

The 1st May 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act VIII. of 1859, ss. 92 & 246—Claim—Injunction—Procedure.

Case No. 68 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Subordinate Judge of Moorshedabad, dated the 24th February 1873.

Roy Luchmееput Singh Bahadoor
(Defendant), *Appellant,*

versus

The Secretary of State for India (Plaintiff),
Respondent.

Mr. R. T. Allan and Baboos Sreenath Doss and Rash Beharee Ghose for Appellant.

The Advocate-General for Respondent.

Certain immoveable property having been attached in execution of a decree by L against N, a claim was put in by S, which being refused, S, as provided by Act VIII. of 1859, s. 246, immediately brought a suit to establish his right. In this suit an injunction was granted by the Subordinate Judge under s. 92 for the purpose of stopping the execution-proceedings in respect of the said property :

HELD, that the provisions of s. 92 were not applicable to a case like the present, and did not justify the issue of the injunction ; and that S's proper course would have been to present a further petition in the execution-case of L v. N, representing that he had brought a suit, and praying for postponement of the sale :

HELD, further, that as S's claim was right and reasonable in itself, though the course he had taken was technically erroneous, his application should be dealt with as if it were made in the execution-proceedings.

Jackson, J.—THIS was an appeal against an order of Baboo Brojendro Coomar Seal, Officiating Subordinate Judge of Moorshedabad, granting an injunction under section 92 of the Code of Civil Procedure for the purpose of stopping the execution-proceedings in respect of certain properties specified which had been attached with a view to sale in execution of a decree obtained by Roy Luchmееput Singh Bahadoor against the Nawab Nazim of Moorshedabad. Upon the attachment of the property in question, a claim had been put forward by the Secretary of State in Council as entitled, in succession to the East India Company, to the immoveable property in question. That claim was refused, and, as provided by section 246, the Secretary of State immediately

brought a suit to establish his right, and it was in this suit that the order now complained of was made.

It appears to us that regard being had to the terms of section 92 and to the place which that section occupies in the Code of Civil Procedure, its provisions are not applicable to a case like the present, and do not justify the issue of this injunction. The suit, although the Nawab Nazim has since been made a party under section 63, was against Roy Luchmееput Singh, and the injunction was specifically directed against him. It cannot, we think, be said that the property in dispute was in danger of being wasted, damaged, or alienated by this defendant, nor has the property been, or is it at present, in any sense in his possession. That which the plaintiff apprehended, and which was in fact likely to occur, was that the defendant should, in executing his own decree, set the Court in motion, and cause the right, title, and interest of the Nawab Nazim to be sold and conveyed to some other person. If such sale had taken place, and if the property had gone into the hands of some person who was likely to waste, damage, or alienate, such injunction might have been properly and reasonably applied for. The course which has been taken in the present instance appears to us too nearly to resemble the action of the Court of Equity upon proceedings at common law in England to be applicable to proceedings of our Mofussil Courts, and we think, therefore, that the plaintiff entirely misconceived the course which he ought to have taken in applying for this injunction. This, however, it appears to us, is only a matter of procedure. The parties before us in the present case are the very parties who were before the Court in the execution-claim and proceedings ; and as in our opinion, upon the state of facts disclosed in this case, it would not have been proper for the Court to proceed to sell the property in dispute, we do not think that that which is in itself right and reasonable should be prejudiced, because the parties have taken a technically erroneous course. We cannot doubt that, if the Secretary of State had presented a further petition in Court in the execution-case of Roy Luchmееput Singh, representing that, upon the rejection of his claim, he has now brought a suit to establish his right, and praying that the sale should be postponed, the property continuing under attachment, the Court would and ought to have complied with his application. It appears to us, therefore,

that we should direct the present injunction to be dissolved, but, at the same time, we should order that the application should be dealt with as if it were made in the execution-proceedings, and that an order should be entered on those proceedings staying the sale pending the suit which has now been commenced, provided always that it should be competent to the decree-holder, in case of any undue delay in prosecuting the suit, to make a further application to the Court for an immediate sale. The order of the Court below being varied in this way, the case appears to us to be one in which we should make no order as to costs.

The 3rd May 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Act XXV. of 1861, s. 318—Act XIV. of 1859,
s. 15.

In the Matter of
Chytun Chunder Roy, *Petitioner,*

versus

Brojo Kant Roy and another, *Opposite Party.*

Baboo Mohinee Mohun Roy for Petitioner.

Baboo Shushee Bhoosun Dutt
for Opposite Party.

An award, under s. 318 of the Criminal Procedure Code (Act XXV. of 1861), is no bar to a possessory action under Act XIV. of 1859, s. 15.

Kemp, J.—WE think that this rule must be discharged. The question before us is whether the fact of an award having been passed by a Magistrate under section 318 of the Code of Criminal Procedure maintaining a party in possession is any bar to a possessory action under the provisions of section 15, Act XIV. of 1859. Now the facts of this case are somewhat peculiar. Prior to the Magistrate's award the opposite party had instituted this possessory action under section 15; in that suit he was of course obliged to admit that he had been dispossessed otherwise than by due course of law by the petitioner, and the petitioner before us taking advantage of this fact appears to have brought to the notice of the Magistrate the plaint in the section 15 case, in which the plaintiff in that case, the opposite party before us, was obliged to admit

that he had been dispossessed otherwise than by due course of law; and the Magistrate, finding an admission on the part of the opposite party that he was not in possession, retained the petitioner in possession without looking into any other question. Now, the object of section 15, Act XIV. of 1859, is, not to maintain, but to restore, a party to possession; the object of section 318 being to maintain a party in possession temporarily at least, whether that possession is a wrongful one or not, while section 15 is to restore to possession parties dispossessed otherwise than by due course of law; and an award under section 318 of the Criminal Procedure Code is, therefore, no bar to a possessory action under section 15, Act XIV. of 1859. We therefore think that this rule must be discharged with costs.

The 5th May 1873.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Surety-bond—Guarantor's Liability.

Case No. 809 of 1872.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 16th April 1872, reversing a decision of the Subordinate Judge of that District, dated the 5th August 1871.

Messrs. James Lyall & Co. (Plaintiffs),
Appellants,

versus

Amorabuttu Dossee and others (Defendants),
Respondents.

The Advocate-General and *Baboo Kalee Mohun Doss* for Appellants.

Mr. C. Jackson and *Baboos Sreenath Doss, Mohinee Mohun Roy, and Rash Beharee Ghose* for Respondents.

Where a party engaged to be surety for a gomashta, and to make good all defalcations proved to have been made by him, the engagement was held to refer to defalcations shown to have been made by the gomashta during the period of the guarantor's life, and not to apply to a time after the guarantor's death, when all power of advising or controlling the gomashta had ceased.

Glover, J.—THE Judge of the Lower Appellate Court dismissed the plaintiff's suit on the ground that the conditions under which Ram Koomar entered into the surety-bond had not been fulfilled, and that the