

13 B. 34.

[34] APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Parsons.*SHIVRAM CHINTAMAN (*Original Plaintiff*), Appellant v. JIVU AND ANOTHER (*Original Defendants*), Respondents.* [15th February, 1888.]*Civil Procedure Code (Act XIV of 1882), s. 244—Separate suit—Auction-purchaser not a representative of either party to a suit—Sale in execution of property belonging to a person other than the judgment-debtor—Denial of title—Cause of action—Declaratory suit.*

In execution of a decree on a mortgage certain property was sold which the plaintiff in this suit claimed as his own under a sale to himself by the sons of the judgment-debtor. He applied to the Court to have the sale set aside, but, failing in his application, he sued both the decree-holder and the auction-purchaser for a declaration of his title to the property in question. The Assistant Judge held, on appeal, that the suit was not maintainable, on the grounds (1) that the greater part of the property being included in the decree, the question of title ought to have been settled in execution proceedings under s. 244 of the Code of Civil Procedure (Act XIV of 1882) and not by a separate suit; and (2) that, even if the point could be raised in a separate suit, the present suit was premature, as the plaintiff should have waited till he was dispossessed by the auction-purchaser.

Held, reversing the decision of the Assistant Judge, that s. 244 did not bar the present suit. It could not apply except as regards property affected by the decree, and a part of the property claimed by the plaintiff was not included in the decree. Moreover, the question in the present suit did not arise between the parties to the former suit or their representatives.

Held, also, that the suit was not premature. A person, whose property is sold in execution of a decree against a third party, is not bound to wait till he is dispossessed by the auction-purchaser. As soon as his title is denied, he is entitled to bring his suit.

[Diss., 18 M. 13 (18); 1 S. L. R. 158; F., 16 M. L. T. 310; R., 24 C. 62 (71); 4 Bur. L. T. 28 = 9 Ind Cas. 472.]

THIS was a second appeal from the decree of G. Jacob, Acting Assistant Judge of Poona, in appeal No. 52 of 1884, confirming the decree of Rav Sabel G. V. Tullu, Joint Subordinate Judge of Poona.

The first defendant, Jivu kom Sakharam, obtained a decree on a mortgage against one Hari Trimbak, and in execution she brought to sale a certain house which was purchased at the sale by Ramchander (defendant No. 2). The plaintiff applied to have the sale set aside with respect to certain portions of the house which he alleged he had purchased subsequently to the decree from the [35] sons of Hari Trimbak, and which he contended were not liable to be taken in execution of any decree obtained against him. His application was rejected and the sale confirmed.

The plaintiff then filed the present suit, to obtain a declaration of his title to the said portions of the house, and to set aside the Court's order confirming the sale.

The first defendant (the decree-holder) denied the plaintiff's title, and alleged that the whole house belonged to Hari Trimbak and had been mortgaged to her; that in execution of a decree on the mortgage she had a right to sell it; and that the question ought to have been settled in the execution proceedings, and not by a separate suit.

The second defendant (the execution-purchaser) replied that the property in suit was included in the mortgage and in the decree; and that the plaintiff's purchase was fraudulent and colourable.

*Second Appeal, No. 810 of 1885.

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The Subordinate Judge found that the sons of Hari Trimbak (the plaintiff's vendors) had no title to the property in dispute, and could not convey any to the plaintiff. He, therefore, rejected the plaintiff's claim.

On appeal, the Acting Assistant Judge held that the greater part, if not the whole, of the property in suit was covered by the mortgage and the decree, and that as the plaintiff's purchase was subsequent to the decree, the question as to the property included in the decree ought to have been determined in execution proceedings under s. 244 of the Civil Procedure Code (Act XIV of 1882), and that that section was, therefore, a bar to the present suit.

The Assistant Judge was also of opinion that even if the point could be raised in a separate suit, the present action was premature, as the plaintiff should have waited until he was dispossessed by the auction-purchaser. Moreover, as the latter had taken possession pending the appeal, the plaintiff's suit for a mere declaration of title without consequential relief would not lie. The decree of the Subordinate Judge was, therefore, confirmed.

[36] Against this decision the plaintiff appealed to the High Court.

Vishnu K. Bhatvadekar, for the appellant.—Section 244 of the Code of Civil Procedure does not bar the present suit. The plaintiff does not derive his title from the judgment-debtor. Nor can the auction-purchaser, (defendant No. 2), be said to be the "representative" of the judgment-debtor—*Ramchhaibar Misr v. Bechu Bhagat*(1); *Zauki Lal v. Jawahir Singh* (2); *Hira Lal Chatterji v. Gourmoni Debi*(3). The question does not arise between the parties to the suit in which the decree was passed, or their "representatives." Section 244 has, therefore, no application to the present case.

Mahadev B. Chaubal, for the respondent.—Most of the property in suit is affected by the decree. The decree directs the sale of the whole house. After the date of the decree the plaintiff purchased a portion of the house. His purchase cannot prevent the decree-holder from bringing to sale every portion of the house. The plaintiff has, no doubt, a right to sue in respect of that portion of the property which is not covered by the decree. With regard to the rest, s. 244 is a bar to the present suit.

Refers to *Deefholts v. Peters* (4); *Dayachand Nemchand v. Hemchand Dharamchand*(5); *Venkatamarasammah v. Ramiah* (6).

JUDGMENT.

The judgment of the Court (BIRDWOOD and PARSONS, JJ.) was delivered by

BIRDWOOD, J.—We are of opinion that the Assistant Judge has wrongly held that the present suit is not maintainable. The defendant No. 1 obtained a decree on a mortgage against one Hari Trimbak on the 31st May, 1882, and in execution of her decree caused certain property to be sold which the plaintiff claims as his own, under a sale to himself by the sons of Hari Trimbak made on the 31st July, 1882. The Assistant Judge has held (1) that under s. 244 of the Code of Civil Procedure the plaintiff is not entitled to bring a suit, and (2) that his suit is premature, as he should have waited till he was dispossessed by the auction-purchaser, the defendant No. 2.

(1) 7 A. 641.

(4) 14 C. 631.

(2) 5 A. 94.

(5) 4 B. 515.

(3) 13 C. 326.

(6) 2 M. 108 (112).

[37] Section 244, however, does not bar the suit. It could have no application except as regards the property affected by the decree, and it is evident from the decision of the Assistant Judge that a part, at any rate, of the property now in suit was not included in the decree. Moreover, the plaintiff does not claim title from the judgment-debtor in the former suit, and the defendant No. 2, the auction-purchaser, cannot be held to be the representative of either party. See *Hira Lal Chatterji v. Gourmoni Debi* (1); *Jagat Narain v. Jag Rup* (2); *Ramchhaibar Misr v. Bechu Bhagat* (3). In the second reason also we cannot concur. As soon as the plaintiff's title was denied, as it clearly was when his property was sold in execution as belonging to some one else, he was entitled to bring his suit. He was not obliged to wait until he was actually dispossessed: see *Baji Yeshvant v. Trimbak Atmaram* (4).

We reverse, therefore, the decree of the lower appellate Court and remand the appeal for a hearing on the merits. It is stated that the plaintiff has now been dispossessed by defendant No. 2. If that is so, or if, in consequence of any proceedings subsequent to the sale, the Court thinks that a prayer for consequential relief should be made, there would be no objection to the Court permitting such an amendment of the plaint as may, under the circumstances, be necessary. Costs to abide the result.

Decree reversed.

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APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

SHRI VISHWAMBHAR PANDIT *alias* NANA MAHARAJ (*Applicant*) v.
VASUDEV PANDIT *alias* BABA MAHARAJ (*Opponent*)*

[29th February, 1888.]

Regulation VIII of 1827, s. 9—Construction of the words "may appoint"—Appointment of administrator—Imperative and not discretionary.

Where the right of succession to the estate of a deceased person is disputed between two or more claimants, and none of them have taken possession, the [38] District Judge within whose jurisdiction the property is situate is bound, on the application of one of the parties concerned, to appoint an administrator under s. 9 of Reg. VIII of 1827.

The words of the section are imperative and not permissive.

The use of the words "*may appoint*" in this section does not imply that the District Judge has any discretion in a proper case to appoint or not to appoint an administrator. If any discretion is given as to the exercise of the power thereby conferred, it is that of determining whether the occasion has arisen in the particular case.

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

The material facts of this case, as set out in the application, were as follows:—One Tatia Maharaj died in 1866 possessed of several *inam* villages and lands situate in the districts of Poona, Belgaum and Satara. He left a childless widow by name Umabai. She succeeded to the widow's estate in her deceased husband's property. During her lifetime she was in full possession and enjoyment of the whole of her husband's property.

* Application, No. 137 of 1887, under Extraordinary Jurisdiction.

(1) 13 C. 326.

(2) 5 A. 452.

(3) 7 A. 641.

(4) Printed Judgments for 1887, p. 287.