

(1925) 03 CAL CK 0073
In the Calcutta High Court

Nabin Chandra Biswas

APPELLANT

Vs

Abdul Aziz and Others

RESPONDENT

Date of Decision : 16-03-1925

Acts Referred:

Citation : AIR 1926 Cal 337

Judgement

1. This appeal raises a question which has now been settled by authorities. The appellant obtained a decree against the respondents and attached certain properties described in three schedules. The appeal is confined to the finding of the lower Court with respect Schedule III. The judgment debtors claimed that the properties described in that schedule could not be sold as they had non-transferable occupancy interest in them. The learned District Judge of the Court of appeal below has given effect to this contention. This view is untenable. In the Full Bench case of Chandra Binode Kundu v. Sheikh Alla Bux [1921] 48 Cal. 184, it was held that the transfer for value of the whole or part of an occupancy holding, apart from custom or local usage, is operative as against the raiyat whether it is voluntary or involuntary. The question involved in the Full Bench case was confined to the right of the landlord to bring a non-transferable occupancy holding of a tenant to sale in execution of a money-decree obtained by him; but the principle upon which this decision is based is a general one which applies to the case of creditors other than landlords, and this view has been adopted in the case of Kenaram Pal Vs. Kinu Mandal, . We see no reason to differ from the view taken in those cases and we must hold that the properties of Schedule III are liable to attachment in execution of the decree obtained by the appellant.

2. It is argued on behalf of the respondent that these properties were claimed by the respondents as their own and, therefore, there should be an enquiry into that question. We do not think that this question was raised in any of the Courts below. On reading the judgments of the Courts and the pleadings we are of opinion that this was a question which was not within the contemplation of the parties in the Court below. The only points upon which they went to trial was

whether the occupancy right in lands of Schedule III was liable to be sold in execution of the appellant's decree.

3. The result is that this appeal is allowed and the order of the lower appellate Court set aside, and we hold that the properties mentioned in Schedule III of the application for execution are liable to be attached and sold in execution of the appellant's decree.

4. There was a cross-appeal in the Court below against the order of the Munsif that the decree-holder should produce at the time of the sale the landlord's consent to the transfer of the lands mentioned in Schedule III. In the view that we take of the law, we think that this order should also be set aside. The judgment of the lower appellate Court with regard to properties mentioned in the other schedules will stand. We make no order as to costs.