

*Special Appeal No. 471 of 1866.*1867.  
Jan. 7.MUSABHI, wife of HAJBEG RUSTAMBEG.....*Appellant.*SHAONUDDIN HISMUDDIN and others.....*Respondents**Decree for delivery of land—Obstruction by mortgagee in possession—Mistake of Munsif—Irregular procedure—Appeal—Civ. Proc. Code, Secs. 226, 227, 229 and 231.*

On a complaint by a decree-holder, under Sec. 226 of the Civ. Proc. Code, against a mortgagee in possession of the land and two other persons, who resisted the execution of the decree, the Munsif passed an order for delivery of possession, but without having numbered and registered the claim as a suit, as directed by Sec. 229 of the Code—which, in his opinion, did not apply to the claim of a mortgagee in possession; and the Senior Assistant Judge—though of opinion that the Munsif was in error in not proceeding under Sec. 229—ruled that there was no appeal from his order, as the claim had not been numbered and registered, and investigated as a suit.

*Held* that the irregular procedure of the Munsif should not prevent the Court from correcting his error; and that his order, which could only have been made under Sec. 229, was subject to appeal under Sec. 221, and should therefore, be reversed, and the case remanded, that the claim might be numbered and registered as a suit, and an order passed thereon after due investigation, as directed by Sec. 229 of the Code.

**T**HIS was a special appeal from the decision of the Senior Assistant Judge of the Surat District, at Broach, rejecting an appeal against an order of the Munsif of Jambusar.

The respondents had applied to the Munsif for the execution of a decree for the delivery into their possession of certain land, and an order for the purpose was accordingly made. The appellant Musabhi and two other persons resisted the execution, alleging that the land was held by Musabhi as mortgagee. The respondents, thereupon, applied to the Court under Sec. 226 of the Civil Procedure Code.

The Munsif passed an order that the land should be delivered into the possession of the respondents, on the ground that two of the persons alleged to have resisted the execution of the decree had no objection to the delivery, and that, with respect to Musabhi's claim, Sec. 229 of the Code did not appear to apply to the case of a mortgagee, and that, under Sec. 227, her claim must be refused.

1867. The Senior Assistant Judge, on the 15th of September  
 Musabhi v. 1866, was of opinion that an appeal *did* lie in the case re-  
 Sultanaddin. cording the following reasons:—

“ The Munsif's order in this case purports to have been passed under Sec. 227 of the Code, and from an order under that section, Sec. 364, in any opinion prevents an appeal being heard. But, though nominally passed under Sec. 227, there is nothing in the order to show that that section applies; because the appellant, Musabhi, who occasioned the resistance, was not the defendant, and there is no proof that she occasioned the resistance at the defendant's instigation, nor does the Munsif in his order state that to be his opinion. The Munsif appears in the first place, to have decided that Sec. 229 could not apply to the case, because Musabhi claimed as mortgagee of the land, and then, without taking any evidence, but (as he has written) ‘having regard to 227.’ to have confirmed the respondents in the possession. I must, therefore, regard the orders as passed under Sec. 229, and therefore appealable from, under Sec. 231 of the Code.”

After this the following minute was entered by the Judge on the 17th of September 1866:—

“ I adjourned the decision of this case on [Saturday 15th September), because it transpired, in the course of the further hearing, that the lower court did not number and register the appellant's claim as a suit between the decree-holder and her, and then pass a decision as in a regular case; and that, therefore, there was an evident irregularity in admitting the present appeal, as if brought under Sec. 231 of the Code. By the words used in that section, it seems clearly to be intended that an appeal shall be from the decision passed by the court *after* the claim has been numbered and registered as a suit. No such decision has been passed by the lower court in this case. \* \* \* Under this view I must vary my finding upon the preliminary issue and now rule that an appeal does *not* lie in this case.

“ That I am correct in this present ruling is proved by the circumstance that it is impossible to apply the rules appli

able to appeals from decrees to this case, without overstepping my jurisdiction as an appellate court. The Munsif has taken no evidence whatever, but has decided that Musabhi's claim does not come under Sec. 229. Under ordinary circumstances I should reverse the lower court's decree upon this preliminary point, and remand the case for re-investigation. But the effect of such a remand in this case would be, not that the Munsif would re-try the claim as a regular suit under Sec. 229 ; but that he would re-open the investigation ( which he ought to have made, but never yet has made ) under Sec. 227, and then, if satisfied that the appellant claims *bona fide* to be in possession of the property on her own account, would number and register the claim as a regular suit. That is to say, whilst apparently deciding an appeal from an order passed under Sec. 229, I should in effect be directing a re-investigation under Sec. 227, which I have no authority to do.

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“ I find that it has been ruled by the High Court of Calcutta, on the 20th of September 1864, in *Goluck Narain Dutt v. Bistoo Prea Dossee (a)*, that no appeal lies against a refusal of the Court to entertain an application made under Sec. 230 of the Code, and that the remedy is by a regular suit ; and that decision confirms the view I have taken, nearly the same reasoning being applicable to that section as to Sec. 229.”

The special appeal came on for hearing this day before COUCH, C.J., NEWTON and WARDEN, JJ.

*Nanabhai Haridas*, for the appellant, contended that the lower court was wrong in law in reversing its order of the 15th of September, in the absence of any application for a review of it. The proper course would have been to remand the case to the Munsif's Court.

*Dhirajlal Mathuradas*, for the respondent, was heard in support of the decision of the Senior Assistant Judge.

COUCH, C.J. :—In this case, as appears from the judgments of the lower courts, a mortgagee in possession resisted the

(a) 1 Cal. W. Rep. Civ. R. 140.

1867. execution of a decree by a decree-holder, and claimed to be  
 Musabhi allowed to remain in possession of the land. The claim,  
 n. therefore, properly came under the provisions of Sec. 229 of  
 Sháunnddin. the Code.

The Munsif passed an order by which he directed the possession of the property in question to be made over to the decree-holder. This order he could pass only under Sec. 229, for that section alone gave him authority to decide such a claim. It is true that, owing to his mistake—that a mortgagee was not contemplated by Sec. 229—he held that section not to apply to the case, and therefore refused to number and register the claim as a suit between the decree-holder as plaintiff and the claimant as defendant. But such an irregularity on his part should not prevent us from correcting his error. The Munsif's order, having been really made under Sec. 229, was subject to an appeal under Sec. 231 ; and the Judge was, therefore, wrong in his final decision. The first view he took of the case was the correct one. He ought to have remanded the matter, for the Munsif to correct his irregularity in not numbering and registering the claim as a suit.

We therefore, reverse the Judge's order ; and remand the case, that the claim may be numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant ; and that the Munsif may proceed to investigate the claim, and pass such order as he may deem proper under the circumstances of the case.

*Case remanded.*

Sec. 221 :—"The decision passed by the Court under either of the last two Sections shall be of the same force as a decree in an ordinary suit, and shall be subject to appeal under the rules applicable to appeal from decrees ; and no fresh suit shall be entertain in any Court between the same party or parties claiming under them, in respect of the same cause of action."