

District Judge of Allahabad in the succession certificate case, might be set aside. The courts below have granted her the reliefs she claimed, with the exception that they declined to set aside the order of the District Judge. It is contended in appeal here that as the appellants had never denied the right or legal character of the respondent Musammat Ram Kuar, she was not entitled to a declaration of an abstract right. The contention is that the lady should have appealed from the order of the District Judge refusing her a certificate to realize the whole amount, and that she has no cause of action for this declaratory suit, inasmuch as the appellants have never denied her title. It was, however, due to the appellants' action in the succession certificate case that limitations were placed upon the power of the lady Musammat Ram Kuar to recover the deposit from the Bank. We are of opinion that this order gave the lady a right to bring the present suit. We dismiss the appeal with costs.

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 KESHO RAM
SINGH
v.
RAM KUAR.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
MASUM-UN-NISSA (PLAINTIFF) v. LATIFAN AND OTHERS (DEFENDANTS).
Civil Procedure Code (1882), section 396—Partition—Preliminary decree in plaintiff's favour—Resistance to commissioner—Refusal of plaintiff's application for reissue of commission.

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A preliminary decree for partition of a house having been made, the court appointed a commissioner to view the house and prepare a scheme for partition. In this he was resisted by the husband of the plaintiff and was unable to execute the commission. The plaintiff applied for the issue of a fresh commission, but the court refused this and dismissed the suit altogether. *Held* that the court had no authority to nullify its decree by totally dismissing the suit, but ought to have acceded to the request of the plaintiff to reissue the commission and to have seen that its order was obeyed.

THIS was an appeal under section 10 of the Letters Patent against a judgement of GRIFFIN, J. The facts of the case appear from the judgement under appeal, which was as follows:—

“Plaintiff's suit was for possession by partition of certain shares in two houses. By an order dated 19th September, 1906, the court of first instance decreed plaintiff's claim for partition and separate possession over 36 *sihams* out of 96 *sihams*. A decree was prepared in accordance with that judgement. In the same order it was directed that a commission will issue to the amin to draw up proposals for the partition and he was directed to submit his report before 31st October, 1906. From the amin's report it appeared that the plaintiff refused to

* Appeal No. 85 of 1908 under section 10 of the Letters Patent.

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have the houses partitioned and the Munsif thereupon dismissed the suit with costs. The plaintiff appealed. The only ground considered by the lower appellate court, was whether the Munsif was right or not in dismissing the suit because the plaintiff through her husband, who was also her general attorney, prevented the amin from preparing a plan of the house.

"The lower appellate court was of opinion that the court of first instance had no option but to dismiss the suit, and the plaintiff's appeal was dismissed. The plaintiff comes here in second appeal.

"It is contended that the lower appellate court should have gone into the merits of the case: but if the suit was rightly dismissed by the court of first instance, the lower appellate court in upholding the decree of the first court was relieved of the necessity of discussing the other grounds of appeal raised by plaintiff. The question raised in this appeal is a somewhat novel one and I have not been referred to any authority on the point. But where the plaintiff by an act of her agent obstructs an amin deputed by the court to draw up partition proposals and thereby renders it impossible for the court to grant the relief asked for by the plaintiff, I cannot see that there is any other alternative for the court but to dismiss plaintiff's suit. I dismiss the appeal with costs."

Mr. *Abdul Majid*, for the appellant.

Mr. *Muhammad Ishaq Khan*, for the respondents.

STANLEY, C. J., and BANERJI, J :—This appeal arises out of a suit for partition. The plaintiff claimed 41 *sihams* out of 96 *sihams* as purchaser from certain persons who are alleged to have been the owners of this share. The court of first instance made a preliminary decree on the 19th of September, 1906, to the effect that the claim of the plaintiff for partition and separate possession of 36 *sihams* out of 96 *sihams* be decreed. The court also gave certain other directions relating to the property. It then appointed a commissioner to effect a partition with a view to a final decree being passed. It appears that the husband of the plaintiff resisted the commissioner and objected to his preparing a plan for purposes of partition. The commissioner thereupon returned the commission with his report. When the case came on for hearing the plaintiff's pleader asked that the commission might be issued again. This the court refused to do, and on the 31st of October, 1906, the learned Munsif passed a decree dismissing the suit with costs.

From this decree the plaintiff preferred an appeal to the learned District Judge, but the appeal was dismissed. A second appeal to this Court was also dismissed. This appeal has been preferred under the Letters Patent from the judgement of the learned Judge of this Court.

We are of opinion that this appeal must prevail. As we have stated above, the Munsif made a decree on the 19th of September, 1906. He ought to have carried out that decree, and with that view, he should, in accordance with the provisions of section 396 of Act XIV of 1882, have issued a commission and made a decree after considering the report of the commissioner. The circumstance of the plaintiff or her agent having resisted the commissioner was not sufficient to justify the dismissal of the suit in its entirety. The court ought to have acceded to the request of the plaintiff's pleader to re-issue the commission and to have seen that the order was obeyed. As the court had passed a preliminary decree, decreeing a part of the claim, it had no authority to nullify that decree by totally dismissing the suit. We allow the appeal, discharge the decrees of this Court, of the lower appellate court and of the court of first instance, and send the case back to the court of first instance with directions to carry out the decree of September 1906. Costs here and hitherto will follow the event.

Appeal decreed and cause remanded.

Before Mr. Justice Richards and Mr. Justice Tudball.

SHEO PARGASH SINGH AND OTHERS (PLAINTIFFS) v. NAWAB SINGH
AND OTHERS (DEPENDANTS).*

*Code of Civil Procedure (1882), section 244—Execution of decree—
Interpretation.*

Held that section 244 of the Code of Civil Procedure (1882) does not apply to a dispute between the decree-holder and a person against whom, though a party to the suit, no decree has been passed. *Kalka Prasad v. Basant Ram* (1) followed.

THE facts of this case were as follows :—

On the 2nd of June, 1866, Raghunandan, Jhumak, Bachu Lal and Padam Nath Saran Singh, mortgaged (usufructuarily) certain property to Jeo Lal and Subh Dayal. On the 15th of December, 1869, the mortgagees sold their rights to Jhumak and Padam Nath Saran Singh. Ambika, the son of Jhumak, and Padam Nath Saran Singh mortgaged certain property including the mortgagee rights of Bachu Lal, to the defendants 1 to 11, and in 1897 these defendants obtained a decree for sale and in execution of that decree they themselves purchased the property. The representatives of

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v.
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* Second Appeal No. 1012 of 1908 from a decree of Sri Lal, District Judge of Ghazipur, dated the 30th of June 1908, reversing a decree of Kalka Singh, Munsif of Ballia, dated the 25th of February 1908.