Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

BAIKANTA NATH MITTRA (JUDGMENT-DEBTOR) *v.* AUGHORE NATH BOSE (DECREE-HOLDER).* 1893 *December* 18.

Bengal Tenancy Act (VIII of 1885*), Sch. III, cl.* 6*—Limitation—Decree in suit for rent—Execution of decree—Final decree—Execution proceedings struck off—Bengal Tenancy Act (VIII of* 1885*), ss.* 143, 144, 148.

Having regard to ss. 143, 144 and 148 of the Bengal Tenancy Act, there is a special procedure laid down for rent suits; and therefore decrees in rent suits are decrees under Art. 6 of Sch. III of that Act.

The words "final decree" in Article 6, Sch. III, of the Bengal Tenancy Act, refer to the final decree in the suit, and cannot be held to include an order of an Appellate Court made in an application to set aside that decree under s. 108 of the Code of Civil Procedure.

An *ex-parte* rent decree having been obtained on the 30th May 1888 for a sum under Rs. 500, the decree-holder on the 27th May 1889 applied for execution thereof and attached certain properties of the judgment-debtor, the date fixed for the sale being the 31st August 1889. The judgment-debtor applied under s. 108 of the Civil Procedure Code for a rehearing of the rent suit, and on the day fixed for the sale applied for stay of execution: the sale was stayed, and the Court of its own motion and for its own convenience directed the execution case to be struck off the file "for the present." On the 28th December 1889 the Court passed an order refusing a rehearing of the suit, which order was upheld on appeal on the 16th May 1890. On the 21st January 1892 the decree-holder again applied for execution, at the same time praying that his application might be taken to be in continuation of his former application of the 27th May 1889. *Held*, that the application was one in continuation of the former proceedings in execution so far, at least, as regarded the property mentioned in the former application, but as regards other properties it must be held to be barred as not having been made within three years from the decree of the 30th May 1888.

ON the 30th May 1888 one Aughore Nath Bose obtained an *ex-parte* decree for arrears of rent for a sum less than Rs. 500 against one Baikanta Nath Mittra, and applied for execution thereof on the 27th May 1889. Certain property belonging to

* Appeal from Order No. 55 of 1893, against the order of Babu Naffar Chunder Bhutto, Subordinate Judge of Hooghly, dated the 31st of December 1892, affirming the order of Babu Sarat Chunder Ghosal, Munsif of Ulloobariah, dated the 13th of May 1892.

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the judgment-debtor was in June attached, and a sale proclamation issued in July 1889. Baikanta Nath thereupon applied under s. 108 of the Code of Civil Procedure for a rehearing of the rent suit, on the ground that he had not received notice of the suit, and on the 31st August 1889, the day fixed for the sale, applied that the execution proceedings might be stayed. The sale was accordingly stayed, and the Court of its own motion on the 31st October 1889 passed an order directing the striking off of the execution proceedings "for the present," the property remaining nevertheless under attachment.

On the 28th December 1889, the Court passed an order refusing the application made for a rehearing of the original suit; and on the 16th May 1890 an appeal against such last-mentioned order was dismissed.

Aughore Nath on the 21st January 1892 made an application to execute his rent decree, asking for the attachment of certain properties, and further praying that the attachment in execution case No. 219 of 1889 (the original execution proceedings) might remain in force and action be taken in the present execution as a continuation or revival of the said execution.

The judgment-debtor contended that the application was barred under Sch. III, Article 6 of the Bengal Tenancy Act, three years having elapsed since the date of the rent decree on the 30th May 1888. The decree-holder contended that (1) limitation ran from the date of the disposal of the appeal on the 16th May 1890; (2) that the present application for execution was one in continuation of the prior execution proceedings; and (3) that the judgment-debtor's successful attempt to stay the sale on the very day fixed for it was a fraud on him, and that he was, therefore, entitled to the exception to Article 6, Sch. III, of the Bengal Tenancy Act.

The Munsif preferring the decisions of *Lutful Huq* v. *Sumbhudin Pattuck* (1) and *Narsingh Sewak Singh* v. *Madho Das* (2) to that of *Jivaji* v. *Ram Chandra* (3), allowed the first contention of the decree-holder, and on the authority of *Chandra Prodhan* v. *Gopi Mohan Shaha* (4) and *Paras Ram* v. *Gardner* (5), held that the

(1) I. L. R., 8 Calc., 248.
(2) I. L. R., 4 All., 274.
(3) I. L. R., 16 Bom., 128.
(4) I. L. R., 14 Calc., 385.
(5) I. L. R., 1 All., 355.

application was one in continuation or revival of the previous application for execution; and further held, on the authority of *Annamalai* v. *Rangasami* (1) and *Bhagu Jetha* v. *Malek Bawasaheb* (2), that the decree-holder was entitled to the exception claimed by him in the third contention. Execution was therefore allowed.

On appeal, the Subordinate Judge held that the application was not barred, as limitation ran from the final decree of the Appellate Court on the 16th May 1890, and that the present application must be considered as a continuance of the previous application for execution on the authority of *Lutful Huq* v. *Sumbhudin Paltuck* (3) and *Hurry Charan Bose* v. *Subaydar Sheikh* (4), and *Chintaman Damodar Agashe* v. *Balshastri* (5), respectively.

The judgment-debtor appealed to the High Court.

Babu *Nilmadhub Bose* (with him Babu *Jyati Prosad Sarbadikary*) for the appellant contended that the final decree from which limitation ran was the decree of the 30th May 1888; and that the application of the 21st January 1892 must be taken to be an application to execute that decree, and was barred by Article 6, Sch. III, of the Bengal Tenancy Act.

Babu *Troilokya Nath Mittra* (with him Babu *Hari Charan Sarkhel*) for the respondent contended that the application of the 21st January 1892 was one in continuation of the previous application for execution, citing *Chandra Prodhan* v. *Gopi Mohan Shaha* (6).

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

BEVERLEY, J.:—This is an appeal from an order of the Subordinate Judge of Hooghly, disallowing an objection to the execution of a decree on the ground of limitation.

The decree was made *ex-parte* on the 30th May 1888, and was for arrears of rent not exceeding Rs. 500. An application to execute the decree (No. 219 of 1889) was made on 27th May 1889, and certain property was attached; but on the 31st August,

(1) I. L. R., 6 Mad., 365.
(2) I. L. R., 9 Bom., 318.
(3) I. L. R., 8 Calc., 248.
(4) I. L. R., 12 Calc., 161.
(5) I. L. R., 16 Bom., 294.
(6) I. L. R., 14 Calc., 385.

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the day fixed for sale, the judgment-debtor applied to have the *ex-parte* decree set aside, and pending the disposal of that application, the sale was stayed. On the 31st October 1889, the Court made a further order striking the execution case off the file "for the present," the property remaining under attachment.

The application to set aside the decree was rejected on the 28th December 1889, and this order was confirmed in appeal on the 16th May 1890.

On the 21st January 1892, the decree-holder made an application to execute the decree by attachment and sale of certain properties, and in that application he prayed that "the attachment in execution 219 of 1889 might remain in force, and action be taken in the present execution as a continuation or revival of the said execution."

The judgment-debtor contended that the application of the 21st January 1892 was barred under Schedule III, Art. 6, of the Bengal Tenancy Act, three years having elapsed since the date of the decree. The Subordinate Judge disallowed the objection relying on the case of *Lutful Huq* v. *Sumbhudin Pattuck* (1), and holding that the order of 16th May 1890 dismissing the appeal against the order rejecting the application to set aside the *ex-parte* decree was the final decree within the meaning of the article referred to. And he also held that as regards the properties named in the first application, the present application might fairly be considered to be a continuance of the proceedings taken upon that application.

It is contended before us that the Subordinate Judge was wrong in treating the order of the 16th May 1890 as the final decree in the suit, and in allowing a fresh period of limitation from the date of that order; and it is further argued that the application of the 21st January 1892 must be taken to be an application to execute the decree within the meaning of the article in question, and that it is therefore barred.

We agree with the learned Pleader who appeared for the appellant in this case that the decree in question must be taken to be a decree under the Bengal Tenancy Act within the meaning of Schedule III, Article 6. We think that, having regard to

(1) I. L. R., 8 Calc., 248.

sections 143, 144 and 148 of that Act, there is a special procedure laid down for rent suits, and that therefore decrees in rent suits are decrees under that Act, within the meaning of that article.

We are also of opinion that the "final decree" mentioned in that article must be the final decree in the suit and cannot be held to include an order in appeal upon an application to set aside that decree under section 108 of the Code. It follows, therefore, that execution of the decree now in question would be barred, unless applied for within three years from the date of the decree of 30th May 1888. We have, however, been referred to a case of *Chandra Prodhan* v. *Gopi Mohun Shaha* (1), which appears to be on all fours with the present case, in which it was held that when the execution proceedings are stayed by order of the Court, a subsequent application to remove that order and proceed with the execution may be taken as a continuation of the former proceedings. That decision appears to be in harmony with a long series of decisions both in this Court and in the other High Courts, and we see no reason to dissent from it. In the present case execution of the decree was stayed at the instance of the judgment-debtor; the case was struck off the file merely "for the present" and for the convenience of the Court; the property remained under attachment, and in his application of 21st January 1892 the decree-holder expressly prayed that that application might be taken to be a continuation of the former proceedings. Under the circumstances we think that the application in question must be taken to be not a distinct application to execute the decree, but an application in the former execution proceedings, so far at least as regards the property which was mentioned in the former application to execute the decree, and which was under attachment at the time when that execution case was struck off, that is to say, on the 31st October 1889. As regards any other properties mentioned in the application of the 21st January 1892, we think that, as has been decided in several cases both in this Court and in the other High Courts, the application is barred. The appeal will accordingly be allowed except as regards the property which was under attachment in execution case No. 219 of 1889, and the Court executing the decree will, of course, see that no proceedings are taken against any other

(1) I. L. R., 14 Calc., 385.

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property except that mentioned in the application of 27th May 1889. We make no order as to costs in this Court.

Appeal allowed in part.

T. A. P.

APPELLATE CRIMINAL.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

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Aug. 28.

MOHER SHEIKH AND OTHERS *v.* QUEEN-EMPRESS.*

Evidence—Statement as complainant while in custody as an accused person—Depositions in counter case—Compelling witness to answer questions—Evidence Act (I of 1872), ss. 129, 130, 131, 132—Rights of true owners against person in wrongful possession—Affray, evidence as to nature of.

If a person while in custody as an accused gives information to the police as complainant in another case, his statements as such informant cannot be used as evidence against him on his trial.

The depositions of witnesses given in a counter case may be used as evidence against them on their trial as accused persons, but such depositions could only be evidence against the persons making them: *Queen* v. *Gopal Doss* (1) and *Queen-Empress* v. *Ganu Sonba* (2) followed.

The mere subpœnaing of a witness or ordering him to go into the witness-box does not compel him to give any particular answer or to answer any particular question. The words "shall be compelled to give" in s. 132, Evidence Act, apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question. The wording of ss. 129, 130, 131, 132, and 148, Evidence Act, compared and discussed.

When a party is in possession for four or five days, though it may be in wrongful possession, another party, although claiming to be the rightful owner, is not entitled to go in force to turn him out, much less is he entitled to take armed men with him for that purpose.

In an affray specific evidence as to the acts of each fighter cannot be expected, but only general evidence as to the accused taking part in it, and persons who, as in this case, punted the boats on which the fight took place, and in whose interests the fight on the boats took place, were held to be just as blameworthy as the men who struck the blows.

* Criminal Appeal No. 626 of 1893, against the order passed by J. F. Bradbury, Esq., Sessions Judge of Pubna, dated the 11th of August 1893.

(1) I. L. R., 3 Mad., 271. (2) I. L. R., 12 Bom., 440.