

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

NARAYAN PARMANAND (ORIGINAL DEFENDANT 5), APPELLANT, v.
NAGINDAS BHAIIDAS (ORIGINAL PLAINTIFF), RESPONDENT.*

1905.

July 20.

Suit of the nature cognizable in the Court of Small Causes—Execution of decree—Second appeal.

No second appeal lies against an order in execution of a decree in a suit of the nature cognizable in the Court of Small Causes.

Shyama Charan Mitter v. Debendra Nath Mukerjee⁽¹⁾, followed.

SECOND appeal from the decision of V. V. Phadke, First Class Subordinate Judge of Thána, with Appellate powers, confirming the decree of N. V. Atre, First Class Subordinate Judge, in an execution proceeding.

Kala Parmanand and Narayan Parmanand were two brothers. They were divided in interest and carried on separate dealings. Parmanand carried on trade in his own name and on his death the trade was managed by his widow Panbai, who died leaving a will under which she appointed four persons as executors. After Panbai's death her creditor Nagindas Bhaidas brought a suit, No. 1113 of 1899, in the Court of the First Class Subordinate Judge of Thána in his Small Cause Jurisdiction for the recovery of Rs. 155-3 on account of the value of goods supplied to her. The defendants in the said suit were the four executors appointed under the will of the deceased Panbai and Narayan Parmanandas, defendant 5, who was joined as being the heir of Panbai and younger brother of Panbai's husband Narayan Parmanand. The Subordinate Judge passed a decree for the recovery of Rs. 155-3 from the property of the deceased defendant Panbai. Subsequently the plaintiff having attached two houses in execution of the said decree under the ordinary jurisdiction of the First Class Subordinate Judge, Narayan Parmanandas, defendant 5, applied for the removal of the attachment on the ground that he and the husband of the deceased Panbai,

* Second Appeal No. 719 of 1904.

(1) (1900) 27 Cal., 481.

1905.

NARAYAN
v.
NAGINDAS.

were united brothers, that the attached property belonged to him and as Panbai had no interest in it, it could not be sold in execution of the decree obtained against her for her personal debts. The Subordinate Judge found that the allegations made by the applicant, defendant 5, were not proved. He, therefore, rejected the application. On appeal by the applicant, defendant 5, the Judge confirmed the order.

The applicant, defendant 5, preferred a second appeal.

D. A. Khare appeared for the respondent (plaintiff):—We have to urge a preliminary objection. No second appeal lies. The suit was for the recovery of Rs. 155 and odd for the value of goods supplied. It was, therefore, cognizable by the Court of Small Causes; sections 586 and 647 of the Civil Procedure Code, *Shyama Charan Mitter v. Debendra Nath Mukerjee*⁽¹⁾. There is no reported decision on the point.

M. M. Karbhari appeared for the appellant (applicant, defendant 5):—The appellant being a party to the original suit, he could only proceed under section 244 of the Civil Procedure Code, *Bhimrao Ramrao v. Ayyappa*⁽²⁾. An order passed under that section is a decree. Therefore in order to determine whether a second appeal lies, the nature of the proceedings under that section must be taken into consideration and not the nature of the original suit. The order appealed against was passed by the First Class Subordinate Judge in his ordinary jurisdiction and it affected immoveable property, therefore, we submit a second appeal can lie.

If the second appeal cannot be allowed, we apply for permission to convert it into an application under the extraordinary jurisdiction, section 622 of the Civil Procedure Code.

JENKINS, C. J.:—This is an appeal arising out of an application in execution of a decree. That decree was passed in a suit of the nature cognizable in the Court of Small Causes, and it has been established by a number of reported decisions of which, so far as we are aware, *Shyama Charan Mitter v. Debendra Nath Mukerjee*⁽¹⁾ is the last, that no second appeal lies. Though there

(1) (1903) 27 Cal., 484.

(2) (1904) 6 Bom. L. R., 697.

is no reported case of this Court on the point, we think we ought to follow these decisions. We must accordingly give effect to the preliminary objection and dismiss this appeal with costs.

It has been suggested that we might deal with the appeal as an application under section 622, but that will carry the appellant no further, because that of which he complains is, if erroneous—a point on which we express no opinion—an error of law not falling within section 622 of the Civil Procedure Code.

Appeal dismissed.

G. B. R.

1905.

NAHAYAN
v.
NAGINDAS.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.B., Chief Justice, and Mr. Justice Aston.

KRISHNAJI BAPPAJI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,
v. KASHIBAI, WIDOW OF VISHNU MAHADEO (ORIGINAL DEFENDANT), RESPONDENT.*

1905.

August 1.

Civil Procedure Code (Act XIV of 1882), Chapter XIX, Division H—Decree for possession—Execution of decree—Obstruction—Application for removal of obstruction numbered and registered as suit—Adverse possession—Limitation.

On the 1st June 1899 defendant's husband Vishnu sold certain land to Vithal and passed to him a rent-note the period of which expired on the 20th March 1890. Subsequent to the expiry of the period, Vishnu, and after his death his widow, the defendant, continued in possession. Afterwards the plaintiffs, to whom the land had been sold, having obtained a decree for possession against the sons of Vithal, Vithal's widow, Kashibai, caused obstruction to delivery of possession in execution of the decree. The plaintiffs, thereupon, on the 22nd January 1902, applied for the removal of the obstruction and the Court, on the 26th July 1902, ordered that their application be numbered and registered as a suit between the decree-holders as plaintiffs and the claimant as defendant under section 331 of the Civil Procedure Code (Act XIV of 1882), Chapter XIX, Division H.

Held, reversing the decree of the lower Appellate Court, that the suit was not time-barred. The claimant was not entitled as against the decree-holders to count the time up to the 26th of July 1902, when the application was numbered as a suit, as the period of his adverse possession; for it had ended prior

* Second Appeal No. 509 of 1904.