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a co-sharer having right to pre-empt. I allow the appeal, set aside the judgments and decrees of both the lower Courts, and remand the case to the Court of first instance through the lower appellate Court, with directions to readmit the suit under its original number in the register and proceed to determine the suit on the merits. Costs will abide the event.

Appeal decreed and cause remanded.

1906

May 1.

Before Mr. Justice Richards.

RANI INDOMATI (DEFENDANT) v. JAGESHAR (PLAINTIFF) AND GAURI SHANKAR (DEFENDANT).*

Civil Procedure Code, sections 13, 244, 278, 283—Execution of decree—Legal representative of judgment-debtor alleging possession as trustee—Objection—Defence raised in separate suit.

Held that, though a legal representative of a judgment-debtor who alleges that the property sought to be sold in execution was not the property of the judgment-debtor, but was property possessed by the legal representative as trustee for others, may file an objection under section 278 of the Code of Civil Procedure, there is nothing to compel the filing of such an objection and it is open to the legal representative to raise the defence in a subsequent suit brought by the auction-purchaser for possession. *See Chand Mal v. Durga Dei (1) and Syed Ali Suijjad v. Bhajan Singh (2) referred to.*

THE following are the facts:—

The plaintiff, Jageshar, at an auction sale in execution of a decree obtained against one Raj Kumar purchased a grove together with other properties. The plaintiff failed to get possession of the grove and, Raj Kumar having died meanwhile, he brought a suit against his legal representative, Rani Indomati. Rani Indomati alleged that she had (prior to the plaintiff's purchase) purchased the grove with her own money and had by a registered deed dedicated it for certain religious purposes, she being herself manager and Gauri Shankar her *karinda*.

Gauri Shankar had filed an objection in regard to the grove in the execution proceedings, and his objection had been upheld.

* Second Appeal No. 696 of 1904, from a decree of Pandit Rai Indar Narain, Subordinate Judge of Farrukhabad, dated the 25th of April, 1904, confirming a decree of Baba Khirod Gopal Banorji, Munsif of Kanauj, dated the 30th of November, 1903.

Rani Indomati had filed no such objection. In the regular suit Gauri Shankar did not appear, but Rani Indomati defended the suit.

The Court of first instance (Munsif of Kanauj) held relying on *Behari Lal v. Majid Ali* (1), that Rani Indomati ought to have raised her objection in the execution case and gave the plaintiff a decree *ex parte* as against Gauri Shankar and as in a contested suit as against Rani Indomati.

The lower appellate Court (Subordinate Judge of Fatehgarh) maintained the decree of the Munsif against Gauri Shankar, holding that he was only a servant of Rani Indomati and against Rani Indomati relying on sections 13 and 244 of the Code of Civil Procedure, because she was legally bound to take an objection in the execution proceedings. Rani Indomati appealed.

Dr *Tej Bahadur Sapru*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

RICHARDS, J.—In this suit the plaintiff seeks to have it declared that he is the auction-purchaser of a certain grove and he also claims possession. He says that in certain proceedings against a man of the name of Raj Kumar certain property was taken in execution and sold, that this property included the grove in question, and that he obtained a sale certificate for the property. After the decree had been obtained against Raj Kumar the latter died, and in the execution proceedings Rani Indomati, his widow, was brought on the record as his representative. Rani Indomati raised no objection either under section 244 or under section 278 of the Code of Civil Procedure. Actual possession of the property sold, save the grove now in dispute, was obtained by the plaintiff and the present suit was instituted in respect of the grove only. Rani Indomati now defends the suit, and alleges that prior to the year 1898 she had become entitled to the grove in question by purchase made with her own money and that by a registered deed she had duly dedicated the property for certain religious purposes. The plaintiff replies to this defence by stating that she was the representative of the deceased, Raj Kumar, and was therefore bound to raise an objection in the previous proceedings under section 244 of the Code of

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Civil Procedure, and that she cannot now be heard in making this defence. It is then urged on behalf of Rani Indomati that inasmuch as the property in question was in her possession, not as judgment-debtor or as the representative of the judgment-debtor, but as trustee for the religious purpose, she was not bound to make this objection in the previous proceedings, that it could not have been decided under section 244 if she had done so, and accordingly she is now entitled to make the defence set forth in her written statement. The Court below has not gone into the question as to whether or not there was a real and genuine sale to Rani Indomati, and a subsequent dedication by her. I do not wish to express any opinion one way or another upon these questions, which will have to be decided when the case goes back. The appellant relies upon the judgment of the Full Bench in the case of *Seth Chand Mal v. Durga Dei* (1). In that case the majority of the Court were of opinion that where a person who was brought on the record as the representative of a deceased judgment-debtor claims the property not as his own, but as trustee for some one else, he is entitled to have the question as to whether or not his claim is well-founded tried in a separate suit. It seems clear that if Rani Indomati had raised the objection that she was a mere trustee, she would have raised the question under section 278 and not under section 244. If her objection had been overruled, she would have been entitled to have brought a separate suit. It is of course to be remembered that she had raised no such objection either under section 278 or section 244. But I can see nothing which renders it obligatory upon a person having a claim which can be raised under section 278 to raise it at the period contemplated by that section. In a recent case, *Syed Ali Sajjad v. Bhajan Singh* (2), a preliminary objection was taken that where an objection to an attachment was taken by the legal representative of a deceased debtor claiming the property for a trust as a trustee under the provisions of section 278, no appeal lay. It appears to have been conceded that if the objection was under section 244 or could have been dealt with under that section an appeal would have lain. The Court held that the preliminary objection must prevail and that the objection could

(1) (1889) I. L. R., 12 All., 313. (2) *Weekly Notes*, 1906, p. 157.

only have been brought under section 278. The Court cites with approval the Full Bench decision which I have just referred to. The only difference between that case and the present is that Rani Indomati did not prefer any claim or make any objection to the attachment of the grove when it was attached with other property in the previous litigation. Under these circumstances I allow the appeal, set aside the decrees of both the Courts below, and remand the suit through the lower appellate Court to the Court of first instance with directions to readmit the suit under its original number in the register and proceed to determine the suit on the merits having regard to the observations made above. Costs will abide the event.

Appeal decreed and cause remanded.

1906

RANI
INDOMATI
v.
JAGESHAR.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
Sir George Know.*

1906
May 4.

NARENDRA BAHADUR SINGH AND OTHERS (PLAINTIFFS) v. ACHHAIBAR
SHUKUL AND OTHERS (DEFENDANTS).*

Alluvion—Gradual accretion—Definition.

Held that accretion to be considered "gradual" must be by gradual, slow, and imperceptible means.

Lopez v. Muddun Mohun Thakoor (1), *Krishn Chandra v. Saseedan Bibi* (2) and *Ritraj Kunwar v. Sarfaraz Kunwar* (3), referred to.

THE plaintiffs sued for possession of certain land on the allegation that formerly it was in their possession, that it was suddenly submerged owing to a change in the course of the river, and that when it reappeared all of a sudden owing to a fresh change in the course of the river, the defendants, neighbouring landholders, took possession of it in the absence of the plaintiffs.

The defendants alleged that the land reappeared gradually and did not bear any old mark.

The Court of first instance (Subordinate Judge of Gorakhpur) framed the following issues:—"Has the land in suit been

* Second Appeal No. 1106 of 1904, from a decree of T. A. H. Way, Esq., District Judge of Gorakhpur, dated the 18th of August, 1904, confirming a decree of Munshi Achal Behari, Subordinate Judge of Gorakhpur, dated the 31st of May, 1904.

(1) (1870) 13 Moo. I. A., 467.

(2) (1905) 2 A. L. J., 821.

(3) (1906) I. L. R., 27 All., 655.