

Solicitor for the appellant: Mr. T. L. Wilson.

Solicitors for the respondents: Messrs W. M. and A. Ranken  
Ford.

1881

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 USAGAR  
SINGH  
v.  
PITAM SINGH.
 

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 1881  
July 23.
 

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 APPELLATE CIVIL.
 

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Before Mr. Justice Straight and Mr. Justice Duthoit.

BENI PRASAD (DEFENDANT) v. LACHMAN PRASAD (PLAINTIFF).<sup>1</sup>

*Obstruction to execution of decree for land—Act VIII of 1859 (Civil Procedure Code), ss. 226, 229, 231—Fresh suit.*

The holder of a decree for land, having been resisted in obtaining possession thereof by a person other than the defendant, claiming to be in possession of such land on his own account, complained under Act VIII of 1859 of such resistance to the Court executing the decree. The Court rejected such application on the ground that it had been made after the time limited by law. Held that the order rejecting such application could not be regarded as one under s. 229 of Act VIII of 1859, which would under s. 231 preclude such decree-holder from instituting a suit against such person for such land.

THE plaintiff in this suit, Lachman Prasad, and one Mohesh Prasad obtained a decree against one Sheoambar Singh for possession of a certain share of a certain village on the 28th July, 1868. The decree-holders applied in execution of this decree for possession of the sir-land appertaining to such share. Sheoambar Singh objected to the quantity of land claimed by the decree-holders, but his objections were disallowed, and the decree-holders were declared by the Court executing the decree entitled to 61 bighas 4 biswas of sir-land. They obtained possession of 10 bighas of such land, and in 1871 applied for delivery of possession of the remainder. The amin deputed to deliver possession was resisted by Raghobar Singh and Sitla Bakhsh, defendants in this suit, who claimed a two-thirds share of such sir-land. This resistance took place on the 13th December, 1871. The decree-holders thereupon, on the 29th January, 1872, applied to the Court executing the decree under s. 226 of Act VIII of 1859. On that same day the Court executing the decree made an order directing

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\* Second Appeal, No 5 of 1881, from a decree of W. Tyrrell, Esq., Judge of Allahabad, dated the 27th September, 1880, affirming a decree of Babu Pramoda Charan Bamarji, Munsif of Allahabad, dated the 30th June, 1880.

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that the 4th May, 1872, should be fixed for the hearing of the case; that the decree-holders should produce evidence on that date; and that notice should be issued to the persons offering obstruction to the execution of the decree to appear personally or by pleader, and produce evidence in support of their claim. Notice was accordingly issued to Raghobar Singh and Sitla Bakbsh, and they appeared and filed written grounds in support of their claim. They also contended that the application could not be entertained having been preferred more than one month after their resistance to the execution of the decree, the time limited by s. 226 of Act VIII of 1859. The Court executing the decree, on the 12th July, 1872, without going into the merits of the case, dismissed the application on the ground that it had been preferred beyond time. Mohesh Prasad subsequently sold his moiety of the zamindari share in question, and it was acquired by Beni Prasad, a defendant in this suit, by right of pre-emption. In 1879 Lachman Prasad again applied for delivery of possession of the remaining sir-land. The Court executing the decree disallowed this application, holding that he could not obtain possession of such land in execution of the decree, but must bring a suit for possession of it. Lachman Prasad accordingly, on the 4th March, 1880, brought the present suit against Raghobar Singh, Sitla Bakbsh, and Beni Prasad for possession of a moiety of such land, the last named person being made a defendant on the ground that he had refused to join in the suit. The defendants Raghobar Singh and Sitla Bakbsh set up as a defence to the suit that they were not in possession of the land in dispute, their rights having been transferred to the defendant Beni Prasad under an execution-sale. Beni Prasad set up as a defence, *inter alia*, that the suit should not be entertained, as the decision of the Court executing the decree, dated the 12th July, 1872, made under s. 229 of Act VIII of 1859, was under s. 231 of the same Act a bar to the institution of a fresh suit in respect of the same matter. The Court of first instance disallowed this defence, observing as follows: "It is contended on behalf of the defendant that, as the application made by the plaintiff in the execution-department under s. 226 of Act VIII of 1859 was rejected, he is precluded from instituting a regular suit in regard to the same matter: this contention would have been valid, had

the application made by the plaintiff in the execution-case been entertained under s. 229 of Act VIII of 1859, and decided against him; but it is admitted that the said application was not entertained and registered as a regular suit, under the provisions of s. 229, but was rejected on the ground that it had been presented after the period of thirty days prescribed by s. 226: the provisions of s. 226 are permissive, and if the plaintiff did not chose to proceed under that section, or if his application was not heard under s. 229, there is nothing to bar a regular suit, as the persons he sues are not those against whom he had obtained his decree, but are third parties." On appeal by Beni Prasad the lower appellate Court affirmed the decision of the Court of first instance. On second appeal to the High Court the defendant Beni Prasad again contended that the plaintiff was precluded from bringing a fresh suit by the provisions of s. 231 of Act VIII of 1859.

Mr. *Howard*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*), for the respondent.

The judgment of the Court (*STRAIGHT, J.* and *DUTHOIT, J.*) was delivered by

*STRAIGHT, J.*—The only plea seriously urged by the learned counsel for the appellant is the first taken in the memorandum of appeal and that has no force. We cannot regard the order of the 12th July, 1872, as passed under s. 229 of Act VIII of 1859; for it in no way dealt with the merits of the rights of the parties, but was simply a rejection of the application on the ground that it had not been preferred within the period mentioned in s. 226. All that was ever decided against the respondent was, that he had come too late to be able to take advantage of the cheaper and more summary procedure provided by s. 229; and it would be as inequitable as absurd to hold that the determination of such a question of limitation, relating solely to the admissibility of the application, concludes all other matters between the parties and prohibits the present suit. (The remaining portion of the judgment is not material for the purposes of this report).

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