but the balance in *W.*'s hands was less than the amount due to *P.*, and was entirely absorbed by the lien in her favour. There was therefore no surplus on which the attachments could operate.

Purshotam Dass v. Mahant Surajbharthi (1), and *Sevburz Bogla v. Shri Chunder Sen* (2) referred to and approved.

(1) I. L. R., 6 Bom., 588.

(2) I. L. R., 13 Calc., 225.

This was an application in which the facts were as follows :—

That by a *décree* in suit No. 369 of 1886, dated 6th December 1886, the defendants in that suit were ordered to pay the plaintiff the sum of Rs. 2,14,728-1, with interest and taxed costs of suit ; that in February 1887 in execution of that *décree* certain immoveable property belonging to the judgment-debtors was attached, including the premises No. 22 Strand Road ; that at the time of the attachment a suit No. 448 of 1883 was pending in the High Court for the construction of a deed of trust, dated 2nd February 1858, executed by the father of the judgment-debtors for ascertainment of the rights of the parties thereunder, and for a declaration that subject to any valid charges the judgment-debtors were absolutely entitled to the properties comprised in the deed, which included the attached properties ; that by the final *décree* made in suit No. 448 of 1883 on 26th March 1888 the trusts of the deed of 2nd February 1858 were declared, and the premises 22 Strand Road were charged with the sums payable in respect of the trusts of the deed ; that subsequently suit No. 441 of 1891 was instituted to have it declared that it was unnecessary to retain the premises 22 Strand Road for the purposes of the trusts, and that those premises might be declared to be discharged from the operation of the trusts, and might be sold, and out of the sale proceeds, after certain specified claims had been paid, a sum might be retained for the purposes of the said trusts, and the balance be divided equally between the judgment-debtors ; that on 2nd September 1892 a final *décree* was made in that suit (441 of 1891) whereby the premises 22 Strand Road were ordered to be sold, and after retaining Rs. 45,000 for the purposes of the trusts and the costs of suit, the balance was directed to be applied to the purposes in the plaint mentioned ; that on 8th August 1893 the plaintiff in suit 369 applied for an order for sale of the premises 22 Strand Road, and a notice was issued to the judgment-debtors to show cause why they should not be sold ; that on 29th August 1893 a notice was served on the plaintiff in suit No. 369 at the instance of the judgment-debtors, (who, together with one Muddooscodum Dutt were the trustees of the deed of trust of 2nd February 1858), of an application for an order that the attachment on the premises 22 Strand

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Road, in execution of the decree in suit No. 369, should be removed, and that the plaintiff in that suit should pay the costs of the application, or in the alternative for an order that an agreement for sale for Rs. 1,43,000 of the said premises 22 Strand Road, which had been made between the trustees of the deed of 2nd February 1858 of the one part and Joygobind Law of the other part, dated 25th February 1893, should be carried out, and the proceeds of sale be applied in the first place towards making certain payments specified in the application (including the payment of a sum of Rs. 45,000 to the trustees of the trust deed for the purpose of carrying out the trusts, and a sum due to Messrs. Watkins & Co. for costs, for which they claimed a lien on the title deeds of the premises 22 Strand Road), and that the balance should be paid into Court to the credit of suit No. 369 as subject to the attachment in that suit, and that the said premises should be released from the attachment; and that the plaintiff in suit No. 369 should pay the costs of and incidental to the application; that the application by the plaintiff in suit No. 369 and that of the judgment-debtors came on for hearing on 14th September, when by consent of all the parties an order was made in suit No. 369, whereby it was ordered that the trustees of the deed of trust of 2nd February 1858 should be at liberty to carry out the contract for sale of the premises 22 Strand Road, to Joygobind Law, the plaintiff releasing her claim to those premises under the attachment for the purpose only of permitting the sale, the sale proceeds to be paid in the first instance to Mr. Watkins who should thereout pay all the costs of and incidental to the sale, the sum of Rs. 45,000 to the trustees of the deed of 2nd February 1858 to be held by them for the purposes of the trusts as declared by the order of 2nd September 1892, and certain other payments, and pay the balance of the sale proceeds into Court to the credit of the suits Nos. 369 of 1886 and 441 of 1891, "the plaintiff Prosonnomoyi Dassi retaining her lien under her attachment upon the said balance in the same way as it then subsisted on the attached property"; the lien if any of Messrs. Watkins & Co. on the title deeds of the property to attach to the balance to be paid into Court, costs to be reserved until further order of Court, and the order to be without pre-

judice to the right of the parties ; that the sale of the premises 22 Strand Road was carried out under the above order, and from an account furnished by Mr. Watkins to the plaintiff in suit No. 369 it appeared that after paying the sums as directed by the said order, and retaining a sum of Rs. 2,000 on account of Messrs. Watkins & Co.'s costs subject to settlement, the balance was paid into Court, and there was in Court the sum of Rs. 75,405-14-8 to the credit of the two suits ; and that after the realization of the proceeds of sale by Mr. Watkins, on the 23rd November 1893, attachments were issued in two other suits brought by one Behary Lall and one Balmokund Singonya, respectively, against the judgment-debtors, viz., suits Nos. 51 and 52 of 1893 against the proceeds of sale in the hands of Mr. Watkins, and the money was paid into Court with notice of these attachments.

The application was that the said sum of Rs. 75,405-14-8, and any balance that might remain in the hands of Mr. Watkins after adjustment of his costs, might be paid to the plaintiff in suit No. 369 of 1886 in part satisfaction of her decree in that suit ; or if the Court should be of opinion that the plaintiff was not alone entitled to the said money, then for an order for rateable distribution under section 295 of the Code of Civil Procedure to those entitled to share in it.

Mr. Dunne (with him Mr. Bonnerjee) for the applicant (the plaintiff in suit No. 369 of 1886.)

Mr. Phillips for the judgment-debtors and for Mr. N. S. Watkins.

Sir Griffith Evans for the trustees.

Mr. Allen for the attaching creditors in suits Nos. 51 and 52 of 1893.

Mr. Henderson and Mr. O'Kinealy for other attaching creditors.

The following cases were cited in support of the application : *Vishvanath Maheshwar v. Firehand Panachand* (1), *Purshotam Dass v. Mahanant Surajbharthi* (2), *Sewbuw Bogla v. Shib Chunder Sen* (3), *Soobul Chunder Law v. Russick Lal Mitter* (4), and *Hafez Mahomed Ali Khan v. Damodar Pramanick* (5).

(1) I. L. R., 6 Bom., 16.

(3) I. L. R., 13 Calc., 225.

(2) I. L. R., 6 Bom., 588.

(4) I. L. R., 15 Calc., 202.

(5) I. L. R., 18 Calc., 242,

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SALE, J.—This is an application as to the disposition of a fund representing the balance of the sale-proceeds of the premises No. 22 Strand Road, which was paid into Court to the credit of the two abovementioned suits under an order, dated the 14th September 1893. The circumstances under which this fund was paid into Court are as follows :—

The plaintiff Prosonnomoyi obtained a decree in the first suit, dated 6th December 1886, for the sum of Rs. 2,14,728 with interest and costs against Sreenauth Roy, Sumbhoonauth Roy and Gopinauth Roy.

In February 1887 the plaintiff, in execution of the decree, attached various properties, including the premises No. 22 Strand Road, which were subject to certain trusts created by an Indenture, dated 2nd February 1858, executed by the father of the judgment-debtors. At that time a suit No. 448 of 1883 was pending, wherein the judgment-debtors as plaintiffs sought for a declaration of what were the valid trusts under the Indenture of Trust, and that, subject to such trusts, the plaintiffs were absolutely entitled to the premises No. 22 Strand Road, and the other properties. On the 26th March 1888 a decree was made in that suit declaring what were the valid trusts, and charging the premises No. 22 Strand Road with the payment of certain specific sums.

In 1891, the second of the abovementioned suits was instituted by the judgment-debtors, the object of which was to have the premises No. 22 Strand Road sold freed from the trusts, to provide for the trusts by setting apart a sufficient sum out of the purchase-money, and then to have the balance divided equally amongst the judgment-debtors.

By the order of the 2nd September 1892 made in that suit the trustees of the Indenture of Settlement were authorized to sell the premises No. 22 Strand Road, and were directed out of the proceeds to set apart Rs. 45,000 to provide for the trusts; next to pay the costs therein directed, and then to apply the balance "for the purposes in the plaint mentioned." In pursuance of this authority the trustees, being the judgment-debtors and one Muddoosoodun Dutt, on the 25th February 1893, entered into an agreement with one Joygobind Law for sale to him of the premises No. 22 Strand Road for the sum of Rs. 1,43,000.

On the 8th of August 1893 a notice was issued at the instance of the plaintiff Prosonnomoyi Dassi calling upon the judgment-debtors to show cause why the premises 22 Strand Road should not be sold in execution of her attachment. On the 29th of August 1893 the trustees gave notice to the plaintiff Prosonnomoyi Dassi of an application to be made in both the abovementioned suits for the removal of her attachment, or in the alternative for an order that the agreement for sale entered into by the trustees be carried out, and that the sale proceeds be applied for the purposes in the notice specified, as having priority over the claim of the judgment-creditor Prosonnomoyi Dassi, that the balance be paid to the credit of the first mentioned suit, as subject to the said attachment, and that the property be thereupon released from attachment. Both applications were heard together, and on the 14th September 1893 an order was made with the consent of all the parties, whereby it was, amongst other things, ordered that the trustees be at liberty to carry out the agreement for sale with Joygobind Law, the plaintiff agreeing to release her claim to the property for the purposes of the sale only ; that the sale proceeds be paid to Mr. N. S. Watkins ; that he do thereout pay the sum of Rs. 45,000 to the trustees and make the other payments directed by the order and then pay into Court the balance to the credit of both the abovementioned suits, "the said Prosonnomoyi Dassi retaining her lien under her attachment upon the said balance in the same way as the same then subsisted upon the said property." There was also a direction that the lien, if any, of Messrs. Watkins & Co. on the title deeds of the premises should attach to the balance. By this order the attachment was removed, but in place thereof a lien was created in favour of the judgment-creditor which was to attach to the balance of the proceeds of sale. The property was sold by the trustees free from the attachment, and the purchase-money was paid to Mr. Watkins, who made certain payments as directed by the order, and after retaining a sum for costs in respect of which his firm claimed a lien on the title deeds, paid the balance into Court. Messrs. Watkins & Co. now claim a further sum in satisfaction of their lien, and there is also a claim by the trustees in respect of certain of the payments directed by the order, which, it is alleged, have not yet been satisfied.

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It appears that the balance, while in the hands of Mr. Watkins, was attached by two other judgment-creditors, being the plaintiffs in the suits No. 52 of 1893 and No. 51 of 1893 who had obtained decrees against the defendants Sreenaath Roy, Shumbhoonauth Roy, and Gopinath Roy, and that it was paid into Court to the credit of both the abovementioned suits with notice of these attachments.

The plaintiff Prosonnomoyi Dassi now asks to have the balance (after satisfaction of the claims of the trustees and of Messrs. Watkins & Co.) paid out to her in priority to the attaching creditors, who, on the other hand, claim to share rateably in the fund under the provisions of section 295 of the Code.

At the hearing of the application a third judgment-creditor appeared and claimed to share in the distribution of the fund.

The main question is whether under the circumstances this fund can be treated as "assets realised by sale or otherwise in execution of a decree" within the meaning of section 295. Can it be said, in the first place, that the sale of the property under the order of the 14th September was a sale in execution?

If the property had been sold under the proviso to section 295, it would have been, doubtless, a sale in execution, but at the same time a sale from the benefit of which the attaching creditors would have been excluded. For the proviso after fixing the order of payment of the prior charges restricts the distribution of the balance to the "holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court which made the decree ordering the sale for execution of such decrees and have not obtained satisfaction thereof."

The facts show that the sale of this property did not take place under the proviso, and that it was a sale, not in execution of any decree or order, but in pursuance of a private agreement entered into by the trustees with the purchaser under a liberty reserved to them by the Court. The sale no doubt was further sanctioned by the Court as part of the arrangement embodied in the consent order of the 14th September, under which Prosonnomoyi agreed to remove her attachment, and thus allow the sale to be carried out, on the condition that instead of the attachment she should have a

lien on the purchase-money. But in no sense can it be suggested that the sale was in *execution* of this order.

The case of *Purshotam Das v. Mahanunt Surajbharti* (1) decides that section 295 must be read as if the words "from the property of the judgment-debtor" were inserted after the word "realized." Here the sale did not purport to be a sale of any right, title or interest of the judgment-debtors or of any property belonging to them. It was a sale by the trustees of property which was vested in them as trustees. Moreover, reading the case just cited with the case of *Sewba Bogla v. Shib Chander Sen* (2), the rule appears to be that to constitute a realization within the meaning of section 295, it must be either a realization by a sale in execution under the process of the Court, or it must be a realization in one of the other modes expressly prescribed by the sections of the Code. It cannot, I think, be said that the money paid to Mr. Watkins under the order of the 14th September 1893 was *realized* in any of the methods provided by the Code for realizing property in execution of a decree.

When the fund was attached it was held by Mr. Watkins subject to a prior lien created by an order of Court in favour of the plaintiff Prosonnomoyi, which lien was binding on the judgment-debtors and those claiming under them. When paid into Court this fund was still subject to that lien. If the money paid into Court had exceeded the amount due to the plaintiff in respect of which the lien was created in her favour, the amount of such excess having been paid into Court with notice of the attachment might perhaps have been treated as a realization in execution within the meaning of section 295. For the excess in that case would have been money belonging to the judgment-debtors attached while in the hands of a third party and subsequently paid into Court under an order of the Court. Payment into Court under such circumstances forms a well recognized method of realization in execution under the Code. But the balance in Mr. Watkins' hands was very far below the amount due to the plaintiff Prosonnomoyi Dassi and was entirely absorbed by the lien in her favour. There was therefore no surplus upon which the attachments could operate.

(1) I. L. R., 6 Bom., 588.

(2) I. L. R., 13 Calc., 225.

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In my opinion this is not a case of distribution of assets under section 295. The rights of the judgment-creditors claiming to share in this fund must therefore be postponed to the rights of the plaintiff Prosonnomoyi Dassi under the lien declared in her favour by the order of the 14th September 1893.

There being no contest as between the plaintiff Prosonnomoyi Dassi and the trustees and Messrs. Watkins & Co. there must be an order for payment of the balance to her after satisfaction of the claims of the trustees and of Messrs. Watkins & Co. The costs of the parties sharing in the fund may be added to their claims.

Attorney for the plaintiff Prosonnomoyi Dassi: Mr. Rutter.

Attorneys for the trustees and the judgment-debtors: Messrs. Watkins & Co.

Attorneys for the attaching creditors in suits 51 and 52 of 1893: Messrs. Sanderson & Co.

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

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 May 21.

AJUDHIA PERSHAD (JUDGMENT-DEBTOR) v. BALDEO SINGH (DECREE-HOLDER).*

Civil Procedure Code, 1882, section 235—Order absolute for sale, Application for—Execution of decree—Verification of application—Limitation—Transfer of Property Act (IV of 1882), section 89.

An application for an order absolute for sale of mortgaged property under the provisions of section 89 of the Transfer of Property Act, 1882, is not an application for execution of a decree and need not therefore be in the form prescribed by section 235 of the Code of Civil Procedure.

A decree was passed in a mortgage suit on the 13th July 1887 by consent, which directed that the amount due was to be paid in ten annual instalments during the years 1295—1304 (1888—1897) in the month of Falgoon (February) each year, and that on default of three successive instalments the whole amount was to become at once due and payable. The mortgagor having defaulted in payment of the instalments due in the years 1297, 1298, and 1299 (1880, 1891, 1892) the mortgagee on the 18th February 1893 presented an application to the Court under section 89 of the Transfer

* Appeal from Order No. 152 of 1893, against the order of Babu Madhab Chander Chatterjee, Subordinate Judge of Bhagalpur, dated the 10th of May 1893.