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that all questions arising between the parties to a suit relating to the execution, discharge or satisfaction of the decree should be determined by the Court executing the decree and not by a separate suit, and there can be no doubt that the question raised before us is one of that description.

We are therefore of opinion that the application of the decree-holders for the resale of the mortgaged properties is not barred in any way, and that this appeal should be decreed, the order of the lower Appellate Court reversed, and that of the first Court overruling the objection of the judgment-debtors restored with costs. Execution will proceed as prayed by the sale of the mortgaged property.

S. C. C.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

1896
 Jan. 3 & 9.

MALLOMED ALI (PLAINTIFF) v. WAZID ALI (DEFENDANT).

Practice—Commission to examine witnesses—Non-attendance of Witnesses—Mode of enforcing attendance—Code of Civil Procedure (Act XIV of 1882), sections 399 and 400 and Schedule IV, No. 156.

On an application to the High Court to authorise a Commissioner to issue process for the purpose of compelling the attendance of witnesses before him :

Held, that the Commissioner should return the commission to the High Court. The High Court may then send the commission to a Civil Court within the local limits of whose jurisdiction the witnesses to be examined reside.

In this suit a Commission was issued by the High Court to examine witnesses residing in the District of Bakharganj. The Commissioner issued notices to the witnesses to attend before him, but they did not appear. He thereupon wrote, informing the High Court that the persons to be examined under the Commission had disregarded a notice to appear before him.

Mr. *Chakravarti* for the plaintiff.

Mr. *T. A. Apcar* for the defendant.

Mr. *Chakravarti* applies on affidavit for an adjournment and requests the Court to authorise the Commissioner to issue process

which can be served through the District Court ; sections 399 and 400 and Schedule IV, No. 156 of the Civil Procedure Code.

[SALE, J.—The point is an entirely new one. The Registrar knows of no such case. If process is to be issued I must consider the matter. I could only issue the process mentioned in Belchambers' Practice, 460, on very good grounds being shown. I don't think you have done all you could to require the attendance of those persons before the Commissioner. The only thing in your favour is the shortness of the notice issued by the Commissioner.]

Mr. T. A. *Apear contra* submitted that the plaintiff has done nothing on which the Court could issue process against those persons. No proper efforts have been made to obtain their attendance. The parties are in exactly the same position as they were in July last. The commission was issued without stay of proceedings, and they have had three stays of proceedings already.

[SALE, J.—I will give some further time, and will after consideration intimate to the Commissioner what powers he has of enforcing any notice he may give to witnesses. I will consider that matter and adjourn the case for a month].

Subsequently on 9th January 1896 the following judgment was delivered :—

SALE, J.—In this case a commission was issued by the Court to examine witnesses residing in the District of Bakharganj. The Commissioner appointed to take the evidence is a vakil practising in that district, and he has written informing this Court that the persons to be examined under the commission have disregarded a notice to appear before him. Section 399 of the Code of Civil Procedure is as follows: (After reading the section His Lordship continued). The Commissioner being thus vested with the powers of a Civil Court may summon witnesses and enforce their attendance under the provisions of the Code, but as a private Commissioner, without the machinery of a Court, he may find practical difficulty in enforcing the order. If unable for this reason to execute the commission he should return it to this Court. This Court may then send the commission to a Civil Court, within the local limits of whose jurisdiction the witnesses to be examined reside, which may be done under section 386 of the Code. The

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same course may be taken under the provisions of 22 Vic., c. 20, and 48 and 49 Vic., c. 74, but having regard to the present provisions of the Code, it is unnecessary to proceed under those statutes.

I propose to direct the Registrar to communicate with the Commissioner to the effect above indicated.

Attorneys for the plaintiff: Messrs. *Wilson & Chatterjee*.

Attorneys for the defendant: Messrs. *Sen & Co.*

C. E. G.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Hill.

1896
 January 8.

BISWA NATH CHAKI (PLAINTIFF) v. BANI KANTA DUTTA
 (DEFENDANT No. 2).^o

Appeal—Civil Procedure Code (Act XIV of 1882), sections 2 and 501—Suit for dissolution of partnership and an account—Order directing accounts to be taken—Omission to appeal from preliminary order—Limitation Act (XV of 1877), Schedule II, Article 152—Construction of Statutes.

The right of appeal given by Act XII of 1879 in making an order directing accounts to be taken within the definition of a decree, and thus giving an appeal in a preliminary stage of a suit for dissolution of a partnership, did not alter the existing law, which allowed an appeal against such an order on the termination of the trial, that is, in the final decree.

In a suit for dissolution of partnership and an account, the Munsif on the 25th April 1893 passed an order declaring the shares of the parties and directing them to render accounts, stating that "this must be done within fifteen days from this date, after which the final order will be passed," and referred the case to a Commissioner to take the accounts. On the 31st May 1893 the Munsif decreed the suit, and made defendants Nos. 1 and 2 liable to pay certain sums of money in accordance with the report of the Commissioner. On the 14th July 1893 defendant No. 1 filed an appeal to the District Judge, in which he questioned the correctness of the preliminary order of the Munsif making him liable as a partner.

Held, that the order of the District Judge allowing the plea of defendant No. 1, and finding that he was not a partner, was right, though no appeal against the preliminary order had been filed within the period of limitation.

^o Appeal from Appellate Decree No. 1348 of 1894, against the decree of Alfred Steinberg, Esq., District Judge of Nuddea, dated 13th of June 1894, modifying the decree of Babu Jagut Chundra Das, Munsif of Kusitea, dated 31st of May 1893.