

**NOTES.**

**[EXECUTION OF JOINT DECREE BY ONE ONLY OF THE DECREE-HOLDERS—**

This is prohibited and as such when an application was made by two only out of thirteen defendants who were given costs in a suit, without joining all the rest, it was held that such an application was held not maintainable:—(1894) 18 Mad. 464. See also (1901) 25 Mad. (431).]

[3 Mad. 81.]

APPELLATE CIVIL.

The 27th October, 1880.

PRESENT :

MR. JUSTICE KERNAN AND MR. JUSTICE MUTTUSAMI AYYAR.

Govinda Nair.....(Petitioner)

versus

Kesava.....(Counter-Petitioner).\*

*Execution of decree—Obstruction by stranger—Civil Procedure Code, Secs. 329—331.*

The power given by Section 329† of the Civil Procedure Code to make such order as the Court shall see fit must be construed with regard to the circumstances in respect of which the power is to be exercised.

An order under Section 329 should be the result of the fact that the defendant in the suit, who is precluded by the decree from disputing plaintiff's right, unjustly instigates a third party, who has no real interest in the property, to prevent the plaintiff from getting the benefit of his execution.

[82] A Court has no power under this section to determine, as between the judgment-creditor and a third party obstructing the execution of the decree, important questions on the merits which are wholly unconnected with, and cannot be affected by, the fact that the obstruction is made at the instigation of the defendant.

THIS was a petition under Section 622 of the *Civil Procedure Code*.

A. Ramachandrayyar for the Petitioner.

The Counter-Petitioner did not appear.

The facts and argument appear sufficiently in the following judgment of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.)

**Judgment:**—Petitioner obtained, as plaintiff in Suit No. 770 of 1877 in the Munsif's Court, a decree for the delivery to him of possession of certain lands specified in the decree.

A warrant for the delivery of the lands in pursuance of the decree was given to the Amin. The Amin was obstructed in the execution of the decree as regards plot C by the younger brother, *Kesava*, of the first defendant, who is not a party to Suit No. 770 of 1877.

\* C. M. P. No. 430 of 1879 against the order of the District Munsif of Angadipuram on M. P. 700 of 1879, dated 19th August 1879.

Procedure in case of obstruction by judgment-debtor or at his instigation. † [Sec. 329 :—If the Court is satisfied that the obstruction or resistance was occasioned by the judgment-debtor or by some person at his instigation, the Court shall inquire into the matter of the complaint, and pass such order as it thinks fit.]

The plaintiff applied in Civil Miscellaneous Petition No. 700 of 1879, under Section 328, that *Kesava* might be sent to gaol under Section 330, and the land given in execution to plaintiff (Petitioner) according to the decree, on 18th July 1879. *Kesava* presented a petition referring to plaintiff's application in Civil Miscellaneous Petition No. 700 of 1879, and stating that the property mentioned in the decree is the jenm of his tarwad, of which first defendant is Karnavan, and that first defendant neglected the interest of the tarwad in respect of the lands; that he (*Kesava*) had, however, no objection to the lands mentioned in the decree being given to plaintiff, but that those lands were only the two plots marked A and B on a plan referred to.

The Munsif issued a summons, and having enquired into the matter and examined the premises and the boundaries and measurements given by the decree, made an order on the 19th August 1879 declaring that the plaintiff was only entitled under the decree to the possession of the plots A and B, but that he was not entitled to get possession of the plot C.

This petition under Section 622 was presented, alleging that the order of the Munsif was illegal—first, as it varied the terms of the decree; second, that the Munsif should have put plaintiff [83] into possession under Section 330, as *Kesava*, the brother of the first defendant, caused the obstruction; third, that if the Munsif was of opinion that *Kesava* claimed in good faith to be in possession, the Court should have registered the application as a suit under Section 331\* and should have made a decree.

On the hearing of this petition on the 19th of March 1880, the petitioner contended that the Munsif should have registered *Kesava's* application as a suit under Section 331 in which case petitioner could have appealed from his order; but that, as that course was not taken, petitioner was deprived of an appeal, as *Kesava* was not a party to the suit, and Section 244 gives an appeal only between the parties to the suit and their representatives. No judgment of the Munsif was then produced, and we did not understand the grounds on which he made his order. We requested the Munsif to state how it was that the application of *Kesava* was not numbered and registered. The Munsif in reply, dated the 8th June 1880, referred to the objection of *Kesava*, and states that he was satisfied on the enquiry that *Kesava* was set up by the first defendant to make the objection; that, however, he was satisfied that C was not included in the decree. But he says that *Kesava* has no title of his own or of any other (whatever this means) to the land. Then he proceeds: "When the contention urged by the objector (*Kesava*) in respect of this land is considered, and it is found that the title was not well-founded, the surrender of this piece of land to the plaintiff would be directed, and then the plaintiff would come by possession of the piece of land C not included in the decree."

Procedure in case of obstruction by claimant in good faith, other than judgment-debtor.

\*[Sec. 331 :—If the resistance or obstruction has been occasioned by any person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the claim shall be numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant;

and the Court shall, without prejudice to any proceedings to which the claimant may be liable under the Indian Penal Code or any other law for the punishment of such resistance or obstruction, proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of the Specific Relief Act, 1877, Section 9; and shall pass such order as it thinks fit for executing or staying execution of the decree.]

The meaning of this passage is not clear, as the plaintiff cannot be held entitled to the land by reason only of *Kesava* having no title, for the Munsif finds C is not included in the decree. The Munsif then states that the order was made under Section 329 and not under Section 331 "for the above reasons, as well as the special circumstance that he was convinced of the objection being raised at the malicious instance of the first defendant, and that it was in respect of a piece of land not included in the decree."

There is some confusion in the language used, but the effect of his judgment (taking it that the reasons given by him are those on which he acted in making the order) is that he found—first, that *Kesava* had no title to the land and no right to raise [84] any objection; second, that *Kesava* was set up by the defendant to make the objection; third, that C was not included in the decree; fourth, that his order was made under Section 329.

The second ground would appear to have justified the Munsif in refusing to entertain the objection of *Kesava*. In that case *Kesava* would, if he had title, be driven to assert his right by suit.

However, instead of making that order, he went into the objection of *Kesava*, and upon that objection he held that the objection was not without good cause, that is, that C was not included in the decree, and decided against the plaintiff that he was not entitled to get possession. He also held that *Kesava* had no title. If *Kesava*, instead of being the brother of the first defendant, was a stranger, and claimed in good faith to be in possession on his own account or on account of some person other than the first defendant, the suit should have been numbered and registered under Section 331. Then the plaintiff would have had an appeal.

If the objection was by the first defendant, plaintiff could in that case also have an appeal, Section 244. But if plaintiff appealed against the order, treating the decision as one made in execution between the parties to the suit under Section 244, plaintiff and defendant, he would be met by the objection that the first defendant did not object and the decision was between plaintiff and *Kesava*, who was not a party to the suit, and therefore that Section 244 gave no appeal. If *Kesava* had not objected, but if the Munsif on his own motion, in examining the decree for the purpose of granting a warrant according to the decree, had refused to give a warrant to deliver possession of C, an appeal would lie under Section 244, as the question would be one to be decided in execution between the parties. An appeal is provided in all cases except under Section 329. No appeal is provided against any order under Section 329, and if the order was warranted by that section, the result would be practically that there would be a decision against plaintiff and in favour of *Kesava*, against which plaintiff could not appeal, because the objector had no right to object and no title, and the objection was made not in good faith, but at the instigation of the first defendant. Thus the plaintiff might lose his right, not owing to any [85] act or default of his, but by the device or misconduct of the objector or of the defendant. It cannot be contended that a construction of Section 329 which would produce such a result is true. The power given by Section 329 in general terms to make such order "as the Court shall see fit," must be construed having regard to the circumstances in respect of which the power is to be exercised. An order under this section should be the reasonable result, in point of justice, of the fact that the defendant in the suit, who is precluded by the decree from disputing plaintiff's right, unjustly instigates a

third party, who has *no real interest* in the property, to prevent the plaintiff from getting the benefit of his execution. There may be cases in which the Court can see that though the obstructor acts at the instigation of the defendant, yet that he has a really good and legal right to obstruct. In such a case, the order that would be proper to be made under Section 329 would be very different from the order which would be proper to make when the obstructor merely acted without any right, and at the instigation or for the benefit of the judgment-debtor. However, under Section 329 it is very clear that the Court had not power to decide important questions, the merits of which are wholly apart from, and cannot be affected by, the fact that the obstruction was caused at the instigation of the defendant. How can it matter, for instance, to the decision of the question whether C was included in the decree, that *Kesava* was instigated by his brother to obstruct? The construction adopted by the Munsif would lead to very mischievous results and place decree-holders at the mercy of the defendants in the decree. The Munsif had clearly not power under Section 329 to determine the question whether C was included within the decree.

The order appealed against, which purports to determine the question, does not in terms purport to be under Section 329, nor does it allude to the instigation by the first defendant of his brother *Kesava* to obstruct, which seems odd considering the Munsif's reply to our enquiry. It deals exclusively with the objection of *Kesava* on the question whether C was included in the decree, and it purports to decide that question against the plaintiff. It is illegal and materially irregular and must be reversed.

A question arose in argument whether *Kesava*, who alleges he has an interest *jointly* with the defendant in lands directed to be [86] delivered in execution, can legally obstruct and have the question of his right determined under Section 331. It is suggested that such a claim would be on account of the defendant under Section 331, inasmuch as the claim of the obstructor is joint with the defendant. It is also suggested that such claim of *Kesava* is not in good faith under Section 331 by reason of such joint interest. It seems to us that, if *Kesava* had any interest in the lands C either as a member of the family or otherwise, which would be affected if plaintiff got possession of C, and if he was in possession in such case, *Kesava*, in respect of his own interest (though joint with the defendant), would claim to be in possession of the property on his own account within Section 331. His joint interest with the defendant could not prevent him from claiming in good faith in respect of his own interest. The effect of his obstruction and claim might be to set up a case in the defendant against the plaintiff if the joint right of the defendant was in every respect similar to his. But this would make no difference, as *Kesava* should not lose his joint right because his co-tenant could not set up his right against the plaintiff. The lands C are in possession of defendant's tenants, who are bound by the decree. *Kesava* claims as a member of a tarwad of which first defendant is Karnavan. Whether such claim is valid or not, and whether he should have obstructed or not there appears to have existed a claim which required the Munsif to number and register the application of the plaintiff as a suit between plaintiff and *Kesava*. The Munsif should number and register plaintiff's application and proceed under Section 331. If *Kesava* withdraws his obstruction, it is open to the Munsif, as a question in execution between the parties to the suit, to determine whether C is included in the decree. In either case plaintiff will be placed in true legal position with right of appeal.

The costs in this and the Lower Court will abide the event.

**NOTES.**

**[" POSSESSION " UNDER Sec. 331, C. P. C. (1882)**

The possession that is contemplated under that word in this and corresponding sections is not merely physical but includes also symbolical possession :—

- (1901) 25 Bom. 478 ;
- (1890) 14 Bom. 627 F. B. ;
- (1906) 33 Cal., 487=3 C. L. J., 293.]

**[87] APPELLATE CIVIL.**

*The 4th November, 1880.*

PRESENT :

MR. JUSTICE KERNAN AND MR. JUSTICE MUTTUSAMI AYYAR.

Virasami Mudali.....(Plaintiff) Appellant.

*versus*

Ramasami Mudali.....(Defendant) Respondent.\*

*Agreement—Condition precedent—Limitation—Specific Performance.*

Two brothers, V and R, in 1861 agreed together that part of their house should be divided and part enjoyed in common. Each brother was to occupy an assigned division and have the use in common of the rest. If either wished to leave the house, he was bound to offer his share to the other at a fixed price ; or if he wished to purchase the share of the other, and the other refused to sell, then the party refusing to sell at a fixed price was bound to buy the share of the other brother who wished to purchase.

V called upon R in 1877 either to pay Rs. 418 or give up the house.

Held that this was an agreement enforceable by law ; that until demand no cause of action arose, and limitation only began to run from the demand ; that specific performance should be granted in the alternative.

*Venkappa Chetti v. Akku* (7 M.H.C.R., 219) distinguished.

THE plaintiff and defendant were brothers. In 1861 they entered into a written agreement that part of the house, in which till then they had lived jointly, should be divided and the remainder enjoyed in common, and that when either desired to leave the house, he should offer his share, except his share in certain trees in the backyard which should be paid for separately, to the other at a fixed price, *viz.*, 418 rupees ; or if he wished to purchase the share of the other, and the other refused to sell, then the one refusing to sell at the fixed price should buy the share of the other one (if he wished to sell).

On 16th October 1877, plaintiff being unwilling to reside any longer with defendant called upon him to fulfil the terms of the agreement, and either pay 418 rupees and 10 rupees for the trees in the backyard or deliver up possession of the premises.

The case was tried by Mr. Justice INNES on the 28th March 1878.

**[88]** *Nullathambi Mudali* for the Plaintiff.

*Ratnavelu Mudali* for the Defendant contended that the object of the agreement was to secure the property from alienation to strangers, and that specific performance could not be enforced after such a lapse of time.

\* Appeal No. 25 of 1878 from the Original Side against a decree of Mr. Justice Innes dated 28th March 1878.