

APPELLATE CIVIL.

1892
March 31.*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

MAHABIR PRASAD AND OTHERS (PLAINTIFFS) v. PARMA (DEFENDANT)*

Civil Procedure Code, ss. 13, 278, 331—Execution of decree—Res judicata.

The plaintiff, having obtained a decree for possession of certain land, applied for execution by delivery of possession. Whereupon a third party filed an objection, in the Court of the Munsif, that he held a prior decree for possession of the same land, and therefore the plaintiff's decree was incapable of execution. This objection was allowed and the plaintiff then sued for establishment of his right to possession of the land jointly with the objector, making the former judgment-debtor and the objector defendants to the suit. The Subordinate Judge in first appeal held that the Munsif had acted under s. 331 of the Code of Civil Procedure, and, applying s. 13 of the same Code, dismissed the plaintiff's suit. The plaintiff then appealed.—*Held* that circumstances did not exist to give the Munsif jurisdiction to act under s. 331 and that his order must be taken to have been made, as it purported to have been made, under s. 278. *Buhal Sing Chowdhry v. Behari Lal* (1) referred to.

The scope and application of s. 331 of the Code of Criminal Procedure commented upon.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

EDGE, C.J. and TYRRELL, J.—This second appeal has arisen out of a suit in which the plaintiffs, who are appellants here, claimed a decree for the establishment of a joint right of the plaintiffs and the respondent here in certain land and for joint possession, and certain other matters. The facts, so far as they appear and are material to the consideration of this appeal, are as follows:—The plaintiffs had obtained a decree against one of the defendants to this suit (defendant No. 2) for possession of the land. After they had obtained that decree the defendant No. 1, respondent here, filed an objection in the Munsif's Court to the delivery of possession in execution, alleging that he held a prior decree for possession of

* Second appeal No 9 of 1890 from a decree of Maulvi Muhammad Mazhar Husain Khan, Subordinate Judge of Gorakhpur, dated the 25th September 1889, reversing a decree of Pandit Alopi Prasad, Munsif of Basti, dated the 21st January 1888.

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this land against defendant No. 2, and that he, and not the plaintiffs, was entitled to possession, and alleging further that he, defendant No. 1, held possession. The Munsif proceeded to deal with that objection, treating it as an objection under s. 278 of the Code of Civil Procedure. The fact that the Munsif considered that he was acting under s. 278 of the Code is apparent from the statement in his *rubkar* that the objection was made under s. 278. The Munsif allowed the objection with costs; thereupon the plaintiffs brought this suit. The first Court decreed the suit. The defendant No. 1 appealed and the lower appellate Court dismissed the suit, holding that as against defendant No. 1 the suit was barred by s. 13 of the Code of Civil Procedure and that as against defendant No. 2 the suit did not lie owing to s. 244 of the Code. We have nothing to do with the suit so far as it related to defendant No. 2. The Subordinate Judge's grounds for applying s. 13 of the Code of Civil Procedure were the objection and the order thereon which had been passed by the Munsif and the assumption by the Subordinate Judge that the proceedings on the objection were proceedings under s. 331 of the Code. It is difficult to understand how the Subordinate Judge came to that conclusion. On the face of the *rubkar* of the Munsif, as we have said, it was obvious that the Munsif dealt with the objection as if s. 278 were the section which applied. He did not adopt any of the procedure of s. 331 of the Code. There was no claim which he had numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant. The facts did not exist which would have given him jurisdiction to proceed under s. 331. S. 331 begins thus:—"If the resistance or obstruction has been occasioned." In order to see what the resistance or obstruction referred to in s. 331 is, we must refer to the previous sections. Now s. 328 is the first of the group of sections relating to resistance to the execution of decree. The intermediate sections, ss. 329 and 330, do not apply to this case, as the resistance was neither on the part of the judgment-debtor nor of any person at his instigation. Consequently the resistance or obstruction mentioned in s. 331 must be the resistance or obstruction contemplated by s. 328. Now the resistance or obstruction contemplated by that

section is the resistance to, or obstruction of, the officer charged with the execution of a warrant for the possession of property, and it is a resistance or an obstruction in the execution of a decree for the possession of property. Now, so far as appears, the officer charged with the execution of the warrant was not resisted or obstructed at all. Such obstruction as there was, was caused by the defendant No. 1 filing his objection in the Munsif's Court. Again, there was no claim to be numbered and registered as a suit within the meaning of s. 331. The word "claim" there has been rather unfortunately used, because at first sight one would think that "claim" and "claimant" had reference to each other; but the claimant in s. 331 is the person who makes or causes the resistance or obstruction, and it never could have been intended that an objection filed by him should be numbered and registered as a suit in which the decree-holder was to be made plaintiff; in other words, it never could have been intended that the decree-holder should be made plaintiff to support a claim put in by the person objecting to his proceedings in execution. The claim mentioned in s. 331 must mean the complaint which is mentioned in s. 328. That complaint is the complaint of the decree-holder and not of the person causing the resistance or obstruction. There were, in fact, no elements in this case to give the Munsif jurisdiction to proceed or pass any order under s. 331. If, contrary to what we believe, the Subordinate Judge is right in thinking that the Munsif did proceed under s. 331, then all that need be said is that his proceedings were without jurisdiction and his order is nugatory. If, on the other hand, he proceeded, as he professed to proceed, under s. 278, he was proceeding under a section which relates to the attachment of property for the purposes of execution, and which does not relate, so far as we can see, to the execution of a decree for possession of immovable property. In any case, the Munsif's order, if passed under s. 278, would not operate as a bar to this suit. The view which we take of s. 331 is similar to that taken as to the corresponding section of a former Code, by Jackson, J., in *Bukal Sing Chowdhry v. Behari Lal* (1). The Subordinate Judge has not tried this appeal on its merits; he has decided it on a

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preliminary point, and wrongly. We set aside his decree and remand the appeal under s. 562 of the Code of Civil Procedure to the Court of the Subordinate Judge to be reinstated on his file and disposed of according to law. Costs here and hitherto will abide the result.

Cause remanded.

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May 14.

PRIVY COUNCIL.

AMARNATH SAH AND OTHERS (PLAINTIFFS), v. ACHAN KUAR AND OTHERS
(DEFENDANTS).

On appeal from the High Court at Allahabad.

Hindu law—Hindu widow—Burden of proving necessity where a Hindu widow attempts to alienate property held by her for her widow's estate.

In order to sustain an alienation of the property held by a Hindu widow for her widow's estate, it must be shown either that there was legal necessity for the alienation, or at least that the grantee was led, on reasonable ground, to believe that there was.

In a suit upon a mortgage of such property executed under the authority of a widow borrowing money, the point whether the loan was necessary was expressed in the issues in the form of a question how far the defendants' objections, grounded on the absence of necessity, were tenable. This was obviously an incorrect mode of trying the suit, because it assumed that it was for the defendants to show absence of necessity, and did not accord with the obligation upon a mortgagee, claiming under a widow, to prove a valid mortgage. It was sufficient to defeat the suit that, upon the whole case, there had been no proof of the lender's having fulfilled the legal obligation to inquire and satisfy himself that the widow, from whom he was taking a charge upon her husband's inheritance, had a proper justification for so charging it. *Hunooman Persaud v. Munraj Koonvere* (1) referred to.

Appeal from a decree (11th August 1888) reversing a decree (27th May 1885) of the Subordinate Judge of Bareilly.

The suit out of which this appeal arose had among its objects the fixing a charge on thirteen villages, which had belonged to Khairati Lal, deceased in 1866, who traded in Bareilly, under the firm of Rattan Singh, Khairati Lal, and whose family continued his business after his death. His widow, Hulas Kuar, on the 4th of

Present: LORDS HOBHOUSE, MACNAGHTEN, and HANNEN, SIR R. COUCH AND...
LORD SHAND.

(1) 6 Moo. I. A., 393.