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judgment is granted, and the appeal will be restored to the file of pending appeals and heard before the Full Bench. Let next Saturday week be fixed for the hearing and notices issue to the parties.

STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ., concurred.

Application granted.

APPELLATE CIVIL.

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November 15

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

JANKI (APPELLANT) *v.* THE COLLECTOR OF ALLAHABAD (RESPONDENT).*

Pauper suit—Court-fees, recovery of, by Government—Execution of decree—Cross-decrees—Cross-claims under same decree—Civil Procedure Code, ss. 244 (*c*), 246, 247, 411.

Held that a Collector applying on behalf of Government under s. 411 of the Civil Procedure Code, for recovery of court-fees by attachment of a sum of money payable under a decree to a plaintiff suing *in formâ pauperis*, might be deemed to have been a party to the suit in which the decree was passed, within the meaning of s. 244 (*c*) of the Code, and that an appeal would, therefore, lie from an order granting such application.

A plaintiff suing *in formâ pauperis* to recover property valued at Rs. 60,000 obtained a decree for Rs. 1,439. The Court, with reference to the provisions of s. 411 of the Civil Procedure Code, directed that the plaintiff should pay Rs. 1,196 as the amount of court-fees which would have been paid by him if he had not been permitted to sue as a pauper. The Collector having applied under s. 411 to recover this amount by attachment of the Rs. 1,439 payable to the plaintiff, the defendant objected that (i) certain costs payable to her by the plaintiff under the same decree, and (ii) a sum of money payable to her by the plaintiff under a decree which she had obtained in a cross-suit in the same Court, should be set-off against the Rs. 1,439 payable by her to him, with reference to ss. 246 and 249 of the Code, and that thus nothing would remain due by her which the Government could recover. No application for execution was made by the plaintiff for his Rs. 1,439, or by the defendant for her costs. In appeal from an order allowing the Collector's application, it was contended that the "subject-matter of the suit" in s. 411 of the Code meant the sum which the successful pauper-plaintiff is entitled to get as a result of his success in the suit; but that in the suit and the cross-suit taken together, the plaintiff ultimately stood to lose a small sum, the defendant being the holder of the larger sum awarded altogether.

Held that the contention had no force, as execution had not been taken out by the plaintiff or the defendant or both, and it could not be said that the Government had been trying to execute the plaintiff's decree, or was a representative of the plaintiff as holder of the decretal order in his favour for Rs. 1,439, so as to

* First Appeal No. 154 of 1886, from an order of Pandit Bansidhar, Subordinate Judge of Allahabad, dated the 15th March, 1886.

bring into operation the special rules of ss. 246 and 247 of the Code between him and the defendant.

Held also that the plaintiff was one who, in the sense of s. 411, had succeeded in respect of part of the "subject-matter" of his suit, and on that part therefore a first charge was by law reserved and secured to the Government, which was justified in recovering it in these proceedings from the defendant, who was ordered by the decree to pay it, in the same way as costs are ordinarily recoverable under the Code.

Held that the decrees in the suit and the cross-suit not having reached a stage in which the provisions of ss. 246 and 247 of the Code would come into play, no questions of set-off and consequent reduction or other modification of the "subject-matter" of the suit decreed against the defendant as payable by her to the plaintiff had arisen or could be entertained.

ONE Chedi Lal sued as a pauper to recover from Musammat Janki the moveable and immoveable property of a certain deceased person, valued at Rs. 60,000. The decree in this suit, which was numbered 359, directed Janki to pay Chedi Lal Rs. 1,439-2-6 and Rs. 22-0-9 costs, and Chedi Lal to pay Janki Rs 879-5-9 costs. It also, with reference to the provisions of s. 411 of the Civil Procedure Code, directed that Rs. 1,225-8, the amount of court-fees which would have been paid by Chedi Lal if he had not been allowed to sue as a pauper, should be paid by him and Janki in the following proportions, that is to say, Rs. 1,196-1-6 by Chedi Lal and Rs. 29-6-6 by Janki.

The Collector, on behalf of Government, applied to recover the Rs. 1,196-1-6 payable by Chedi Lal in respect of court-fees by the attachment and sale of the Rs. 1,439-2-6 payable by Janki to him, and the Rs. 29-6-6 payable by Janki in respect of court-fees by the attachment and sale of the Rs. 879-5-9 payable by Chedi Lal to her. In the course of the proceedings Janki paid to the Collector the Rs. 29-6-6.

With reference to the application that the Rs. 1,196-1-6 payable by Chedi Lal to Government should be recovered by the attachment and sale of the Rs. 1,439-2-6 payable by Janki to him, Janki objected to the same, contending that the amount of costs payable under the decree by Chedi Lal to her, *viz.*, Rs. 879-5-9, should, under the provisions of s. 247 of the Civil Procedure Code, be set-off against the Rs. 1,439-2-6 payable by her to him, which would leave a balance of Rs. 559-12-9 due by her to Chedi Lal, and that a sum

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of Rs. 558-13-0 payable by Chedi Lal to her under a decree which she had obtained against him in a suit brought by her, numbered 415, should, under s. 246, be set-off against this balance, and thus nothing would remain due by her to Chedi Lal which the Government could recover.

The lower Court disallowed this contention, and directed execution to issue as prayed by the Collector.

Janki appealed to the High Court.

Mr. *C. H. Hill* and Paudit *Sundar Lal*, for the appellant.

The *Government Pleader* (Munshi *Ram Prasad*), for the respondent.

TYRRELL and BRODHURST, JJ.—A preliminary objection was taken to the hearing of this appeal by the learned pleader for the respondent, on the ground that the case does not come within the provisions of clause (*c*) of s. 244 of the Civil Procedure Code, and therefore no appeal lies under that section, none also being allowed under s. 588 *id.* We hold that, having regard to s. 411 of the Code, the respondent may be deemed to have been a party to the suit in the sense of s. 244 *supra*. We therefore entertained the appeal. The facts of the case are fully and correctly given by the Subordinate Judge, whose order is under appeal before us. Briefly stated, the case stands thus:—In suit No. 359 the Subordinate Judge of Allahabad practically made three decretal awards; (*a*) he decreed to the plaintiff Chedi Rs. 1,439-2-6 with costs thereon against the defendant Musammat Janki, now appellant here; (*b*) he decreed to the same defendant her costs on the large portion of Chedi's claim which stood dismissed; and (*c*) he awarded to the Government—respondent here—Rs. 1,225-8-0, costs in the sense of s. 411 of the Civil Procedure Code, of which Rs. 1,196 were payable by Chedi and Rs. 29-6-6 by Musammat Janki. The latter has paid this claim. No application for execution was made by Chedi on the one hand, or by Musammat Janki on the other.

But on the 11th April, 1885, the Government applied for and obtained attachment of Chedi's claim against Musammat Janki for Rs. 1,439-2-6, and an order was served on Musammat Janki forbidding her to pay to Chedi, and on him restraining him from recovering from Musammat Janki, the decretal amount just mentioned. Musam-

mat Janki objected to this order, but her objection was disallowed. The Subordinate Judge ruled that the Government had a first and paramount claim on the sum decreed to Chedi by reason of his partial success in his suit against Musammat Janki, and that no step in execution having been taken by Chedi to realize this debt from Janki, and consequently no counter-claim against the same on the part of Janki having come into existence in the modes contemplated in ss. 246 and 247 of the Civil Procedure Code, and the Government being in these proceedings *not* the representative of Chedi, the decree-holder, but an independent party holding a decretal order apart from, and even adverse to, the said Chedi, this first claim must be allowed, and could not be defeated by the cross-claim of Musammat Janki under the decree in suit No. 359, or in her cross-suit against Chedi No. 445. We think that this decision was right. It was argued for the appellant that the "subject-matter of the suit" (s. 411) means the sum which the successful pauper-plaintiff is entitled to get and can obtain as a result of his success in his suit; but that in the suit No. 359 and in the cross-suit between the same parties, No. 445, decreed together by the same Court, Chedi ultimately stands to lose a small sum, Musammat Janki being, on the combined results of the two suits, the holder of the larger sum awarded altogether. Now, whatever force there might be in this contention, if execution had been initiated or taken out by Chedi or by Musammat Janki, or by both of them, we think that it has none in the state of affairs presented in these proceedings. For it cannot be conceded that the Government has been trying to execute Chedi's decree, or is a representative of Chedi as holder of this decretal order that Musammat Janki should pay him Rs. 1,439-2-6, in such a sense or mode as to bring into operation the special rules of ss. 246 and 247 between those two persons.

It also seems to us to be clear that when Chedi, claiming to recover by his pauper suit Rs. 60,000 from Musammat Janki, alleged to be wrongfully kept from him by her, gained a decree against her for Rs. 1,439-2-6 of that money, he is a plaintiff in the sense of s. 411, Civil Procedure Code, who has succeeded in respect of part of the "subject-matter" of that suit, and on that part, therefore, a first charge is by the law reserved and secured to

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the Government-respondent, which is justified in recovering it in these proceedings, under the circumstances of this case mentioned above, from Musammat Janki, who was ordered by the decree to pay it, in the same way as costs are ordinarily recoverable under the Code. Holding, then, that the decrees in the cases Nos. 359 and 445 had not reached a stage in which the provisions of ss. 246 and 247 would come into play, we are of opinion that no questions of set-off and consequent reduction or other modification of the "subject-matter" of the suit decreed against Musammat Janki as payable by her to Chedi have arisen or can be entertained. Therefore the pleas of this appeal are irrelevant to the case, and we dismiss the appeal with costs.

Appeal dismissed.

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November 22.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

PARSOTAM SARAN BY HIS GUARDIAN CHIRANJI (PLAINTIFF) *v.* MULU AND OTHERS (DEFENDANTS).*

Mortgage—Right to sale—Death of sole mortgagee leaving several heirs—Sale of mortgagee's rights by one of such heirs—Suit by purchaser for sale of mortgaged property—Act IV of 1882 *(Transfer of Property Act), s.* 67.

Upon the death of a sole mortgagee of zamindari property, his estate was divided among his heirs, one of whom, a son, was entitled to fourteen out of thirty-two shares. The son executed a sale-deed whereby he conveyed the mortgagee's rights under the mortgage to another person. In a suit for sale brought against the mortgagor by the representative of the purchaser, it was found that the plaintiff acquired, under the deed of sale, only the rights in the mortgage of the son of the mortgagee, though the deed purported to be an assignment of the whole mortgage.

Held by the Full Bench that the plaintiff was not entitled, in respect of his own share, to maintain the suit for sale against the whole property, the other parties interested not having been joined; that moreover he was not entitled to succeed, even in an amended action, in claiming the sale of a portion of the property in respect of his own share, and that the suit was, therefore, not maintainable. *Bishan Dial* v. *Manni Ram* (1), *Bhora Roy* v. *Abilach Roy* (2), and *Bedar Bakht Muhammad Ali* v. *Khurram Bakht Yahya Ali Khan* (3) referred to

* Second Appeal No. 1765 of 1885, from a decree of H. G. Pearse, Esq., District Judge of Moradabad, dated the 22nd July, 1885, confirming a decree of Mr. H. David, Munsif of Bilari, dated 9th February, 1885.

(1) I. L. R., 1 All. 297 (2) 10 W. R. 476.
(3) 19 W. R. 315.