

[428] S. A. 22 of 1876), both decided by Westropp, C. J., and Melvill, J., on the 19th December, 1877. He also referred to *Gopal Hanmant Gumiste v. Sakharam Govind* (Mis. S. A. No. 7 of 1877).

G. N. Nadkarni appeared for the opponent.

The following is the judgment of the Court:—

JUDGMENT.

SARGENT, C. J.—The Collector's certificate refers both to the profits of the *vatan* which had accrued due before the passing of the Act, and also to those which have been subsequently assigned by him as the remuneration of the officiator. As to the latter, there can be no doubt that, as, in virtue of the pending attachment of 1866, they might pass into the beneficial possession of the attaching creditor, the Collector was authorized by the first part of s. 10 of the *Vatandars' Act* to inform the Court by his certificate that such portion of the profits had been assigned, and that the Court was bound, on receiving such certificate, to cancel the pending attachment, in so far as it might affect the portion so assigned. As to the arrears due at the date of the Act, and which have not been assigned, they fall under the latter part of the section, where it is true that the words "may have passed" are not to be found; but we think the section must be read as if they had been, as it can scarcely be supposed that it was intended that the Collector should pay over the profits to the attaching creditor one day and apply the next day to the Court for an order to have them restored, as he would be entitled to do as soon as they had passed into the "beneficial possession" of the attaching creditor. The decisions in *Miscellaneous Appeals No. 17 of 1876* and *No. 22 of 1876*, both decided on 19th December, 1877, are apparently in conformity with this view. We must, therefore, discharge the rule with costs.

Rule discharged.

NOTE.—The decision in this case was followed in Applications Nos. 91 and 93 of 1879 under Extraordinary Jurisdiction, both decided by Westropp, C. J., and F. D. Melvill, J., on the 23rd February, 1880. In both of them the attachment placed on the *vatans* was removed by the Court on the receipt of the Collector's certificate, granted under s. 10 of the *Vatandars' Act*, although the decrees sought to be executed were against the *vatans* as mortgaged property.

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[429] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

MANIKLAL VENILAL (*Judgment-creditor*), v. LAKHA AND MANSING, (*Judgment-debtors*); AND DAYABHAI PREMCHAND, (*Judgment-creditors*) v. MANSING (*Judgment-debtor*)*

[17th February, 1880.]

Civil Procedure Code (Act X of 1877), s. 266, cl. (c), and explanation (a), and s. 295—Attachment and sale of building materials—Rateable distribution of proceeds of sale.

By cl. (c) of s. 266 of the *Civil Procedure Code (X of 1877)* an ordinary judgment-creditor is precluded from attaching or selling the materials of a house or other building belonging to his judgment-debtor, but by explanation (a) of the same section, this prohibition does not extend to a creditor whose decree is for

* Civil Reference, No. 31 of 1879.

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rent. *Held*, that ss. 266 and 295 must be read together, and that an ordinary judgment-creditor is not entitled, under s. 295, to a rateable proportion of the assets realized by the sale of such house or building, under a decree obtained by another creditor for rent due to him in respect of the said house or building.

One Maniklal obtained a decree against L. and M. for rent due from them, and, in execution thereof, applied for the attachment and sale of two houses, with their compounds and the ground underneath them (in respect of which property the said rent had fallen due) belonging, respectively, one to each of his judgment-debtors. The properties were, accordingly, sold on the 23rd July, 1879, and the sale proceeds handed over to Maniklal. In the meantime, on the 18th February, 1879, D. a judgment-creditor of M. under a money decree, applied for the attachment and sale of the same immoveable property (excepting the houses) of his judgment-debtor which had been previously attached under Maniklal's decree for rent. On the realization of the sale proceeds, D. applied, under s. 295 of Act X of 1877, for a rateable proportion of the assets realized by the sale of M.'s property in execution of Maniklal's decree.

Held, that D. was not entitled to such rateable proportion of the assets.

[R., 23 A. 106 (111) ; (1888) A.W.N. 154.]

THE following case was referred for the opinion of the High Court by Rao Sahab Krishnamukhram, Subordinate Judge of Vagra, in the District of Broach, under s. 617 of Act X of 1877 :—

"The facts of the case are that one Maniklal Venilal, of Broach, having obtained a decree against Lakha Lala and Mansing Lala in Suit No. 240 of 1878, presented *darkhast* No. 2380 of 1878 for execution of his decree. In the ninth column of his *darkhast* he named both the defendants as the persons against whom the [430] enforcement of the decree was sought. In the last column of the same, regarding the mode in which the assistance of the Court was required, he requested that he might be awarded his judgment-debt with costs by the attachment and sale of the immovable properties of his judgment-debtors, as described, at the foot of his *darkhast*.

"The property of Lakha Lala was described at the foot of the *darkhast* as consisting of a house, with an open *chouk* to its north and a compound to the south.

"In the same way the property of Mansing Lala was described as consisting of another house, with an open *chouk* and a compound.

"There is a remark at the foot of this *darkhast*, to the effect that the decree sought to be executed was obtained for the rent of lands due by the defendants, meaning, apparently, that the materials of the houses were also liable to attachment and sale under s. 266, proviso 2 (a).

"Under these circumstances the properties were all attached, and on the 23rd July 1879, sold by public auction for Rs. 31-6 only. The full amount of the purchase money was paid in due time.

"On the 18th February, 1879, one Dayabhai Premchand presented *darkhast* No. 666 of 1879 for execution of his decree against Mansing Lala alone, and requested the Court to get the immoveable property of his judgment-debtor—consisting of a *gokhan* (building site) on which stood a house, and of a compound and *chouk* attached and sold, the same property which was sought to be attached and sold by Maniklal, excepting the superstructure of the house.

"Thinking that the materials of the houses and other buildings belonging to and occupied by agriculturists were not liable to be attached or sold, Dayabhai Premchand sought to get the *gokhan*, *chouk* and compound attached and sold, leaving aside the superstructure of the house.

"There is no dispute about the property of Lakha Lala, or about the sale proceeds of the same. All the properties of Mansing Lala, including the superstructure, were sold in execution of the [431] *darkhast* of Maniklal Venilal, and Dayabhai Premchand requests the Court that the assets realized by the sale of the properties of Mansing Lala, including the superstructure, be divided rateably among himself and Maniklal under s. 295 of Act X of 1877.

"Maniklal's pleader, on the contrary, contends that explanation (a), s. 266 of the Act, was introduced for the benefit of a judgment-creditor holding a decree for rent, and that, therefore, Dayabhai was not entitled to a share in the sale-proceeds of the house. For Dayabhai it is contended that s. 295 of the Act was quite clear on the point, and that the wording of the section was imperative.

"As I entertain reasonable doubts on the point, which is also of frequent occurrence in almost all the Courts, I have thought it proper to refer the following point for the decision of Her Majesty's High Court:—

"1. Whether, under the circumstances, a creditor, who cannot get the materials of houses and other buildings of his judgment-debtor attached or sold under s. 266, cl. (c), of Act X of 1877, is entitled, under s. 295, to a rateable proportion of the share of the assets realized by the sale of the same property at the instance of another, who can get it attached and sold under explanation (a) of s. 266?"

The parties did not appear by pleader or in person.

JUDGMENT.

WESTROPP, C.J.—To the Subordinate Judge's query, whether Dayabhai Premchand is entitled to a rateable proportion of the proceeds of the materials of the house and buildings belonging to his judgment-debtor, Mansing Lala, which were realized by the sale of the same house and buildings under a decree obtained by Maniklal Venilal for rent due to him in respect of such house and buildings, we must reply in the negative, it being our opinion that, inasmuch as the materials of the same house and buildings could not have been attached or sold by an ordinary creditor such as Dayabhai Premchand [see s. 266 of the new Civil Procedure Code, Act X of 1877, cl. (c), but may be sold by the landlord for rent (see same section, explanation (a))], we would frustrate the intention of the Legislature were we to apply s. 295 to the proceeds of sale [432] realized at the suit of the landlord, and would be giving to the ordinary creditor a benefit which the Legislature clearly meant to confer upon the landlord, but to withhold from the ordinary creditor. The two sections (266 and 295) must be read together, in which case the general intention of the Legislature, expressed in s. 295, cannot be permitted to frustrate the special intention equally apparent in s. 266. This construction of the Act avoids any repugnancy.

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