

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Brandt.*

SEVU (PLAINTIFF), APPELLANT,
and

MUTTUSÁMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1886.
Sept. 8, 11.

Civil Procedure Code, ss. 318, 335—Suit to recover possession of property sold in execution of decree.

S. attached certain land and a house in execution of a decree against R. M. put in a claim under s. 278 of the Code of Civil Procedure; alleging that he was in possession as purchaser from R. The claim was rejected. No suit was brought by M. to contest this order. S. purchased the said land and house in execution, and obtained a sale certificate. In 1884 S. sued M. to recover possession of the land and house alleging that in execution proceedings in 1882 he had been put into possession of the land, but not of the house, which was found locked up by the Court amin, and that M. prevented him from enjoying both the land and house. M. pleaded that S. had never been put into possession, and again set up his title as purchaser from R. and possession under such title.

The Múnsif found that S. had been put into formal or constructive possession of the land, but not of the house, and decreed the claim.

On appeal the District Judge held that S. was bound to proceed according to the provisions of s. 335 of the Code of Civil Procedure to recover possession, and could not bring a separate suit :

Held that, whether there had been legal delivery or not, the suit was not barred.

APPEAL from the decree of J. A. Davies, Acting District Judge of Tanjore, reversing the decree of T. Rangácharyár, District Múnsif of Tiruválúr, in suit No. 183 of 1884.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Brandt, J.).

Mr. Wedderburn for appellant.

Bháskyam Ayyangár for respondents.

JUDGMENT.—The plaintiff, appellant, purchased the plaint properties in execution of a decree against one Rámasámi Pillai. The respondents (Muttusámi Pillai and Dorasámi Ayyangár) raised objection to the lands, &c., being attached, setting up a claim on

SEVU
MUTTUSÁMI.

their own account. Their objections were disallowed in execution proceedings, and they filed no suit to set aside the order made against them; and it is admitted that they cannot raise any objection on the merits to the appellant's claim to the lands or to his obtaining possession of them.

In 1882, the appellant obtained a sale certificate, and he also obtained delivery, not actual delivery under s. 318, Civil Procedure Code, but symbolical delivery, presumably given under s. 319. The District Munsif passed a decree in plaintiff's favor, but in appeal that decree was reversed, the plaintiff's claim being disallowed on the grounds, apparently taken for the first time in argument in appeal, that the plaintiff accepted symbolical delivery only when he was entitled to and might have had actual delivery; that express provision for summary remedy in the case of obstructions offered to an auction purchaser in obtaining possession is provided in the Code of Civil Procedure, and that the plaintiff is therefore precluded from bringing a separate suit for possession; and reference is made to *Lolit Coomar Bhowe v. Ishan Chunder Chuckerbutty*.⁽¹⁾ It is further observed by the District Judge that even if resisted the plaintiff could still obtain redress under s. 335, Civil Procedure Code.

It is contended in appeal that the decision of the Lower Appellate Court is wrong in law, that there is no express provision in the Code of Civil Procedure in bar of a suit like the present, and that it therefore lies on the respondents to show affirmatively that such a suit is not maintainable; and with reference to the case mentioned by the District Judge, it is pointed out that this case is not reported in the authorized Law Reports, and that there are other subsequent decisions by the same Court, *Krishna Lall Dutt v. Radha Krishna Surkhel*,⁽²⁾ and *Shama Charan Chatterji v. Madhub Chandra Mookerji*,⁽³⁾ to the contrary.

For the respondents it is urged that the decision in *Lolit Coomar Bhowe's* case only follows another in *Kristo Gobind Kur v. Gunga Pershad Surmah*,⁽⁴⁾ and that it is correct in principle, and may be distinguished from the other cases above cited.

Section 244, Civil Procedure Code, has no bearing on the present case, as the respondents were no parties to the suit in which the

(1) 10 C.L.R., 258.

(2) I.L.R., 10 Cal., 401.

(3) I.L.R., 11 Cal., 93.

(4) 25 N.L., 372.

decree was passed, in execution of which the appellant purchased the plaint lands.

SEVU
v.
MUTTU&AMI.

Section 13 has no application, as there has not been any previous suit between the parties to this suit in respect of the plaint lands.

The case of *Lolit Coomār Bhoṣe v. Ishan Chunder Chukkerbutty* differs from the present case, in that there was no application made for delivery in execution. The case in the Weekly Reports above referred to and followed in *Lolit Coomār Bhoṣe's* case is on all fours with this, assuming it to be correctly held therein that the symbolical delivery here given is in fact no delivery at all. But the correctness of this latter decision was questioned by Garth, C.J., in *Lolit Coomār Bhoṣe's* case; and in *Shama Charan Chatterji v. Madhub Chandra Mookerji* (in which the question was whether a plaintiff, who obtains a decree for possession against a defendant and in execution obtains formal, *i.e.*, symbolical delivery, has a fresh starting point as regards limitation, and also a fresh cause of action) reference is made to the case of *Seru Mohun Bania* (1) as authority for the proposition that an auction-purchaser is not confined to the remedies provided by s. 318 and 319 of the Code, but may sue without proceeding under those sections, or if the possession obtained under them be infructuous, the decision in *Kristo Gabind's* case being thereby overruled, at all events as regards an auction purchaser.

We have to observe that *Seru Mohun Bania's* case is not precisely the same as that now before us, seeing that the auction purchaser had failed to obtain any sort of delivery whatever by reason of alleged errors in boundaries and of opposition by the defendants on this score; in other respects it is an authority in favor of the appellant.

We are then certainly not met with any unquestioned authority for the decision of the Lower Appellate Court in this case, and we are of opinion that the appellant's suit is maintainable.

The appellant certainly might have had delivery under s. 318, the respondents being actually and physically ejected from the land if necessary.

Delivery under s. 319 could properly be made only in the case of there being tenants or other persons entitled to occupy the

SEVU
v.
MURUGASAMI.

land in occupation: it is not alleged there were any tenants on it, and the respondents were not entitled to occupy it. Either then there was a delivery of some sort, or there was legally no delivery at all. If there was no delivery at all, then certainly the appellant is in our opinion not debarred from maintaining the suit. If there was delivery—whatever the nature of, that delivery may have been—the respondents either remained in possession or occupation, having no right thereto, or they re-entered and their re-entry was wrongful and a trespass.

There are in our opinion no grounds for holding that a suit like the present is barred by reason of the Civil Procedure Code containing special provisions for putting an auction purchaser in possession in execution proceedings.

Section 244 specifies the cases in which questions arising in execution of decrees shall be decided in execution and not by separate suit, and this is not one of those questions.

This disposes of the argument that the appellant, having been resisted by persons not claiming in good faith, has his remedy under s. 335 of the Civil Procedure Code. He might, perhaps, apply to the Court under that section: on the other hand, the Court might hold that having given delivery before, on which occasion no resistance or obstruction was offered, it is *functus officio* and has nothing more to do in execution with the conduct of the purchaser and those opposing him; and, as is pointed out by the learned counsel for the appellant, if the latter did apply and obtain an order in his favor under that section, the respondents, as parties against whom the order was made, might perhaps claim to institute a suit to establish their right.

However this may be, unless the suit is clearly not maintainable by reason of some express provision of processual law, it cannot be held to be barred: we have not been referred to any such provision.

The decree of the Lower Appellate Court should be reversed, that of the Court of First Instance being restored, and the appellant should have costs in the Lower Appellate Court and in this Court.
