Before Mr. Justice L. S. Jackson, and Mr Justice Mitter.

BUHAL SING CHOWDHRY *v.* BEHARILAL.*

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Aug. 26.

Resisting execution of Decree—Act VIII. of 1859, *ss.* 229 *&* 230.

A and B obtained a decree for possession of land against C. On their proceeding to execute their decree, D., who was in possession, presented a petition to the Moonsiff, complaining that they were thereby attempting unlawfully to interfere with his possession. The case was tried, on remand from the Judge, as a suit under the provisions of s. 229 of Act VIII. of 1859. *Held*, per *Jackson*, J.—That as the decree-holder had not complained that the Officer of the Court had been obstructed or resisted by the claimant, the case did not fall within s. 229 of Act VIII. of 1859; and, therefore, the Court had not jurisdiction to take summary cognizance of the case. Per *Mitter*, J.—This objection, taken for the first time on special appeal, did not affect the merits of the case or the jurisdiction of the Court.

BEHARILAL and GANORILAL had obtained decrees against one Mitrajit Sing, for possession of land of Mouza Faridpur, on the 19th December 1865. Beharilal claimed under a mokurrari potta dated 28th August 1864, from one Rasulan, in respect of two-anna-six-dam share of the Mouza; and Ganorilal, under a similar potta, dated 2nd October 1864, from, one Dularu, in respect of two-anna share of the aforesaid Mouza. On their seeking to execute their decrees, Than Sing, the present plaintiff, preferred an application to the Moonsiff of Behar, complaining that the decree-holders in taking out execution *were attempting unlawfully to "interfere with his possession."* The objections stated in his petition were, that the decrees held by Beharilal and Ganorilal, as well as the mukarrari leases set up by them, were collusive; that they were not entitled to possession of the lands, for that Rasulan and Dularu, the alleged lessors of the decree-holders, had executed in favor of the plaintiff a registered mukarrari potta of a prior date, *viz.* the 18th September 1862, for their respective shares of the Mouza in question; and that under this potta the petitioner was all along in possession. He prayed "that a complete investigation might be made in the case, and that he might be protected from the wrongful interference of the decree-holder."

* Special Appeal, No. 464 of 1863, from a decree of the Principal Sudder Ameen of Patna, reversing a decree of the Moonsiff of that district.

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The Moonsiff rejected the application of the plaintiff on the 18th May 1866, holding that the provision of section 230, Act VIII. of 1859, was not applicable to the case, and he referred the plaintiff to a regular suit.

On appeal, the Judge held, on the 13th February 1867, that the application was not under section 230, but under section 229 of Act VIII. of 1859, and remanded the case to the Moonsiff for trial.

On remand, Rasulan and Dularu were made parties to the suit. Beharilal and Ganorilal contended that the lease propounded by the plaintiff was never delivered to him in consequence of his having failed to pay the consideration-money fixed therein; and that the mukarrari pottas which they set up were actually executed in their favor by Rasulan and Dularu in 1864, who were in want of money. Rasulan and Dularu supported the allegations of the decree-holders, Beharilal and Ganorilal. The Moonsiff gave a decree for the plaintiff on the merits. On appeal, the Principal Sudder Ameen reversed this decree.

The plaintiff, Than Sing, appealed to the High Court. The defendants, decree-holders, under section 348 of Act VIII. of 1859, raised a preliminary objection, namely that the whole proceedings were illegal, as there was no complaint made before the Moonsiff that any resistance or obstruction had been offered to the officer executing the decree.

Baboo *Anukul Chandra Mookerjee* (with him Baboo *Hem Chandra Banerjee*) for appellant.—Plaintiff's claim is clearly contemplated by the provision of section 229. The word "resistance" referred to in that section, cannot possibly mean actual resistance by force of arms, in the literal sense of the word. A party, who is in possession of a property on his own account, is entitled to seek the benefit of that section, when he is apprehensive that his possession is likely to be disturbed in execution of a decree held against another. The plaintiff is entitled to appeal specially against the decision of the Principal Sudder Ameen. Whether the provisions of section 229 exactly tally with the circumstances of plaintiff's case or not, is imma-

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terial, as the defendants cannot point out that they have been in any way prejudiced by the lower Court's treating this case as one falling under section 229. But the defendants not having urged such an objection in either of the Courts below, are precluded from raising it for the first time in special appeal, it is now too late for them to profit by such a technical objection.

Mr. *C. Gregory* for respondent.—Sections 229 and 230 are the two sections that have any bearing on the case of the plaintiff. He can come in under section 230 of Act VIII. of 1859 only, when he was dispossessed of his lands in execution of a decree held against a third party. But he does not allege that he was ousted by the decree-holders. Therefore, section 230 is not applicable to his case. Nor can he avail himself of the provision of section 229. It contemplates a case, where the officer deputed to execute the decree informs the Court, that a third party other than the judgment-debtor, who was in *bonâ fide* possession of lands (the subject of decree), was offering resistance to the carrying out of execution. That section presupposes an obstruction or resistance in some shape or other. But there is no allegation that the petitioner offered any obstruction to the execution of the decree. Thus plaintiff's case does not fall within the purview of either of the above sections. Therefore the lower Courts acted wholly without jurisdiction in treating this case as one contemplated by the provisions of either section 229 or 230.

JACKSON, J.—This case appears to me so clear that, but for the contrary opinion of Mr. Justice Mitter from whom I am sorry to dissent, I should have no doubt upon it. Section 229 is the last of four sections of the Civil Procedure Code which deal with cases of obstruction to execution of decrees for immovable property. The first of these sections (226) is in these words: "If in the execution of a decree for land or "other immovable property, the officer executing the same "shall be resisted or obstructed by any person, the person in "whose favor such decree was made, may apply to the Court, "at any time within one month from the time of such resistance "or obstruction. The Court shall fix a day for investigating

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"the complaint, and shall summon the party against whom the complaint is made to answer the same." Therefore, the section supposes obstruction or resistance actully made, and in such case it enables the party in whose favor the decree was made to complain of it, and from his complaint the party against whom it is made is to be summoned. It will be seen throughout these four sections that the person creating the obstruction is dealt with, as the party complained of or defendant, in the enquiry which is to follow, as the case may be. For sections 227 and 228 deal with the case in which the party obstructing is a defendant in the suit, or some person at his instigation. Under section 227, in such case, the Court "may pass such orders as may be proper under the circumstances of the case;" and by section 228, if the Court be satisfied in such case that the resistance or obstruction was without any just cause, it may commit the person obstructing to custody. Under section 229, we have a different class of cases, in which the person committing the obstruction is some one "other than the defendant claiming *bona fide* to be in possession of the property on his own account, or on account of some other person than the defendant," and in these cases the claim is to be numbered and registered as a suit between the decree-holder, as plaintiff, and the claimant, as defendant; "and the Court shall proceed to investigate the claim in the same manner and with the like power, as if a suit for the property had been instituted by the decree-holder against the claimant," that is to say, reversing the position which the claimant (special appellant) has assumed in this case, for he seeks to be dealt with as plaintiff, whereas the claimant in section 229 is to be the defendant.

Under section 230, which deals with a distinct class of cases, *viz.*, "where any person other than the defendant shall be dispossessed of any land or other immovable property in execution of a decree," such person may apply to the Court; and if it appear that he has probable ground for his application, he is made plaintiff, and the decree-holder, defendant; and the matter is investigated as in a suit so framed That section, it is admitted, will not apply in the present case, and the sole question is, whether the case can be brought under section 229.

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It has been said that this objection has been taken now for the first time; it has also been said that the objection is technical, and one which cannot be entertained in conformity wit section 350 of the Code; and further, that to entertain it no would be an act of injustice to the special appellant, because if it had been taken in the first instance, the special appellant might have gone into the Mofussil, made actual resistance, and so committed a misdemeanour. With great deference, I think that the objection has not been taken too late. The application was not made under section 229, but, at least as it was understood, and doubtless intended, under section 230. The Moonsiff in the first instance refused to entertain the application, holding that section 230 was not applicable. The Judge decided that the application is entertainable not under section 230, but under 229, and remanded the case for trial. In this state of things, the decree-holder's remedy was, it may be said, by special appeal. But it has been held that a party is not bound to appeal specially to this Court under a mere interlocutory order, but may reserve such objection to be urged in the appeal against the final order. I think, if the opposite objection had now been made by the claimant, namely, that section 230 did apply, it would be now in time.

Now, as to the observation that the objection is technical and not entertainable by reason of section 350, the latter part of that section is in these words:—"But no decree shall be reversed "or modified, nor shall any case be remanded to the lower Court, "on account of any error, defect, or irregularity either in the "decision or any interlocutory order passed in the suit not affect- "ing the merits of the case or the jurisdiction of the Court." The phrase "jurisdiction of the Court" is, no doubt, one which has been very much misapplied, but it is fully applicable in this case. The question which the special appellant desired to bring under the cognizance of the Court, was one which had not been investigated in the previous suit. It was one which, if he desired to have it investigated under ordinary circumstances, he ought to have brought in the form of a suit commencing with a plaint on the prescribed stamp; but under the circumstances set forth in section 229 or 230, he might be enabled to bring his

case under the cognizance of the Court otherwise than by regular suit, *but only under such circumstances.* Section 230 admittedly would not apply; and, therefore, the appellant claimed to bring his case under section 229; and as the claim, in my opinion, could not be made under section 229, I think the error was one which affected the jurisdiction of the Court to take summary cognizance of the case.

It is suggested that the word "resistance" does not necessarily mean resistance by force. I fully agree in this opinion. It is only necessary to bring the case within section 226 and the following sections, that the officer of the Court shall have been obstructed and resisted, and in consequence of that the decree-holder shall have complained. That is not the case in the present instance. I think that the application was one which the appellant was not entitled to make. I am of opinion that the Judge's order was erroneous, and that the proceeding should be set aside.

I regret very much that my learned colleague is of a different opinion; but under the 36th section of the Letters Patent, I have no option but to give effect to my judgment, and to direct that the special appeal be dismissed with costs.

MITTER, J.—The plaintiff, now special appellant before us, preferred an application to the Moonsiff of Behar, complaining that the defendants, Beharilal and Ganorilal, having obtained a decree against one Mitrajit Sing, were attempting unlawfully to interfere with his possession in execution of that decree. This application was rejected by the Moonsiff, and on appeal to the Judge, the Moonsiff was directed to deal with it under the provisions of section 229, Act VIII. of 1859. The Moonsiff then gave a decree to the plaintiff, holding that the plaintiff was entitled to remain in possession as a mukarraridar, and that the defendants had no right to interfere with that possession in execution of the decree obtained by them against Mitrajit Sing. Against this decision, an appeal was preferred by the defendants to the subordinate judge of Patna, and that officer has reversed it, upon the ground that the plaintiff has failed to show that the mukarrari potta relied upon by him was ever delivered to him by his lessors.

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The plaintiff appeals specially to this Court, but a preliminary objection has been raised before us, upon the ground, that the proceedings in the case are illegal, inasmuch as there was no complaint before the Moonsiff that any resistance or obstruction had been offered to the officer who was deputed by the Court to execute the decree.

I am of opinion that this objection is of a purely technical character, and as it appears that it was never taken before either of the lower Courts, I would not entertain it at this late stage of the proceedings. Rightly or wrongly, the case has been already numbered and registered as a regular suit between the parties, and has been dealt with as such by both the lower Courts. Nor has it been suggested to us that the Moonsiff could not have tried this suit, either with reference to the nature of the relief sought for, or with reference to the value of the property involved in it. Under such circumstances, it is clear that the objection is not one which affects either the merits of the case or the jurisdiction of the Court by which it has been tried; and this Court is not competent, in my opinion, to entertain such an objection under the provisions of section 350 of the Code. Whether there was a complaint before the Moonsiff under the provisions of section 260 or not, it is too late now to enquire. The fact, however, is evident, that whilst the defendants were trying to obtain possession of the property decreed to them, the plaintiff came forward and complained against them before the Moonsiff, instead of taking the law into his own hands. If this objection had been taken earlier, the plaintiff might have gone back and resisted the officer who was deputed to deliver possession to the defendants, although I am far from saying that such a course would have been either legal or proper. At any rate, the objection amounts to nothing more than a plea that the plaint has not been engrossed upon a full stamp; but such a plea, I apprehend, is not within the jurisdiction of this Court to entertain when the case has been tried upon its merits by both the lower Courts. I would, therefore, over-rule this objection, and try this special appeal upon the merits.