

that court, but he tendered it again in the court at Ludhiana where Munna Lal had filed his suit against the trustees. I am of opinion that in the circumstances mentioned above, interest ceased from 5th September, 1921.

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## REVISIONAL CIVIL

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Before Mr. Justice Mulla

KULSUM-UN-NISSA (APPLICANT) v. RAGHUBAR DAYAL  
(OPPOSITE PARTY)\*

1939  
October, 3

*Civil Procedure Code, order XXI, rule 98—Resistance to execution of decree—"Judgment-debtor"—Whether includes a person against whom the decree operates as res judicata.*

The word "judgment-debtor" does not include a person against whom the decree may operate as *res judicata* by virtue of explanation VI to section 11 of the Civil Procedure Code but who was not a person against whom the decree was passed. Order XXI, rule 98, of the Code does not therefore apply to resistance by such a person to the execution of the decree, as being resistance by a judgment-debtor.

Mr. *Mushtaq Ahmad*, for the applicant.

Mr. *S. N. Gupta*, for the opposite party.

MULLA, J.:—This is an application in revision by one Bibi Kulsum-un-nissa under section 115 of the Civil Procedure Code against an order passed by the learned Munsif of Khurja in the following circumstances. The applicant who is a zamindar obtained a decree for possession of two plots of land after demolition of certain constructions existing thereon. In the suit in which that decree was obtained the applicant impleaded three persons as defendants, one of whom was Dambar Lal an uncle of the opposite party Raghubar Dayal. The defendants resisted the suit on various grounds and also raised a plea of non-joinder of necessary parties. It was specifically pointed out on behalf of all the defendants

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\*Civil Revision No. 161 of 1938.

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that the opposite party Raghubar Dayal was also a member of the family who was interested in the subject of dispute and was therefore a necessary party. In spite of these objections being made by the defendants in that suit the applicant refused to implead Raghubar Dayal and eventually obtained a decree against Dambar Lal the uncle of Raghubar Dayal and two others alone. When this decree was put into execution and the applicant wanted to take possession of the property which was the subject of dispute in that case Raghubar Dayal resisted the proceeding and put forward his own title. An application was then made by Bibi Kulsum-un-nissa under order XXI, rule 97. This application has been dismissed by the learned Munsif under order XXI, rule 99, and it is against this order of dismissal that the present application in revision has been made.

The sum and substance of the elaborate argument advanced by the learned counsel for the applicant is that the learned Munsif acted with material illegality in the exercise of his jurisdiction inasmuch as he arrived at the conclusion that Raghubar Dayal was not a person who was bound by the decree obtained by the applicant and was consequently a person claiming in good faith to be in possession of the property on his own account. A large number of authorities were cited by the learned counsel for the applicant in support of his contention that the decree obtained by the applicant in the circumstances stated above was binding also on the opposite party Raghubar Dayal. I need only refer to one of those cases, viz., the decision of their Lordships of the Privy Council in the case of *Lingangowda v. Basangowda* (1). Great stress was laid upon the observations made by their Lordships in that case which may be set out as follows: "In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action, or bring an action by his guardian

(1) (1927) I.L.R. 51 Bom. 450(453).

before; and in each of these cases, therefore, the court looks to the explanation VI of section 11 of the Civil Procedure Code to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors." I need only say that the cases relied upon by the learned counsel are not quite relevant to the question in issue in the present case. We are not here concerned with any question of *res judicata*. All that we are really concerned with in the present case is whether the opposite party Raghubar Dayal is a person against whom the relief sought by the applicant could be granted by the court below under order XXI, rule 98 of the Civil Procedure Code. Now order XXI, rule 98 runs as follows: "Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf it shall direct that the applicant be put into possession of the property. . . ." It is clear that the condition precedent to the court putting the decree-holder into possession is that the resistance or obstruction should have been occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf. The question, therefore, resolves itself into this: Whether Raghubar Dayal can be said to be the judgment-debtor or some other person acting at the instigation or on behalf of the judgment-debtor within the meaning of order XXI, rule 98. Upon careful consideration I am of the opinion that the answer to this question must be in the negative and in arriving at that conclusion I am in agreement with the view taken by the court below. The word "judgment-debtor" as used in order XXI, rule 98 must be interpreted in the light of the definition of that term as given in section 2(10) in the following terms: "Judgment-debtor means any person against whom a decree has been passed or an order capable of execution has been made." I fail to see how it is possible to hold

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upon the facts stated above that Raghubar Dayal was a person against whom the decree obtained by the applicant was passed. It may be that certain pleas may not be open to Raghubar Dayal in contesting any suit brought by the applicant on the ground that those pleas were barred by *res judicata*, but that does not affect the question in issue in the present case. Here all that we have to decide is whether Raghubar Dayal was a person contemplated by order XXI, rule 98, against whom the applicant could have obtained the relief sought by her. Upon the interpretation of "judgment-debtor" in the light of the definition of that term referred to above the answer to my mind quite clearly is that Raghubar Dayal was not the judgment-debtor as contemplated by order XXI, rule 98 of the Civil Procedure Code.

The only other question which remains for consideration is whether he can be said to be a person acting at the instigation or on behalf of the judgment-debtor. The answer to that question obviously depends upon evidence and there is no finding of the court below that Raghubar Dayal was acting at the instigation or on behalf of the judgment-debtor. It is true that at one place in his judgment the learned Munsif has made an observation that he would have been inclined to hold that Raghubar Dayal was acting on behalf of the judgment-debtor in view of the fact that he is a nephew of Dambar Lal one of the judgment-debtors. The learned Munsif has, however, not arrived at that finding, though if he had done so it would have been open to the objection that it was not supported by any evidence but only by a presumption based upon the relationship between Raghubar Dayal and Dambar Lal. The learned Munsif does not refer to any evidence produced by the applicant to prove that Raghubar Dayal was acting at the instigation or on behalf of the judgment-debtor. It is evident, therefore, that the applicant had failed to satisfy the condition precedent laid down in order XXI.

rule 98 and the learned Munsif was bound to dismiss her application for being put into possession of the property in dispute under order XXI, rule 99 of the Civil Procedure Code. I do not see any reason for interference with the order of the learned Munsif and dismiss this application with costs.

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## APPELLATE CIVIL.

*Before Sir John Thom, Chief Justice, and Mr. Justice  
Ganga Nath*

SANKATHA PRASAD (PLAINTIFF) v. RUKMANI AND OTHERS  
(DEFENDANTS)\*

1939  
October, 6

*Pre-emption—Benami purchase—Real purchaser to be ascertained—No pre-emption if no preferential right as against real purchaser.*

A suit for pre-emption does not lie in the case of a sale in which the ostensible vendee is a benamidar for a person against whom the plaintiff has no preferential right of pre-emption. It is the duty of the court in such a suit to discover who is the real purchaser and to consider whether the plaintiff has any preferential right as against him.

Mr. *Ram Nama Prasad*, for the appellant.

Mr. *G. S. Pathak*, for the respondents.

THOM, C.J., and GANGA NATH, J.:—This is a plaintiff's appeal and arises out of a pre-emption suit.

The suit was dismissed by the learned Munsif whose decision was confirmed by the lower appellate court. The second appeal in this Court was dismissed and it is against that order of dismissal that the present appeal has been filed.

The main question in issue between the parties is as to whether a suit for pre-emption will lie in the case of a sale in which the ostensible vendee is a benamidar for a co-sharer.

The learned single Judge has held that the question for decision in such a case is, who is the real purchaser

\*Appeal No. 8 of 1939, under section 10 of the Letters Patent.