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Calcutta High Court

Case No: Motion No. 956 of 1868

Desaratulla APPELLANT

Vs

Nawab Nazim Nazar Ali Khan RESPONDENT

Date of Decision: Sept. 5, 1868

Judgement

Sir Barnes Peacock, Kt., C.J.
We are of opinion that this rule ought to be made absolute, and that the attachment of the pucca houses, that is to say, the brick-built houses, and of the doors and windows belonging to the same should be set aside, and the order directing the sale and all subsequent proceedings thereon. This is a case in which the Collector had no jurisdiction to attach the property, and in which this Court, under its general power of control, ought to prevent the Lower Court from doing that which it has no jurisdiction to do. The attachment and sale was not in the exercise of a power which belong to the Collector, but in the exercise of a power which was not at all within his jurisdiction. The Revenue Courts have merely a limited jurisdiction conferred upon them by Act X of 1859; and this Court, under its general power of control, has the right to prevent them exceeding that jurisdiction. The Full Bench Ruling, Gobindakumar Chowdhry v. Krishnakumar Chowdhry (No. 530 of 1866, 31st May 1867), which was cited, was a case in which the High Court ordered a Revenue Court to exercise a jurisdiction which belong to it, and which that Court had refused to exercise. The present is a converse case, in which the High Court is asked to prevent the Revenue Court from exercising a power which is not within its jurisdiction. The property has been attached by the Collector of the 24-Pergunnahs under an order from the Deputy Collector of Basirhat in that Zillah. A decree had been obtained by the plaintiff against the defendant, in the Court of the Deputy Collector of Basirhat, for arrears of rent payable in respect of a saleable under-tenure; and in execution of that decree the Deputy Collector requested the Collector of the 24-Pergunnahs to sell any moveable property belonging to the plaintiff. The decree itself, as I understand, was not sent by the Deputy Collector to the Collector to be executed, but there was a mere request from the Deputy Collector to the Collector to execute

the decree by seizing the moveable property. If the Collector acquired jurisdiction in consequence of that request, it was merely a jurisdiction to attach moveable property, and not to attach and sell immoveable property. But independently of that, I am of opinion that the decree of the Deputy Collector could not be executed by the attachment of any immoveable property except the tenure, before it was shown that satisfaction of the decree could not be obtained by execution against the person or moveable property of the debtor. Section 86 of- Act X of 1859 enacts that process of execution may be issued against either the person or the property of a judgment-debtor; but process shall not be issued simultaneously against both person and property. That section has been repealed, but substantially re-enacted by Section 17 of Act VI of 1862 of the Bengal Council. Having laid down that general rule, Section 109 enacts that, in the execution of any decree for the payment of money under this Act, not being money due as arrears of rent of a saleable under-tenure, the judgment-creditor may apply for execution against any immoveable property belonging to his debtor, if satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor within the district in which the suit was instituted. This decree being for money due for arrears of rent of a saleable under-tenure, falls within the exception in Section 109, and we must, therefore, ascertain how the money may be obtained by execution. Section 109 shows clearly, that, as a general rule, process of execution for a money-decree under Act X, is not to be levied in the first instance by attachment of immoveable property. The Legislature seems to have been anxious to guard against the sale of immoveable property in execution of decrees of the Revenue Courts, under Act X of 1859, until the moveable property should have been first exhausted. Section 105, however, forms an exception to that rule, and provides that, "if the decree be for an arrear of rent in respect of an under-tenure, which, by the title-deeds or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof, contained in any law for the time being in force." But then it provides that "no such application shall be received when a warrant of execution has been previously issued against the person or moveable property of the judgment-debtor, so long as such warrant remains in force," from which I infer that the Legislature considered that, under the provisions of Act X of 1859, no other execution could be issued before the application to sell the under-tenure except an execution against the person or moveable property of the debtor. I can scarcely conceive that the Legislature, if they had considered that an attachment of the general immoveable property of the debtor might be made in the first instance, would not have provided that the under-tenure should not be sold so long as a warrant should remain in force against the other immoveable property, as well as when a warrant should remain in force against the moveable property. I, therefore, think that even for arrears of rent of a saleable under-tenure, the other immoveable property of the

debtor cannot be attached in the first instance.

2. The Legislature then proceeds in Section 105: "If after sale of an under-tenure any portion of the amount decreed remains, due process may be applied for against any other property, moveable or immoveable, belonging to the debtor; and any such immoveable property may be brought to sale in the manner provided in Section 110 of this Act."

3. The only exception, then, which the Legislature intended to make to the general provisions contained in Section 109, was that in the case of arrears of rent in respect of a saleable under-tenure, the under-tenure itself might be sold in the first instance, although it was immoveable property; and that if after the sale of the under-tenure any portion of the debt might remain due, execution might issue against other property, moveable or immoveable. It did not prevent, even in the case of arrears of rent due in respect of a saleable under-tenure, execution against the person or moveable property of the debtor, in the first instance. It appears to me, therefore, that the Collector not -having been satisfied that the decree could not be levied upon the moveable property of the debtor or by execution against his person, had no jurisdiction to attach the debtor''s immoveable property.

4. It was contended, that there was a proviso in the under-tenure that the tenure would become void upon a decree for rent being obtained and remaining unsatisfied for fifteen days; and that, consequently, at the end of the fifteen days, the under-tenure ceased to exist, and was not saleable. I am of opinion, however, that the under-tenure did not become absolutely void and at an end, at the expiration of fifteen days, but that it was only voidable at the election of grantor. But even if it were at an end, that would not justify an attachment of the general immoveable property of the debtor, because it is only after a sale of the under-tenure that the immoveable property, by virtue of Section 105, becomes attachable. If the immoveable property cannot be attached by virtue of Section 105, it cannot be attached except under the provision of Section 109, and then it can only be attached if satisfaction of the debt cannot be obtained against the person or the moveable property of the debtor. If, therefore, the Collector had been acting under a decree of his own Court, and not in pursuance of the request of the Deputy Collector to attach the moveable property, it appears to me that he had no jurisdiction in the first instance to proceed against immoveable property other than the tenure itself. The rule will be made absolute with costs.