

1883

TEGH SINGH
v.
AMIN CHAND.

sidering the question as to the alleged adjustment of the decree of 1879, and the case must go back under s. 566 for a finding on the following issue:—At the time the agreement was entered into between Daulat Singh and the defendants Amin Chand and Kashmiri, as to the transfer of the villages of Dhawa and Gujrara, was it the intention of the parties that the decree of 1879 should be superseded by such new arrangement; and was such agreement regarded by them at that time as an adjustment of that decree?

In determining this issue the Judge may advantageously peruse some remarks of this Court at page 696 of the third volume of the Allahabad Series, Indian Law Reports, as showing the principal to be applied in the matter of mortgage, which may guide him in determining the question of intention in this case.

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January 17.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

KALKA PRASAD (JUDGMENT-DEBTOR) v. RAM DIN AND ANOTHER
(DECREE-HOLDERS.)*

Execution of decree—Cross-decrees—Simple money-decree—Decree enforcing mortgage—Civil Procedure Code, ss. 246, 247.

S. 246 of the Civil Procedure Code is applicable to cross-decrees and not to cross-claims under one decree. To make s. 247 of the Code applicable in the case of cross-claims under one decree, the parties entitled thereunder to recover from each other must hold the same character and possess identical rights of enforcing execution, and enforcement of the decree can only be refused, or satisfaction entered up, when this is the case.

Held, therefore, where a decree for money of a Court of first instance directed that the money should be realizable from certain specific property of the defendant, and exempted his person and other property, and the lower appellate Court modified this decree by extending it to the person of the defendant, and in second appeal the High Court set aside the lower appellate Court's decree and restored that of the first Court, directing that the costs of the defendant in the lower appellate Court and in the High Court should be paid by the plaintiff, that, inasmuch as the plaintiff was only entitled to recover the judgment-debt due to him from the defendant from such specific property, whereas the defendant was entitled to recover the judgment-debt due to him from the plaintiff from his person and property, the provisions of s. 247 were not applicable.

THE respondents obtained a decree against the appellant for the principal and interest due on a bond, costs of the suit, and

* Second Appeal No. 33 of 1882, from an order of H. A. Harrison, Esq., Judge of Farukhabad, dated the 13th May, 1882, reversing an order of Pandit Jagat Narain, Subordinate Judge of Farukhabad, dated the 29th March, 1882.

Rs. 6-13-0 interest on the amount claimed for the period the suit was pending, such decree being enforceable only against certain property belonging to the appellant, hypothecated in the bond, the person of the appellant and his other property being exempted. The respondents appealed, and the lower appellate Court modified the decree of the first Court, by extending it to the person of the appellant. The appellant preferred a second appeal, and the High Court reversed the decree of the lower appellate Court, and restored that of the first Court. The High Court's decree directed that the respondents should pay the appellant the costs incurred by him in the High Court and the lower appellate Court. The question in this case was, whether the appellant should be allowed to realize the amount of these costs from the respondents or whether such amount should be deducted from the sum due to the respondents. The lower appellate Court held that the amount should be deducted from the sum due to the respondents. It observed:—"The terms of ss. 246 and 247 are general, and this Court holds that both, in equity and law, execution for costs should not be taken out, but that the amount due should be deducted from the decree for the larger sum." For the appellant it was contended that ss. 246 and 247 of the Civil Procedure Code were not applicable in this case.

Pandit *Bishambhar Nath*, for the appellant.

Pandit *Ajudhia Nath* and *Maunshi Kashi Prasad*, for the respondents.

The Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment:—

STRAIGHT, J.—In our opinion the decision of the Judge cannot be sustained. S. 246 of the Code, dealing as it does with cross-decrees, has no application to the present case, which relates to cross-claims under one decree. The right of the respondents under their decree were limited to the realization of their judgment-debt solely against the property hypothecated in the bond on which the suit was brought, whereas the appellant was entitled to recover his costs, not only from the property, but the person of the respondents. To make s. 247 of the Code applicable, we think that the parties entitled under one decree to recover from

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each other must hold the same character and possess identical rights of enforcing execution, and that enforcement of the decree shall only be refused, or satisfaction entered up, when this is the case. We come to this conclusion in the present instance with extreme regret, having regard to all the circumstances, but it appears to us we have no alternative but to decree the appeal with costs.

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January 15.

CIVIL REVISIONAL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

KAULESHAR RAI AND OTHERS (DEPENDANTS) v. DOST MUHAMMAD KHAN
(PLAINTIFF) *

Small Cause Court suit—Institution in Court of Subordinate Judge invested with powers of a Court of Small Causes—Trial by Subordinate Judge not so invested—Transfer of suit—Appeal—Jurisdiction—Civil Procedure Code, s. 25

A suit of the nature cognizable in a Court of Small Causes was instituted in the Court of a Subordinate Judge, the Judge of which at the time of the institution of the suit was personally invested with Small Cause Court jurisdiction. That Judge retired from office without trying the suit, and the District Judge directed his successor, who was not invested with Small Cause Court jurisdiction, to try it, and he did so. *Held* that it must be taken that the suit was transferred under s. 25 of the Civil Procedure Code to the Court of the Subordinate Judge, and that therefore, regard being had to the provisions of that section, that the Court trying any suit withdrawn thereunder from a Court of Small Causes shall, for the purposes of such suit, be deemed a Court of Small Causes, no appeal would lie in the case to the District Judge.

THIS was an application by the defendants in a suit for revision under s. 622 of the Civil Procedure Code. It appeared that the suit had been instituted in the Court of the Subordinate Judge of Ghazipur, it being a suit of the nature cognizable in a Court of Small Causes, and the Judge at the time of its institution of that Court being invested with the powers of a Court of Small Causes. Before the suit could be tried that Judge retired from service, and a new Subordinate Judge was appointed. The new Subordinate Judge was not invested with the powers of a Court of Small Causes. Under the orders of the District Judge the new Subordinate Judge entertained the suit, and dismissed it. The

* Application No. 28 of 1882, for revision under s. 622 of the Civil Procedure Code of a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 11th September, 1882, reversing a decree of Maulvi Mahmud Bekhsh, Subordinate Judge of Ghazipur, dated the 10th August, 1881.