

as to show that unless such order be passed, the contract can still be enforced. The object of the Indian Act, moreover, is stated in the preamble to be to punish fraudulent breaches of contract, as well as to enable a contractor to obtain a more speedy remedy than by recourse to the Civil Courts, which would ordinarily have jurisdiction, so as to afford him relief.

We cannot hold that it is the intention of the Legislature that a contumacious labourer under contract should be liable to imprisonment for several terms for several breaches so as to end in his imprisonment until the term of his contract has expired. This might be the consequence of a persistent refusal to perform a contract for labour for a specific term.

We accordingly approve the law laid down by the Magistrate. From the terms of the order of the Magistrate under which the cooly woman has already suffered imprisonment, it would seem that sentence was summarily passed. It is, however, not quite clear what the terms of the order were. We would point out that a Magistrate's order should at the option of the complainant be either for repayment of the advances made (in whole or in part at the Magistrate's discretion), or for performance of the contract, and that it is only on failure to comply with such order that a sentence of imprisonment can be passed. The application is rejected.

G. S.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

KAMINI KANT ROY, MINOR, BY HIS NEXT FRIEND AND GUARDIAN
AD LITEM CHANDRA MOHAN DEY ROY (DEFENDANT) v. RAM NATH
CHUCKERBUTTY (PLAINTIFF).*

1893
August 4.

*Withdrawal of suit—Civil Procedure Code (Act XIV of 1882), s. 373—
Institution of fresh suit.*

Where *A* instituted a suit to establish his right to sell certain property in satisfaction of a decree against *B*, but withdrew the suit without having obtained leave to bring a fresh suit, and subsequently instituted

* Appeal from Appellate Decree No. 1336 of 1893 against the decree of Babu Ram Gopal Chaki, Subordinate Judge of Mymensingh, dated 4th of May 1892, affirming the decree of Babu Uma Charan Kur, Munsif of Kishoregunge, dated the 10th of July 1891.

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another suit to establish his right to sell the same property in satisfaction of another decree against *B*, held, that the second suit was not barred by the provisions of s. 373 of the Code of Civil Procedure.

Explanation III of section 13 of the Civil Procedure Code contemplates a decree which does not expressly grant the relief claimed: the termination of a suit by the plaintiff being allowed to withdraw it, without leave to bring a fresh one, is not a bar, under Explanation III, to a subsequent suit in which the same matter is in issue.

THE facts in this case were as follows:—Ram Mohun Roy, who had an interest in certain lands, borrowed certain sums of money. The lender, after obtaining a decree (No. 1082 of 1882) for the sums advanced, sold the decree to the plaintiff, and the latter caused the land in which Ram Mohun Roy had an interest to be attached in execution of that decree. The defendant then put in a claim stating that the interest in the land was his, and the property was released. In 1886 the plaintiff instituted a suit against the defendant to establish his right to sell the property in execution of decree No. 781 of 1884, but withdrew the suit, no permission being given to bring a fresh suit.

On the 16th May 1890 the plaintiff instituted the present suit to establish his right to sell the property in dispute in satisfaction of his decree, No. 1082 of 1882, against Ram Mohun Roy. The defendant contended that the property did not belong to Ram Mohun Roy, but that it belonged to him, and that the plaintiff was not entitled to maintain the suit, as he had on a former occasion unsuccessfully instituted a similar suit against the defendant for a declaration that the property in question belonged to Ram Mohun Roy.

The Munsif overruled the objections, finding that the property belonged to Ram Mohun Roy, the judgment-debtor of the plaintiff, and decreed the suit. On appeal, the Subordinate Judge upheld the Munsif's finding.

From this decree the defendant appealed to the High Court.

Babu *Tarakishore Chowdhry* for the appellant.

Babu *Dwarkanath Chuckerbutty* for the respondent.

The judgment of the Court (BANERJEE and RAMPINI, JJ.) was as follows:—

The plaintiff brought this suit to establish his right to sell the property in dispute in satisfaction of a decree against one Ram

Mohun Roy, which he had purchased; and he alleged in his plaint that upon the attachment by him of the said property in execution of that decree, a claim was preferred by the defendant, upon which the property was released in May 1889.

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The defence was that the property did not belong to the judgment-debtor; that it belonged to the defendant; and that the plaintiff was not entitled to maintain the suit, as he had on a former occasion unsuccessfully instituted a similar suit against the defendant for obtaining a declaration that the property in question belonged to the judgment-debtor.

The Courts below have overruled the objections raised by the defendant, and found that the property belonged to the judgment-debtor of the plaintiff; and they have accordingly decreed the suit.

On second appeal it is contended on behalf of the defendant—*first*, that the suit is barred by sections 13 and 373 of the Code of Civil Procedure; and *secondly*, that the decision on the merits in favour of the plaintiff is wrong in law, as the only evidence on which that decision is based is a recital in a document, which recital is inadmissible in evidence against the defendant.

The facts upon which the first contention is based are shortly these. The plaintiff in execution of a decree held by him against the judgment-debtor Ram Mohun Roy, attached the property now in dispute. Thereupon a claim was preferred by the present defendant, and the property was released. The present plaintiff then brought a suit to establish his right to sell the property in execution of his decree, and that suit the plaintiff withdrew without leave to bring a fresh suit. It is thereupon contended, in the first place, that section 13 of the Code bars the suit, and that as in the former suit the plaintiff sought to establish the right of his judgment-debtor Ram Mohun Roy, to this property, and as he did not obtain any decree in that suit, it must be held, under the third explanation to section 13, that the relief that was claimed had been refused; and it is further contended that even if section 13 is not applicable, the present suit is barred under section 373 of the Code of Civil Procedure, it being a suit for the same matter as that for which the former suit was brought. With regard to the first part of this contention it is enough to say that Explanation III evidently contemplates a decree being passed which does

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not expressly grant a certain relief, and it lays down that such relief must in that case be deemed to have been refused. In the present case the former suit did not result in any decree. That suit was not heard and determined, but was allowed to be withdrawn, though without leave to bring a fresh suit. That being so, section 13 can have no application in this suit.

The only question then is, whether section 373 of the Code is a bar to the present suit. That section provides that if the plaintiff withdraws from the suit without permission to bring a fresh suit, he shall be precluded from bringing a fresh suit for the same matter. Now, though the property in respect of which the present suit is brought is the same as that in respect of which the former suit was brought, still that would not be sufficient to make the present suit one for the same matter as that for which the former suit was brought, within the meaning of section 373. The object of the former suit was to establish the plaintiff's right to bring to sale certain property which no doubt was the same as that in dispute now, and his cause of action was the release of that property from attachment upon a claim being preferred by the present defendant. The object of the present suit is to establish the present plaintiff's right to bring to sale the same property, but in execution of a different decree, and we may observe, a decree originally obtained by a third party, who has transferred it to the plaintiff; and the cause of action in the present suit is different, arising from an order passed on a different claim case. That being so, we think the present suit is not for the same matter as that for which the former suit was brought. It may be quite true that the main issue to be tried in the present suit is the same as that which was the main issue to the former suit, but that would not make the present suit one for the same matter as that for which the former suit was brought. If the former suit had been heard and determined, and if section 13 was in consequence applicable to this suit, such an issue tried in the former suit might have operated as *res judicata* in the present suit; but that is not the case here.

Then as to the second contention, the evidence objected to as being inadmissible against the defendant-appellant is a recital in a *kobala* in favour of the defendant, under which he alleges he has acquired title to the property in dispute; and that recital is an

admission by the defendant's vendor that the property in dispute had previously been conveyed by him to the plaintiff's judgment-debtor. That being so, we think it is clearly admissible in evidence against the defendant.

The objections urged before us therefore both fail, and this appeal must accordingly be dismissed with costs.

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Appeal dismissed.

C. S.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comar Petheram, Kt., Chief Justice, Mr. Justice Prinsep, and Mr. Justice Norris.

SITAL HARI BANERJEE (PLAINTIFF) v. HEERA LAL CHAT-
TERJEE (DEFENDANT).*

1894
January 9.

Civil Procedure Code (Act XIV of 1882), ss. 108 and 157—Ex-parte decree—Presidency Small Cause Court Act (XV of 1882), s. 37—Limitation Act (XV of 1877), Schedule II, Art. 164—New trial.

There is a distinction made by the Code of Civil Procedure between cases decided *ex-parte* in the absence of one of the parties after first hearing, and cases decided in the absence of one of the parties at an adjourned hearing.

Chapter VII of the Code relates to the appearance of parties and the consequence of their non-appearance at first hearings, whereas Chapter XIII, of which s. 157 forms a part, contains the procedure for the trial of a suit on an adjournment after the first hearing.

Where, therefore, a defendant put in an appearance in the Small Cause Court at the first hearing, and the case was adjourned to a later date for hearing, on which date the case was heard in his absence and a decree given against him, *held*, that such a decree was not one made *ex-parte* so as to enable the defendant to obtain the benefit of s. 108 of the Code, but that his only remedy was under section 37 of Act XV of 1882.

REFERENCE from the Court of Small Causes as to whether a certain decree, made on the 30th June 1893 by the Officiating Second Judge of the Small Cause Court, was an *ex-parte* decree within the meaning of section 108 of the Code of Civil Procedure,

* Reference No. 6 of 1893, made in suit No. 1654 of 1893, by E. W. Ormond, Esq., Officiating Second Judge of the Calcutta Court of Small Causes.