1878

POGOSE v. CATCHICK.

father's representative in the face of the Chief Justice's judgment and the Succession Act. What he really does is this: He chooses to take upon himself to say that the proceedings pointed out by the law would be very inconvenient to the parties, and thinks that he would do some good to them by taking the course which he has taken. As I have already said, the result of taking that course must be disastrous to the parties, and we think we are fully justified in interfering in this case. The order of the Subordinate Judge putting Mr. P. N. Pogose upon the record as the legal representative of the deceased without enquiring whether he is so or not, is an order which cannot be allowed to stand. Properly there ought to have been a formal application under s. 15; but as there has been some difference of opinion between the Judges of this Court upon this matter, we think that we are justified in treating this case substantially as an application under s. 15, without putting the parties to further expense.

Dealing with this case under s. 15, we direct that the order of the Subordinate Judge putting Mr. P. N. Pogose upon the record as the representative of the deceased be set aside. We make no order as to costs.

Before Mr. Justice Ainslie and Mr. Justice Morris.

1877 *May* 8 & 1878 *Feby.* 6.

HURRISH CHUNDER ROY (JUDGMENT-DEBTOR) *v.* THE COLLECTOR OF JESSORE (DECREE-HOLDER).*

Under Tenure—Arrears—Sale in Execution—Execution against Property—(Beng.) Act VIII of 1869, *s.* 61.

A, a judgment-creditor, having obtained two decrees, one for money, the other for the rent of certain tenures, sold his debtor's right and interest in the tenures in execution of his money-decree, and afterwards in execution of his decree for rent again put up for sale the same tenures. At the second sale, *B* became the purchaser of whatever could pass under such sale. *A* subsequently sued and obtained a decree against *B* for arrears of rent that

* Miscellaneous Special Appeal, No. 42 of 1877, against the order of H. B. Lawford, Esq., Judge of Zillah Jessore, dated the 31st of January 1877, affirming the order of Baboo Kedaressur Roy, Subordinate Judge of that district, dated the 6th of November 1876.

had come due in respect of the said tenure since the last supposed sale to him, and in execution of such last-mentioned decree again attached the tenures. On the intervention of third parties, the tenures were released from attachment. *A* having applied to levy execution on other immoveable properties of *B*, *Held*, that the tenures having been released from attachment, *A* was not entitled, under s. 61 of Act VIII of 1869 (B.C.), to proceed against the other immoveable property of *B*, it being open to him to show by a regular suit that the tenures were liable to be sold in execution of his decree, and further, that upon the facts of the case he had disentitled himself to any equitable relief.

IN this case the plaintiff, the present decree-holder, obtained two decrees against one Behari Lall; the first an ordinary money-decree, the other a decree for the rent of certain tenures. In execution of the money-decree the plaintiff, on the 15th April 1869, sold his debtor's right and interest in the tenures, which ultimately passed into the hands of two persons, Keshub Nath and Omnath. On the 24th of the same month the plaintiff, after having extinguished the whole of Behari Lall's interest in the said tenures by the previous sale, proceded again to sell the same tenures in execution of his decree for rent, and whatever may be supposed to have passed by such sale was purchased by the defendant, the present judgment-debtor. Subsequent to this sale the plaintiff brought his present suit against the defendant for arrears of rent since due on the same tenures, and in execution of the decree so obtained attached the tenures. Third parties intervening under s. 246 of Act VIII of 1859, the tenures were, on the 11th May 1873, released from attachment. The judgment-creditor then sought to levy execution on other immoveable properties of the judgment-debtor.

The lower Appellate Court affirming the order of the Court of first instance considered that, as he (the judgment-creditor) had done his best to get the tenures sold, but that the Subordinate Judge, by an apparently illegal order refusing their sale, had released them from attachment, he was entitled to proceed against other immoveable property of the judgment-debtor.

The present appeal was accordingly preferred to the High Court. The case came on for argument on 8th May 1877.

Baboo *Nullit Chunder Sen* for the appellant.

1878

HURRISH CHUNDER ROY v. THE COLLECTOR OF JESSORE.

Baboo *Annoda Persaud Banerjee* for the respondent.

AINSLIE and MORRIS, JJ., reversed the order of the Courts below on the ground that the question had already been decided in a previous application to execute the decree which had been refused by the Judge of the 24-Pergunnahs on 11th March 1873, and that as no appeal had been preferred the question must be taken to have been finally determined.

Subsequently, but before judgment was signed, Baboo Annoda Persaud Banerjee for the respondent, pointed out to the Court that the purport of the decree passed by the Judge of the 24-Pergunnahs on 11th March 1873 had been misunderstood.

The following judgments were accordingly delivered by—

AINSLIE, J.—A judgment in this case was delivered by us on the 8th of May last, but before it was signed it was objected by Baboo Annoda Persaud Banerjee, for the respondent, that the Court had fallen into a mistake as to the purport of the decree made by the Judge of 24-Pergunnahs on the 11th of March 1873. On examining that decree it appears to us that it was so. The case, therefore, must be disposed of on other grounds.

The object of the special appellant here is to set aside the judgment of both the Courts below on the ground that it is inconsistent with the terms of s. 61 of Act VIII of 1869 (B.C.) which says that "if *after sale of any such under-tenure in execution of decree* any portion of the amount decreed remains due, process may be applied for and issued against any other property, moveable or immoveable, belonging to the debtor." In this case the under-tenure, of which the arrear was decreed to be due, has not been sold. Therefore, in the words of the section, execution cannot proceed against any other immoveable property of the debtor. But it is contended that inasmuch as the tenure had been attached and subsequently released from attachment by an order of Court, and as execution therefore could not proceed against it, the judgment-creditor is clearly entitled to proceed against other immoveable property of the debtor.

In the first place it does not appear that the creditor has exhausted all the remedies open to him. On the order of the Subordinate Judge releasing the property from attachment it was open to him by a regular suit to show that the property was really liable to be sold in execution of his decree. Besides, it appears to us that if we are to go into the question of the equity of the judgment-creditor, we must look at the whole of the facts. On the statement of facts put before us it seems to me, speaking for myself, perfectly clear that the judgment-creditor is not entitled to the equitable relief he seeks. (The learned Judge proceeded to go into the facts of the case, and continued.) Whatever may be the rights of a zemindar holding a decree for rent against one of his tenants in respect of the sale of the tenure on which the arrears have accrued, when such rights are put forward in opposition to the rights of third parties, it seems to me that it is impossible for any zemindar to put forward a claim under the Rent Law which shall take effect against his own acts done as in this case under the Code of Civil Procedure. It is sufficient to state the circumstances of the original sale to show that when nominal arrears are said to have accrued due from Hurrish Chunder, the appellant, on the tenure nominally sold to him, but previously sold to others; and when it is sought to seize and sell other property of Hurrish Chunder for such arrears, the whole proceedings are certainly tainted by want of equity. Therefore, when the zemindar comes here and asks us to give him an equitable relief against the distinct words of the Statute, it seems to me that his mouth is completely closed by reference to his own proceedings in 1869.

I would, therefore, reverse the judgments of both the Courts below with costs.

MORRIS, J.—I concur in thinking that no further execution as asked for, can be taken out.

Appeal dismissed.