

## APPELLATE CIVIL.

1896

December 17.*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.*

INDO MATI (JUDGMENT-DEBTOR) v. GAYA PRASAD AND ANOTHER (DECREE-HOLDERS).\*

*Civil Procedure Code, section 372; sections 2, 244, 588—Order dismissing application to be brought on the record—“Decree”—“Order”—Appeal.*

An appeal will lie from an order dismissing an application under section 372 of the Code of Civil Procedure to be brought upon a record as representative of a deceased party, such order being a decree with the meaning of section 2 of the Code.

THE respondents to this appeal had obtained a decree for sale on a mortgage against one Chaudhri Raj Kunwar, who was the husband of Rani Indo Mati, the appellant. After the death of her husband Rani Indo Mati applied to the Court which had passed the decree (Subordinate Judge of Mainpuri) stating that the property to which the decree applied had devolved upon her in virtue of the will of Rani Lachhmin Kunwar, to whom it had been transferred on the 19th of September 1895, and praying that she might be made a party to the execution proceedings, and that, under section 87 of the Transfer of Property Act, 1882, six months' time might be granted to her in which to make arrangements for satisfying the decree. Upon this application the Subordinate Judge, without issuing notice to the other side, passed the following order:—“This is not an application on behalf of a party to the suit, but on behalf of a third person. Time has been granted twice; it cannot be granted now. It is ordered that the application be rejected.” Against this order the applicant appealed to the High Court.

*Babu Jogindro Nath Chaudhri*, for the appellant.

*Pandit Sundar Lal*, for the respondents.

EDGE, C.J. and BLAIR, J.—The appellant here, Rani Indo Mati, applied to be brought on the record of a suit for foreclosure in which a decree under section 86 of the Transfer of Property Act, 1882, had been made, and to have the day appointed for the

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\* First Appeal No. 87 of 1896, from an order of Maulvi Mazhar Husain, Subordinate Judge of Mainpuri, dated the 23rd December 1895.

payment postponed. She claimed to be the representative in interest of the mortgagor, who was the defendant in the suit. The Court below dismissed her application, apparently on the ground that she was not a party to the record, and that the day appointed by the decree for payment had been twice postponed on the application of the mortgagor. The application was dismissed without notice to the other side. The applicant brought this appeal.

A preliminary objection has been taken on behalf of the respondents that the appeal does not lie. It is contended, and we think rightly, that the application to be brought upon the record was one under section 372 of the Code of Civil Procedure, and in support of the argument that the appeal does not lie clause 2 of section 588 of the Code has been used to show that the only appeal given by section 588 from an order passed under section 372 is an appeal from an order dismissing an objection to an application made under section 372. There is no doubt that, if the allegations as to title of the appellant are true, the interest of the mortgagor had vested in her before she made her application to the Court below. It appears to us that the dismissal of her application was an adjudication on the representative right which she claimed, and, as an order under section 372 dismissing an application is not an order specified in section 588, the order dismissing her application would be a decree as that word is defined in section 2 of the Code of Civil Procedure, and in our opinion an appeal lay, the case coming within section 244 of the Code.

The Court below should have issued notice to the other side, and first of all determined the question as to whether the applicant was a representative, and, if she was what she alleged herself to be, she should have been brought on the record, and in that event the Court should have gone on to consider whether or not the time should have been extended under the proviso to section 87 of the Transfer of Property Act, and that would depend upon whether the applicant succeeded in showing good cause for the postponement. It would be premature on our part to express any

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opinion as to whether there was good cause or not, as the other side should be allowed an opportunity of producing evidence on the point if necessary. We set aside the order of the Subordinate Judge and remand the case under section 562 of the Code of Civil Procedure to his Court for the application to be disposed of on the merits. The costs of this appeal will abide the result.

*Appeal decreed and cause remanded.*

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December 18.

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.*  
LALMAN (JUDGMENT-DEBTOR) v. GOPI NATH (DECREE-HOLDER).  
*Civil Procedure Code, section 357—Insolvency—Execution of decree—*  
*Limitation.*

Section 357 of the Code of Civil Procedure provides a limitation of its own and in substitution for the limitation provided for the execution of decrees by the Indian Limitation Act, 1877.

In this case one Lalman applied to the District Judge of Farukhabad, on the 11th of April 1889, to be declared an insolvent, and was discharged by an order under section 355 of the Code of Civil Procedure on the 7th of October 1890. On the 21st of February 1896, Gopi Nath, one of the judgment-creditors of Lalman, applied to the Court for execution of his decree against certain property which he alleged to have been acquired by the insolvent subsequently to his discharge. To this application the insolvent objected, pleading, *inter alia*, that execution of the decree in question was barred by limitation, the provisions of section 357 of the Code of Civil Procedure not being exclusive of the rules of limitation for the execution of decrees prescribed by Act No. XV of 1877. This objection was disallowed and execution was ordered to proceed, a new receiver being appointed. The judgment-debtor appealed to the High Court.

Mr. *E. A. Howard*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

EDGE, C.J. and BLAIR, J.—In our opinion section 357 of the Code of Civil Procedure provides a limitation of its own and in

\* First Appeal No. 170 of 1896, from an order of G. A. Tweedy, Esq., District Judge of Farukhabad, dated the 13th April 1896.