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him to be trustee of the endowed property for the purpose of carrying out the intention of the founder. We declare that the award, the leases, the assignments and the incumbrances referred to in the plaint do not affect the endowed property or any part of it, and are not and will not be binding on the trustee for the time being appointed. We give the plaintiff a decree for possession in order that Rameshwar Misr, who is not a party to this suit, may be placed in possession of the endowed property as trustee. The claim for *mesne* profits is abandoned. To the above extent we vary the decree below and decree this appeal with costs in this Court and in the Court below.

BURKITT, J.—I concur in the interpretation put by the learned Chief Justice on Act No. XX of 1863, and in the order proposed and in the reasons given therefor.

*Appeal decreed.*

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*Before Mr. Justice Knox and Mr. Justice Blair.*

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*December* 10.

NARAIN DAS (APPELLANT) *v.* HAZARI LAL AND ANOTHER (RESPONDENTS).*

*Civil Procedure Code, sections* 328, 331—*Execution of decree—Resistance or obstruction to execution—Complaint—Limitation—Renewal of resistance or obstruction—Fresh cause of action—Estoppel.*

The period of limitation provided for in section 328 of the Code of Civil Procedure is a limitation which governs a cause of action arising out of a particular resistance or obstruction. So far as that resistance or obstruction is concerned, the decree-holder, if he wishes to take proceedings under section 328, must do so within one month from the time of such resistance or obstruction. But the bar created by the limitation imposed by this section does not extend to and hold good so as to bar complaints against acts of resistance or obstruction made upon fresh proceedings taken by the decree-holder. *Ramasekara* v. *Dharmaraya* (1) followed. *Balvant Santaram* v. *Babaji* (2) and *Vinayak Rav Amrit* v. *Devrao Govind* (3) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

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* First Appeal No. 76 of 1895 from an order of J. J. McLean, Esq., District Judge of Cawnpore, dated the 22nd June 1895.

(1) I. L. R., 5 Mad., 113. (2) I. L. R., 8 Bom., 602.
(3) I. L. R., 11 Bom., 473.

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NARAIN DAS v. HAZARI LAL.

Pandit *Sundar Lal* and Pandit *Moti Lal* for the appellant.

Mr. *T. Conlan* and Maulvi *Ghulam Mujtaba* for the respondents.

KNOX and BLAIR, JJ.—The parties to this suit are one Narain Das, who claims to be proprietor and to be in possession of four shops situated in Nimak Mandi, a *mohalla* of Cawnpore, and the respondents, Hazari Lal and Fauji Lal, who are the sons of one Bakhtawar Lal, who has obtained by purchase the rights and interests of one Nabi Bakhsh. [One Ram Sahai held a decree against Nabi Bakhsh and Musammat Afzalunnissa, and this decree he executed by bringing to sale on the 5th of September 1881 property which consisted of nineteen shops in Nimak Mandi and thirteen shops in Dal Mandi. With the 13 shops in Dal Mandi we are not concerned at all. The whole of the dispute to which this case relates has reference to four shops out of the nineteen shops in Nimak Mandi. One fact further has to be mentioned, and that is that Narain Das, the appellant in this appeal, claims to have purchased the rights of Musammat Afzalunnissa, the judgment-debtor in Ram Sahai's decree. As said before, he not only claims the right and title to these shops, but also claims to be in actual possession.] Bakhtawar Lal, the purchaser of the rights and interests of Nabi Bakhsh, brought a suit in 1886 against Kallu Mal, Kanhaiya Lal and others, to obtain possession of the nineteen shops which he considered to be his. He obtained a decree, which was eventually confirmed by this Court on the 30th of November 1888. On the 17th of March 1887 he made his first attempt by execution of that decree to get possession of the nineteen shops. He was resisted by the appellant Narain Das. He at once resorted to the Court in which execution proceedings were pending, and put in a petition. That petition is of importance. It is claimed by the appellant that that petition was one under section 328 of the Code of Civil Procedure, and that the orders passed upon it were orders passed under section 331 of that Code. The learned vakil who appears for the respondents asks us to view it, not as a complaint of resistance or obstruction on the part

of Narain Das, but as a complaint to the effect that the amin had not carried out the orders of the Court and had not put him in possession of nineteen shops to which he was entitled. There is no allusion whatever in the order to section 331 or 328 of the Code of Civil Procedure, and the terms in which the order is couched are certainly not those in which an order under section 331 should run. Briefly, the order is to the effect:—"Let the decree-holder be put in possession of fifteen shops. As for the four shops to which an objection is raised, the decree-holder can proceed according to law." Against this order Bakhtawar Lal appealed, but appealed ineffectually. On the 8th of April 1889 he instituted a regular suit against the appellant, Narain Das and others, and that suit came to an end on the 20th of June 1890 with this order:—"To-day the plaintiff was called for and did not appear. Moreover he has not paid in process fees. It is therefore ordered that his suit be dismissed, and he should pay the costs of the other side." Round this order too dispute prevails. The appellant maintains that it was an order passed under section 102 of the Code of Civil Procedure. There is no doubt whatever that Bakhtawar Lal attempted to have a rehearing of the suit, but his applications to that effect were dismissed. On the 28th of November 1891 the respondents, who were the sons of Bakhtawar Lal (Bakhtawar Lal in the meanwhile having died), took fresh execution proceedings. They applied that their decree might be executed against the four shops in question. That application was dismissed. They made a second attempt on the 22nd of November 1892, and this time so far with success that orders were issued for possession. Again resistance was made by the appellant, and the amin reported to the effect that he could not give effect to the order for possession with which he charged. Upon this the respondent instituted a complaint under section 328 of the Code of Civil Procedure, and the Court this time without question took action under section 331 and numbered and registered the claim as a suit between the respondents as plaintiffs and the appellant as defendant. The order passed upon the hearing was to the effect that

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the matter between the parties had, by the order of the 20th of June 1890, become *res judicata*. An appeal was preferred, and the lower appellate Court, reversing the decision and holding that the matter in dispute was not *res judicata*, remanded the suit to the Court of first instance for trial, and directed it to decide the case upon its merits. It is from this order that the present appeal has been filed. The grounds taken in the appeal are :—(1) that the order of the 7th of May 1887, never having been set aside, the present proceedings are not maintainable, and that order concludes the matter in controversy; and (2) that if that order does not bar, then the order of the 20th of June 1890 is a fatal bar to the claim now brought.

Without entering upon the question as to whether the proceedings which terminated in the order of the 7th of May 1887 were or were not proceedings arising out of a complaint under section 328, a matter upon which we entertain considerable doubt, and assuming that the order was such an order, we do not accede to the contention which was pressed upon us with much energy and ability, and much show of authority, by the learned vakil for the appellant, and which was to the effect that the present proceedings are barred by reason of not having been instituted within a month of the resistance in 1887. In our opinion the period of limitation provided in section 328 of the Code of Civil Procedure is a limitation which governs a cause of action arising out of a particular resistance or obstruction. So far as that resistance or obstruction is concerned, the decree-holder, if he wishes to take proceedings under section 328, must do so within one month from the time of such resistance or obstruction. But the bar created by the limitation imposed by this section does not, in our opinion, extend to and hold good so as to bar complaints against acts of resistance or obstruction made upon fresh proceedings taken by the decree-holder. We were referred to the precedent *Balvant Santaram* v. *Babaji* (1). The particular matter in dispute in that case was whether the plaintiff, who was taking possession of a room and was resisted

(1) I. L. R., 8 Bom. 602.

by one Lakhshman, was bound by previous proceedings between the plaintiff and Lakhshman's brothers. That case differs from the case before us, and it was never held that the limitation provided in section 328 barred fresh proceedings taken in execution of decree. What is said there is that it was optional with the decree-holder to proceed either summarily or by a regular suit, and that the failure of the plaintiff to avail himself of the remedy under section 331 of the Code of Civil Procedure did not prevent him from proceeding against the defendant by a regular suit. There is no doubt that limitation was set up, but the decision of the Court was that, as the defendant had been no party and had not been represented in those execution proceedings, he could not in any way be affected by them. The next case cited to us was the case of *Vinayak Rav Amrit* v. *Devrao Govind* (2). But that case also differs from the present case. The matter decided in that case was that an attempt made by the decree-holder to renew proceedings arising out of a former obstruction was rightly rejected by the lower Court. Those proceedings were held as barred by Art. 167 of the second schedule of the Indian Limitation Act, 1877. We have not now to decide whether the proceedings taken by the representatives of Bakhtawar Lal were rightly or wrongly granted by the Court which had to deal with them. All that we have to consider is whether the resistance made by the appellant does or does not give a fresh cause of action to the respondents so as to give them the right of taking proceedings under section 328 of the Code of Civil Procedure. The case, which corresponds with the one before us, is that of *Ramasekara* v. *Dharmaraya* (3). In that case a decree had been returned unexecuted owing to the resistance of the judgment-debtors. Fresh warrant for possession was afterwards applied for and granted, and fresh resistance took place. The learned Judges who decided that case have held that the period of limitation for an application of this nature commences to run from the date of the resistance, obstruction or dispossession, and that resistance, obstruction or dispossession can hardly be any other

(2) I. L. R., 11 Bom. 473. (3) I. L. R., 5 Mad. 113.

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resistance, obstruction or dispossession than that mentioned as forming the subject of the complaint. They held that such was the plain interpretation of the terms of the Act, and we agree with them in that view. The first plea therefore fails.

Our decision upon the second plea virtually proceeds upon the same ground, assuming that the suit brought in 1890 was dismissed under section 102 of the Code of Civil Procedure. All that section 103 enacts is that when a suit is so dismissed, the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. We hold that, as regards the proceedings of 1890, the cause of action was the resistance made by Narain Das on or about the 5th of April 1887. The cause of action in the present proceedings is the perfectly distinct and separate resistance offered by Narain Das in the separate execution proceedings founded upon a different order passed on or about the 22nd of November 1892. The second plea therefore also fails, and this appeal will stand dismissed with costs.

*Appeal dismissed.*

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*January* 10.

*Before Mr. Justice Knox and Mr. Justice Blair.*

IN THE MATTER OF THE PETITION OF E. MORGAN.*

*Act No. IV of* 1869 (*Indian Divorce Act*), *section* 3, *clause* (5)—*Minor children—Age of majority—Alimony—Application for refund of alimony paid by mistake after period during which it was payable had expired.*

In 1882 a decree for dissolution of marriage between E. M. and S. M. was passed by the High Court on the wife's petition, and the husband was ordered to pay alimony for the wife and certain minor children of the marriage. On the 26th of August 1895 a petition was presented to the Court on behalf of E. M. stating that S. M. had married again on the 3rd of August 1895; that one of the children in respect of whom alimony was payable had come of age on the 16th of April 1895; and that another of such children had married in April 1893, and it was prayed that certain sums which had been paid into Court after the respective dates mentioned above as alimony in respect of the three persons above referred to might be refunded. *Held* that E. M. was not entitled to any refund of alimony except as to sums, if any, paid into Court after the date of the filing of petition for refund and relating to a period subsequent to that date.

THIS was an application for the refund of certain sums paid as alimony under an order of the Court. Sarah Morgan, one of

* Application of the respondent in Matrimonial Case No. 1 of 1881.