

(1889) 01 CAL CK 0012
In the Calcutta High Court

Bhaba Nath Roy Chowdhry and Others	APPELLANT
Vs	
Durga Prosunno Ghose and Others	RESPONDENT

Date of Decision : 24-01-1889

Acts Referred:

Citation : (1889) ILR (Cal) 327

Hon'ble Judges : Tottenham, J; O'Kinealy, J

Bench : Division Bench

Judgement

Tottenham and O'Kinealy, JJ.—This was a suit to have it declared that a certain tenure was liable to be sold in execution of a decree for arrears of rent, the decree having been obtained against the former owner of the tenure.

2. It appears that before the decree was passed, the appellant's right and interest had been sold in execution of a money decree, and purchased by the principal defendant in the present suit. The landlord was only a co-sharer. He applied for the sale of the tenure under the provisions of Section 64, Bengal Act VIII of 1869, and the procedure governing that application was that laid down in the Code of Civil Procedure. A claim was put in by the purchaser of the tenants' right and interest, who was not registered as transferee in the zemindar's sherishta, u/s 278; and that claim was allowed, and the attachment was withdrawn.

3. The present suit was brought to establish the decree-holder's right to sell the property in the hands of the alienee. Both the Courts below dismissed the suit. This second appeal was preferred by the plaintiff, and it has been argued on his behalf that the landlord, although only a co-sharer to a certain extent, was entitled to sell the tenure in whosoever hands it might be, because his rent suit was brought and a decree obtained against the recorded tenant.

4. It appears to us that the appellant was entitled to alienate his tenure, unless and until it was attached in execution. The case was governed by the ordinary Procedure Code, and, in that Code, there is no bar to alienation of property by

the judgment-debtor, so long as that property has not been attached; unless, of course, it was shown that the alienation was intended to defraud creditors. But there is nothing in the procedure, and there is nothing in the decree obtained by the plaintiff giving him any lien upon the land in question, and we are not aware of any statutory lien existing in favour of the plaintiff as a co-sharer. The decree was obtained in May 1883. The purchase by the defendant was in March 1883 and the sale was confirmed and certificate granted on the 26th July 1883, and the attachment and execution proceedings had not apparently then been commenced.

5. We find that the property having been attached, the day fixed for sale was 5th March 1884; but, in the meantime, a claim was preferred upon which the property was ultimately released. So far, therefore, as we are aware, the alienation by the original tenant was effected before any execution proceedings were taken by the plaintiff. Had the plaintiff been a sixteen-anna proprietor, there is no doubt that he could, u/s 59 of the then Rent Act, have attached and sold the tenure itself upon the decree obtained against the recorded tenant.

6. But in the present case it appears to us that his position was different, he being only a fractional co-sharer; and, so far from having any lien upon the land by the Rent Act, he is expressly precluded by Section 64 from proceeding against the tenure, until he has first of all proceeded against all the moveable property of the defaulter. If the plaintiff had no lien upon the tenure in satisfaction of his decree, he cannot succeed in the present suit; and, as I have said, we think that he had no lien either by the decree or by any statute. That being so, we must hold that the decision of the lower Court was correct, and this appeal must be dismissed with costs.