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nominally as the agent of his vendors, but substantially for his own benefit, where all this is done with the view that the successful plaintiff may be met with the objection that the fruits of his litigation are illusory and that a subsequent claim by him may be effectively met by the bar of limitation, there is unmistakeable indication of fraud carefully planned and successfully carried out. There is, however, no clear finding in the judgment of the learned Subordinate Judge upon several of the points we have just indicated; for instance, he does not decide upon the question of possession immediately after the transfer of 1892 and at the date of the institution of the previous suit, nor has he decided whether the plaintiff was actually aware of the transfer, or sued the vendors of the defendants because he was misled by their continued possession. These are questions which must be investigated before the plaintiff's action can be dismissed. We may add that the case before us furnishes an illustration of the undoubted hardship which may be caused to an innocent person in the position of the plaintiff, by reason of an obvious defect in the law relating to the transfer of tenancies; and until the Legislature intervenes and provides for the service of notice upon the landlord in every case of a transfer of a tenancy of every description in some such manner as the one prescribed in section 12 of the Bengal Tenancy Act, cases like the present must occur.

The result, therefore, is that this appeal must be allowed, the decree of the Subordinate Judge reversed, and the case remitted to him, so that he may rehear the appeal and determine the question of fraud in accordance with the observations contained in this judgment. If he determines the issue of possession and the question of fraud against the plaintiff, the suit must fail; if, on the other [366] hand, he finds upon these matters in favour of the plaintiff, the decree in the previous suit must be held to bind the defendants and the claim of the plaintiff must succeed as against them. If the Subordinate Judge considers that additional evidence is necessary to enable him to decide the case he will be at liberty to proceed under sections 568 and 569 of the Code of Civil Procedure.

The costs of this appeal will abide the result.

Appeal allowed: case remanded.

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[367] CRIMINAL REVISION.

Before Mr. Justice Henderson.

HARA CHARAN MOOKERJEE v. KING EMPEROR.*

[16th January, 1905.]

Judicial proceeding, offence in the course of—Resistance to delivery of possession—Criminal Procedure Code (Act V of 1898), ss. 4 (m), 476—Jurisdiction—Civil Procedure Code (Act XIV of 1892), s. 328.

Where in an execution case a warrant for the delivery of possession of lands was entrusted for execution to the Nazir who went to the spot but was obstructed by the opposite party to the suit, and on his reporting the matter, the Munsif held an enquiry under s. 476 of the Criminal Procedure Code and sent the accused to the Magistrate for trial under s. 186 of the Penal Code:—

Held, that the "judicial proceeding" in the case determined when the Munsif finally decided the case, there being no further question left for determination as to the rights of the parties to the suit upon which evidence could

* Criminal Revision No. 992 of 1904, against the order of Gagan Behari Chowdhuri, Munsif of Narainganj, dated August 27, 1904.

have been legally taken, that the obstruction was not therefore brought to the notice of the Munsif in the course of a "judicial proceeding," and that he had no jurisdiction under s. 476 of the Criminal Procedure Code to hold an inquiry.

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I. C. 672 ; Pol. 35 Cal. 133=7 Cr. L. J. 159 ; Ref. 40 Cal. 477=17 C. L. J. REVISION.
245=17 C. W. N. 647=14 Cr. L. J. 197=19 I. C. 197 ; 12 C. L. J. 618=12 Cr.
L. J. 21=8 I. C. 1106 ; 11 Cr. L. J. 90 =5 I. C. 257=1 P. R. 1910 ; 13 Cr. L. J. 32 C. 367=8
1=13 I. C. 111 ; Doubted & dist. 10 C. L. J. 450=10 Cr. L. J. 564=4 I. C. C. W. N. 364
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RULE granted to Hara Charan Mookerjee and others.

In an execution case of the Court of the fourth Munsif of Narain-gunge, a warrant for the delivery of possession of the decretal lands was entrusted to the Nazir for execution. On the 12th May 1904 he went to the spot to deliver possession, and was about to demarcate the lands prior to such delivery, when the petitioners, the opposite party in the case, prevented him from marking the boundaries, and forcibly took away from the decree-holder's men some branches of trees which had been brought by them for the above purpose, and subsequently when an attempt was made to lay down a string and dig a furrow as a boundary line, the spades were also snatched away by the petitioners. The Nazir made a report of these circumstances to the Munsif who had made the decree. The Munsif there-upon held an inquiry [368] under s. 476 of the Criminal Procedure Code against the petitioners and sent them to the nearest first class Magistrate for trial under s. 186 of the Penal Code.

The petitioners then applied to the High Court and obtained this Rule upon the District Magistrate of Dacca to show cause why the order passed under s. 476 of the Code of Criminal Procedure by the Munsif of Narain-gunge should not be set aside on the ground that the section did not apply to the facts of the present case.

The Rule came on for hearing before the Criminal Bench of the Court (HARRINGTON AND PARGITER, JJ). Their Lordships having differed in opinion as to the jurisdiction of the Munsif in this case to hold an inquiry under s. 476 of the Criminal Procedure Code, delivered the following dissentient judgments :—

HARRINGTON, J. In this case a Rule was issued calling upon the District Magistrate of Dacca to show cause why the order passed under section 476 of the Code of Criminal Procedure should not be set aside on the ground that that section did not apply.

The first objection taken by the learned pleader who appeared to show cause against the rule is that the order of the Munsif can only be questioned in a rule granted under section 622 of the Civil Procedure Code.

In this case the rule was granted by this Bench in which both the Civil and Criminal appellate jurisdiction of the Court is vested. On the face of the petition it does not appear whether the Court was moved to exercise its powers under section 622 of the Civil Procedure Code or its powers of revision under section 439 of the Criminal Procedure Code. But inasmuch as we have jurisdiction to deal with the question raised either under the powers vested in us as a Court of Criminal appeal or as a Court of Civil appeal, we disallow the objection and hear argument on the rule.

The other objection is that on the facts stated in the order it is shown that the offence disclosed was not committed before any Civil, Criminal or Revenue Court, nor was it brought to its notice in the course of a judicial proceeding, and that therefore section 476 is inapplicable.

The facts stated in the order or that in Execution Case No. 428 of 1904 a warrant for the delivery of possession of the decretal land was entrusted to the nazir for execution.

He went to the spot to deliver possession, but was obstructed, branches of trees which he had brought to mark out the boundaries were taken away, and when it was

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sought to mark the boundaries by digging a furrow, the spades were taken forcibly away.

On one side it is argued that the delivery of possession is in the course of a judicial proceeding; on the other that the judicial proceeding determined when the Court finally decreed that one of the parties was entitled to the land in [369] question, and that as there was nothing left to be judicially determined *qua* the decree-holder's claim to the land to which, the Court had decided, he was entitled, an obstruction, therefore, to the carrying out of the orders of the Court was not committed in the course of a judicial proceeding but after the judicial proceeding was over. The definition of judicial proceeding includes any proceeding in which evidence is, or may be, legally taken on oath. Now in this case, as between the parties to the suit, evidence could not have been legally taken, because their rights had been finally determined by the Court. It is true that some third person might have claimed the land as against the execution creditor; and that his claim might have had to be determined in a judicial proceeding in which evidence might legally be taken. But this would be a fresh judicial proceeding between fresh parties raising fresh issues, and the fact that this possibility exists does not in my opinion affect the question whether the judicial proceeding in which the rights of the decree-holder were decided had or had not determined before possession was delivered.

In my opinion section 476 does not apply. "Judicial" proceeding means a proceeding in which judicial functions are being exercised: when the final decision is given and the order for the execution of that decision has been made, the judicial proceeding is at an end, because there is no question remaining for judicial determination. The officer of the Court who executes the order to give effect to the Court's decision does not exercise a judicial but a ministerial function. In my opinion the obstruction was committed in the course of a ministerial and not a judicial proceeding, and therefore, the offence does not fall within section 476, and the Rule should be made absolute.

It was open to the Crown, if they thought proper, to cause a prosecution to be instituted against the persons who obstructed the Nazir for an offence under section 186, Indian Penal Code.

This prosecution should have been instituted under section 195 (1) Criminal Procedure Code, with the previous sanction, or on the complaint of the Nazir or of the Munsif, and as at present advised I see no reason why, if the interests of justice require it, such a prosecution should not be instituted. But for the reasons I have already stated proceedings under section 476 cannot be taken.

PARGITER, J. Under the orders of the 4th Munsif of Narainganj the Nazir went to give possession of certain decretal land to the decree-holders on 12th May 1904, and was opposed by certain persons. The Munsif drew up a proceeding under section 476, Criminal Procedure Code, setting out the facts and committing seven persons to the Magistrate to be dealt with according to law. These persons applied to us as a Criminal Bench of this Court, and a Rule was issued to the District Magistrate of Dacca calling on him to show cause why the order under section 476 should not be set aside and such other order made as to this Court may seem fit on the ground that section 476 does not apply to the case on the facts stated in the order. The District Magistrate has submitted an explanation from the Munsif.

As a Criminal Bench we have no jurisdiction to deal with the proceedings taken by Civil Courts under section 476; see *Kali Prasad Chatterjee v. Bhuban Mohini Dass* (1), and it has been the practice that such [370] proceedings should be dealt with under section 622, Civil Procedure Code, by the Civil Bench having jurisdiction over the Civil Court concerned. We, therefore, discharge the criminal Rule and deal with the matter under section 622, Civil Procedure Code, in our civil jurisdiction.

The question for decision is whether the Munsif had jurisdiction to deal under section 476, Criminal Procedure Code, with the offence alleged, *i.e.*, whether the offence, which is one under section 186, Indian Penal Code, and, therefore, is an offence referred to in section 195, Criminal Procedure Code, was brought under the Munsif's notice "in the course of a judicial proceeding." This is the only question to be decided.

The Nazir was carrying out an order passed in an execution case, *viz.*, to give possession of the decretal land to the decree-holders. The execution case was without dispute a "judicial proceeding," but it is contended by the applicants that the Court had finished that case in ordering possession to be given, so that the judicial

(1) (1903) 8 C. W. N. 73.

proceeding had terminated, and that the Nazir's function of carrying out that order was a separate matter and was not part of the judicial proceeding.

It has not been shown to us how the execution case had terminated. It was the Court's duty in executing the decree not only to pass an order to give possession, but also to see that possession was given. Its duty did not end with the mere passing of the order nor did the execution case terminate thereat. The Nazir was the hand of the Court for the purpose of giving possession, and until possession was given the Court could not treat the case of executing the decree as completed. The resistance, therefore, to the delivery of possession, which resistance was reported by the Nazir, was an offence brought to the notice of the Court "in the course of a judicial proceeding" within the meaning of section 476, Criminal Procedure Code.

I would, therefore, discharge the Rule altogether.

The case was then referred to a third Judge, under s. 429 of the Criminal Procedure Code, and was in due course heard by HENDERSON, J.

Mr. P. L. Roy (Babu Barkanta Nath Das with him), for the petitioners. The order of the Munsif passed under s. 476 of the Criminal Procedure Code is bad in law, as the alleged obstruction of the Nazir by the petitioners was not committed before the Munsif nor brought under his notice in the course of a judicial proceeding. A Court does not act in a judicial capacity after the pronouncement of a decree. The execution of the decree and the delivery of possession under its terms is only a ministerial and not a judicial proceeding. If execution is resisted, it can be brought to the notice of the Court only by the judgment-creditor under s. 328 of the Civil Procedure Code, and the Court may then [371] investigate the complaint. But no provision is made for holding any inquiry upon the receipt of the serving officer's report of an obstruction to execution. In this case there was no complaint by the decree holder under s. 328 of the Civil Procedure Code, nor any application by a claimant under s. 332 of the same Code. There was, therefore, no judicial proceeding pending before the Munsif at the time of the Nazir's report.

Babu Dasharathi Sanyal showed cause. The Criminal Bench has no jurisdiction to revise an order of a Civil Court passed under s. 476 of the Criminal Procedure Code. The matter can only be dealt with by a Civil Bench under s. 622 of the Code of Civil Procedure. The execution proceedings did not put an end to the dispute between the parties, and until possession was actually delivered, the Court had a right to see that its order was carried out. The judicial proceeding, therefore, continued till the Nazir filed his report showing the delivery of possession: *Ishri Prasad v. Sham Lal* (1).

HENDERSON J. This case has been referred to me as a third Judge in consequence of the members of the Bench, before whom this rule was originally heard, being unable to agree as to whether the offence of resisting the delivery of possession by a Nazir in execution of a decree of the Civil Court could, when subsequently in due course reported by the Nazir to the Munsif, be said to have been brought to the notice of the Munsif "in the course of a judicial proceeding" within the meaning of section 476, Criminal Procedure Code.

It appears that under a warrant directing him to make over possession of the property, the subject-matter of the suit, to one of the parties under the decree made in the suit, the Nazir was obstructed by the petitioners. He reported the fact to the Munsif, who thereupon instituted a proceeding under section 476, Criminal Procedure Code, held an enquiry

(1) (1895) 1 L. R. 7 All. 871.

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and directed the petitioners to be sent to the nearest Magistrate to be tried upon a charge under section 186, Indian Penal Code.

[372] Where, in the execution of a decree for the delivery of possession of immovable property, the officer charged with the execution of the warrant is resisted or obstructed by any person, the decree-holder may, under section 328 of the Civil Procedure Code, complain to the Court, that is to the Civil Court, at any time within one month from the time of such resistance or obstruction; and thereupon the Court shall fix a date for the investigation of the complaint, but no provision is made in that section and the sections next following for any action to be taken merely upon the report of the officer obstructed.

Section 195 of the Code of Criminal Procedure, however, declares that no Court shall take cognizance of (amongst other offences) the offence of obstructing a public servant in the prosecution of his public functions under section 186 of the Indian Penal Code except with the previous sanction, or on the complaint, of the public servant concerned, or of some public servant to whom he is subordinate. In the present case, therefore a prosecution might have been instituted either with the previous sanction or on the complaint of the Nazir or of the Munsif to whom he was apparently subordinate, but no such prosecution was in fact instituted.

It is clear that the offence was not committed before the Munsif; and the question is whether it was "brought under his notice in the course of a judicial proceeding" within the meaning of section 476, Code of Criminal Procedure. For the meaning of the words "Judicial proceedings" reference must be made to clause (m) of section 4 of the Criminal Procedure Code, where a judicial proceeding is said to include any proceeding in the course of which evidence is, or may be, legally taken on oath. At the time when the Nazir reported the fact of his having been obstructed to the Munsif the questions between the parties to the suit had been determined in a judicial proceeding, and the act of the Nazir himself in delivering possession was, it seems to me, a purely ministerial act. It is true that in one sense the suit was not at an end, inasmuch as in consequence of the obstruction, delivery of possession under the decree had not actually been made over to the person entitled to possession under the decree. But so far as any question in the suit was concerned, the judicial functions of the Munsif were at an end when he made his decree.

[373] After a decree has been made, it may of course happen in the course of proceedings in execution of the decree that objections are raised by the parties or by a third person claiming the property which is the subject of the decree, and in consequence of such objections, it may be necessary for further judicial proceedings to be held. So in the present case it might be said that it was always possible, upon objection being taken in regard to the execution of the decree, for such fresh judicial proceedings to become necessary, and that in these proceedings evidence might be legally taken on oath. But at the time when the Nazir made his report to the Munsif, there was in fact no judicial proceeding pending in the course of which the matter of the obstruction could be brought to the notice of the Court; for no objection which might have rendered a further judicial proceeding necessary had in fact been made.

In my opinion, therefore, there was no judicial proceeding in the course of which the alleged offence under section 186 of the Indian Penal Code

could be brought to the notice of the Munsif. That being so, the Munsif had no jurisdiction under section 476, Criminal Procedure Code, to make the order which he did, inasmuch as the offence was not brought to his notice in the course of a judicial proceeding.

The result is that the Rule is made absolute.

Rule absolute.

32 C. 374.

[374] APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mitra.

JARAO KUMARI v. BASANTA KUMAR ROY.*

[2nd December, 1904.]

Contribution, suit for—Improvements by co-owner—Non-gratuitous act—Contract Act (IX of 1872), s. 70—Notice by Municipality.

A notice was issued upon the owners of a *hât* by the Municipality to effect certain improvements, and A, one of the co-sharers, effected the required improvements, for in the event of non-compliance with the notice the license for holding the *hât* was threatened to be withdrawn. Upon a suit for contribution brought by A against B, the other co-sharer :—

Held, that inasmuch as the property was saved from a forfeiture or disability which would have injuriously affected its value, A in making the improvements did not intend to act gratuitously and was, therefore, entitled to contribution under section 70 of the Contract Act.

Damodara Mudasâra v. The Secretary of State for India (1) approved.

[Rel. 38 Mad. 189; Ref. 16 M. L. T. 375=25 I. C. 783.]

SECOND APPEAL by the defendant, Bibi Jarao Kumari.

The plaintiffs brought an action against the defendant, Jarao Kumari, for the recovery of a sum of money spent by them in effecting certain improvements to a *hât* which jointly belonged to them and the defendant. The plaintiffs alleged that the Baidyabati Municipality had issued notices to them and the defendant to effect certain improvements in the *hât*, intimating to them at the same time that non-compliance with the said notices would lead to a withdrawal of the license granted to hold the *hât*; and that in pursuance of the said notice they effected the required improvements at their own cost and thus benefited the defendant. [375] The plaintiffs further alleged that the defendant's servants contracted to pay a moiety of the said costs.

The defence, *inter alia*, was that the suit in its present form was not maintainable without bringing a suit for account as owing to objections by the Municipality, the plaintiffs and the defendant jointly and separately had to make improvements of the *hât*; that there was no contract as stated by the plaintiffs, and that even if there was such a contract it was not binding on her.

The Court of first instance found, that the contract, if any, was not binding on the defendant, but on equitable grounds it passed a decree in favour of the plaintiffs. On appeal, the Subordinate Judge, relying upon section 70 of the Contract Act, affirmed the decision of the first Court. Against this decision the defendant appealed to the High Court.

* Appeal from Appellate Decree, No. 2207 of 1902, against the decree of Aukhoy Kumar Bose, Subordinate Judge of Hooghly, dated July 26, 1902, affirming the decree of Surendra Nath Mitra, Munsif, of Sirampore, dated Feb. 21, 1902.

(1) (1894) I. L. R. 18 Mad. 88.

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