

1811  


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 JAGGABANDHU  
 BOSE  
 v.  
 SRIMATI  
 SACHYI BIBI

was not an order under that section because "there was no decision" as to possession in the order passed on the plaintiff's claim under section 246." Now, without expressing any opinion whatever as to the construction of section 246, *i. e.*, whether the limitation prescribed by it affects suits brought to establish the right of the judgment-debtor, which is a matter on which the Court in the execution case had passed no decision whatsoever, or whether the section simply contemplates suits brought expressly to set aside an order under section 246 contesting the decision on the point of *bona fide* possession only, I am of opinion that the rule of one year's limitation does not apply to the present case, and that therefore, the suit is not barred.

Under this view of the law it is not necessary to remand the case, a both the Courts have held that the alleged purchase by Sachyi Bibi, the sisters of the judgment-debtor Mahomed Jahed, is a *benami* and fraudulent one, and that the property in dispute is the property of the judgment-debtor, and, as such, liable to sale in execution of the decree obtained by the plaintiff against Mahomed Jahed. I would therefore decree the appeal of the plaintiff with costs: the effect of the order will be that the judgment and decree of the first Court will stand, and the appeal of the defendants to the Subordinate Judge will be dismissed.

JACKSON, J.—I agree with my learned colleague that no decision was arrived at within the terms of section 246 of Act VIII of 1859 in the execution proceedings out of which this case arose, and that the limitation of section 246 is therefore inapplicable to the plaintiff's suit. The plaintiff's claim will therefore be decreed with all costs, the decision of the first Court to that effect being restored.

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J. M. EDMOND *v.* M. NIERSES AND ANOTHER.

1871  
 June 21.

*Court Fees' Act (VII of 1870)—Act VIII of 1859, ss. 280 & 281—Act XXIII of 1861, s. 8.*

THE following case was referred to the Chief Justice, under section 5 of the Court Fees' Act VII of 1870, by Mr. Belchambers, the Taxing Officer of the Court ;—

"The defendant, having been arrested in execution of the decree obtained against him in this suit, applied for his discharge, under section 230 and 281 of Act VIII of 1859. On being brought before the Court, he was examined by the plaintiff, and his examination was reduced into writing, in conformity with the usual practice in such cases. It is submitted, on behalf of the plaintiff, that the fee allowed by the table of fees for swearing a witness and reducing his deposition into writing is not payable when a defendant is examined under section 281, or, if payable, is not payable by the plaintiff. The question I am asked to refer, for the determination of the Chief Justice, is whether any fee is payable for reducing into writing the examination of a defendant examined under section 281, and if so, by whom the same is payable."

The opinion of the Officiating Chief Justice was as follows :—

NORMAN, J.—I think that, when the plaintiff, in order to make the proof referred to in section 281, chooses to examine the defendant, he must pay for the oath and the cost of reducing the deposition of the witness to writing. It would be otherwise under section 8 of Act XXIII of 1861, in which case the fee is apparently demandable, if at all, from the applicant.

1871

J. M. EDMOND  
v.  
M. NIERSEB

1871  
Sep. 13.

IN THE GOODS OF PETER INNES (DECEASED).

Court Fees' Act (VII of 1870,) sch. I, cl. 11—Property on which there is a mortgage or Encumbrance.

See also 14th  
B. L. R. 186.

THE following case was referred to the Chief Justice, under section 5 of Act VII of 1870, by Mr. Belchambers, the Taxing Officer of the Court :—

“ On June 9th, 1871, letters of administration of the property and credits of Lieutenant-General Peter Innes, deceased, were granted by the Judge of Simla to the Secretary of the Simla Bank Corporation, as to a creditor, without notice to the Administrator-General, who, under section 15 of the Administrator-General's Act, 1867, is entitled to the letters of administration in preference to ' a creditor, legatee, other than an universal legatee, or a friend of the deceased.' ”

“ It would seem that the property, in respect of which the letters of administration were granted, was taken to be of the value of Rs. 10,000, for it was on that amount that the *ad valorem* stamp of 2 per cent., prescribed by clause 11, schedule I of the Court Fees' Act, was paid.

“ On 22nd August 1871, the Judge of Simla, on the application of the Administrator-General, cancelled the letters of administration so granted by him to the Secretary of the Simla Bank, subject to the costs, including the *ad valorem* fee of Rs. 200, being paid out of the assets of the deceased.”

The property of the deceased is estimated by the Administrator-General to be of the value of Rs. 2,00,000, but, as stated by him, “ there are mortgage charges and encumbrances to the amount of Rs. 1,53,000 and upwards.”

The Administrator-General, who has now obtained from this Court letters of administration of the property and credits of the deceased, submits that he is liable to pay probate duty in respect only of the difference between the above two sums of Rs. 2,00,000, and Rs. 1,53,000. and that the amount payable as probate duty should be reduced by Rs. 200, that sum having been already paid in respect of the former letters of administration.

The opinion of the Officiating Chief Justice was as follows :—

NORMAN, J.—I am of opinion that, when letters of administration are granted in respect of property which is subject to a mortgage, the value of the property, for the purpose of estimating the *ad valorem* duty payable under the