

Moreover, the plaintiff is a usufructuary mortgagee in possession of the house and, as such, she is not entitled to redeem after the extinction of the first mortgage. For these reasons I concur in the decree proposed by my learned colleague.

PERUMAL
v.
KAVERI.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

GOPALA AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2),
APPELLANTS,

1892.
March 25, 28

v.

FERNANDES (DEFENDANT), RESPONDENT.*

Civil Procedure Code, ss. 264, 328, 331—Obstruction to execution of decree—Obstruction offered by a tenant—Dismissal of decree-holder's petition—Appeal.

Obstruction was offered to the execution of a decree for partition of certain property, by one claiming to be entitled to occupy part of the land in question as a mulgeni tenant. The decree-holder presented a petition to the court under Civil Procedure Code, s. 328: this petition was rejected and the claim was not numbered and registered as a suit:

Held, (1) that an appeal lay against the order rejecting the petition;

(2) that the decree for partition was a decree for possession of property within the meaning of Civil Procedure Code, s. 328;

(3) that that section was not rendered inapplicable by the fact that the obstructor claimed to be a mulgeni tenant.

APPEAL against the order of S. Subba Ayyar, Subordinate Judge of South Canara, in miscellaneous petition No. 246 of 1890.

The petitioners had obtained a decree in original suit No. 43 of 1885 in the file of the Subordinate Court of South Canara for the partition of certain moveable and immoveable property and now sought to execute it. The respondent was in possession of part of the land: he claimed to be entitled to occupy it as a mulgeni tenant and obstructed the execution of the decree. The decree-holders' petition was preferred under Civil Procedure Code, s. 328, but the Subordinate Judge held that that section was not applicable to the case, and he rejected the petition without numbering and registering the claim as a suit.

* Appeal against orders Nos. 117 of 1890 and 29 to 34 of 1891.

GOPALA
v.
FERNANDES,

The petitioners preferred this appeal.
Ramachandra Rau Saheb for appellants.
Narayana Rau for respondent.

BEST, J.—The appellants obtained a decree in original suit No. 43 of 1885 on the file of the Subordinate Judge's Court of South Canara for possession of their shares in certain properties, moveable and immoveable. Execution of the decree was resisted by the respondent who claimed to be in possession of a part of the property under a mulgeni lease.

Appellants thereupon complained to the court under section 328 of the Code of Civil Procedure.

The respondent was summoned to answer to the complaint, and both parties were heard, with the result that the Subordinate Judge rejected the petition without even numbering and registering the claim as a suit as required by section 331 of the Code. Hence this appeal.

A preliminary objection is taken by the respondent, viz., that the claim not having been numbered and registered under section 331, there was no suit and consequently no decree from which an appeal will lie.

As was observed, however, in *Fonindro Deb Raikut v. Rani Jugodishwari Dabi*(1), "the law declares that proceedings in a case under section 331 are to be conducted in the same manner and with the like powers as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Chapter V of the Code. Chapter V provides for matters relating to the institution of suits. The refusal of the Judge to number and register the claim as a suit is therefore of the same effect as the refusal to register a plaint; or, in other words, it amounts to rejecting a plaint."

Therefore the order is appealable as coming within the definition of a decree under section 2 of the Code, and the preliminary objection must be disallowed and this appeal considered.

On reading together the three sections 329, 330 and 331, I think it is clear that the Subordinate Judge was not justified in disposing of this case without numbering and registering it as a suit and investigating the claim as required by section 331. Sections 329 and 330 deal with obstruction or resistance by the

(1) I.L.R., 14 Cal., 234.

judgment-debtor himself, or by some other person "at his instigation." In such cases the court may "pass such order as it thinks fit" as the result of its investigation under section 328. But "if the resistance has been occasioned by any person other than the judgment-debtor claiming to be in possession of the property on his own account or on account of some person other than the judgment-debtor," section 331 directs that the claim "shall be numbered and registered as a suit between the decree-holder and claimant," and the court shall 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 Chapter V. The claimant here is not one of the judgment-debtors, and it is clear from the Subordinate Judge's order that he does not consider that the claim is made at the instigation of the judgment-debtor. The case, therefore, is one falling under section 331, and must be disposed of in accordance with the procedure therein prescribed.

It has been contended on behalf of the respondent that, as the latter merely claims a right of occupancy, the procedure to be adopted is that laid down in section 264. I am of opinion, however, that the last-mentioned section is inapplicable to a case like the present where the respondent's right of occupancy is disputed. The object of section 331 is, I take it, to avoid putting a decree-holder to the expense of instituting further suits for the possession of property for which he had already obtained a decree after paying all the requisite institution fees. It has also been suggested that a tenant—even a permanent tenant, (as the claimant in this case is alleged to be,) cannot be a person claiming to be in possession of the property on his own account. I am unable to accede to this contention. But even if it were otherwise, it is sufficient that the claim is one of possession "on account of some person other than the judgment-debtor."

Being satisfied that the case is one that should have been disposed of in the manner directed in section 331 of the Code of Civil Procedure, and that the Lower Court has erred in summarily rejecting the appellant's petition without investigating the same as required by that section, I would set aside the order appealed against and remand the case for disposal according to law and direct that the costs incurred hitherto be provided for in the decree to be passed in the suit.

GOPALA
v.
FERNANDES.

MUTTUSAMI AIYAR, J.—The preliminary objection is taken that no appeal lies from an order refusing to register an application under section 331 as a suit between the decree-holder and the party causing the obstruction. It is true that the order is not specified in section 588, but the language of section 331 is mandatory. Moreover an application made under that section is in the nature of a plaint, and the order rejecting a plaint is appealable. The same view was taken by the High Court at Calcutta in *Fonindro Deb Raikut v. Rani Jugodishwari Dabi*(1) I would overrule this objection.

Passing on to the merits, the Subordinate Judge is in error in holding that a decree for partition is not a decree for possession of immoveable property, and, as such, it is not within the purview of section 331. It is not denied that in the present case a partition was decreed as well of immoveable as of moveable property. It may be that the share awarded by the decree has first to be set out by metes and bounds before it can be placed in the possession of the decree-holder, but when the share is so set out, the decree becomes at once a decree for the possession of specific immoveable property to which section 331 is admittedly applicable.

It is argued by the respondent's pleader that in the case now before us the party obstructing is a mulgeni tenant and that section 331 does not apply to tenants, and reliance is placed on section 264 of the Code of Civil Procedure. If the decree-holder is actually placed in possession under this section, he may not be at liberty to change his mind and to proceed under section 331. But when such is not the case, there is nothing in the language of section 331 or 264 to render the former inapplicable to mulgeni tenures.

The object of section 331 is to secure to the decree-holder the fruits of his decree without a fresh suit by a special proceeding in continuation of the first suit. I, therefore, concur in the order proposed by my learned colleague.

(1) I.L.R., 14 Cal., 234.