

1893

JAN. 13.

18 B. 98.

APPELLATE CIVIL.

APPEL-
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18 B. 98.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

HIMATRAM (Original Judgment-Creditor), Applicant v. KHUSHAL
JETHIRAM GUJAR (Original Applicant), Opponent.* [13th January, 1893.]

Mortgage—Decree on mortgage—Sale in execution—Claim on property ordered to be sold under a mortgage decree—Civil Procedure Code (Act XIV of 1882), ss. 278 and 287—Jurisdiction.

Himatram obtained a decree upon a mortgage against Dewji in 1891, and applied in execution for the sale of the mortgaged property. On the proclamation of the sale being issued, Khushal intervened, alleging that the property had been sold to him by Dewji in 1883 at a private sale. The Subordinate Judge allowed his claim, and stopped the sale, being of opinion that he had power, under s. 287 of the Civil Procedure Code, to make this order.

Held, that the order was made without jurisdiction, and must be discharged. Proceedings by way of claim as provided by s. 278 of the Civil Procedure Code (Act XIV of 1882) are not applicable where the property is directed to be sold under a mortgage decree, and s. 287 had no application.

Deefholts v. Peters (1) followed.

[F., 1 N.L.R. 142 (143); R., 6 Bom. L. R. 1043 (1049); 12 C.P.L.R. 73 (75); L.B.R. (1893—1900) 509 (510); 2 L. B. R. 138 (139); D., 13 Ind. Cas. 563 = 123 P.L.R. 1912 = 247 P.W.R. 1912.]

[99] THIS was an application under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against an order passed by Rao Saheb V. G. Kaduskar, Joint Subordinate Judge of Nasik.

In 1891 one Himatram obtained a decree in the Court of the Subordinate Judge at Nasik against Dewji on a mortgage. The decree directed the payment of the mortgage-debt within six months, or, in default, the sale of the mortgaged property. Default having been made, and the defendant being an agriculturist, the Subordinate Judge sent the proceedings to the Collector that he might sell the property, and realize the amount of the decree.

Before the date fixed for the sale, one Khushal Jethiram claimed the property in the Court of the Subordinate Judge, alleging that he had bought it from Dewji in 1883. He prayed for a declaration that the property was not liable to attachment. The Subordinate Judge cancelled the proclamation, and stopped the sale, and referred Himatram to a regular suit. He was of opinion that although s. 278 of the Civil Procedure Code (XIV of 1882) did not apply to this case as there had been no attachment, yet that under s. 287 of the Civil Procedure Code he could deal with Khushal's application and make the order. He held that the ruling of the Calcutta High Court in *Deefholts v. Peters* (1) was not applicable to the case.

Against the above order Himatram applied to the High Court in its extraordinary jurisdiction (Civil Procedure Code (XIV of 1882), s. 622), contending that the Subordinate Judge had acted illegally and without jurisdiction. He obtained a rule *nisi* to set aside the above order. The rule now came on for argument.

Shivram V. Bhandarkar, for the applicant, in support of the rule.—The Subordinate Judge had no jurisdiction to make the order stopping the

* Application No. 113 of 1892 under Extraordinary Jurisdiction.

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sale. It is admitted that the order could not be made under s. 278 of the Civil Procedure Code, as there was no attachment. Nor could it be made under s. 287, which does not contemplate such an application at all.

[100] *N. G. Chandavarkar*, for the opponent, showed cause:—Technically no doubt s. 278 does not apply, because the property was not attached; but although not attached, yet as it was directed to be sold in execution of a decree, it should be regarded as practically attached for the purpose of a sale, and that being so the claimant's application should be dealt with. If property to which claims are made, is put up for sale, the purchaser runs the risk of buying what may turn out to be property which does not belong to the judgment-debtor, and which ought not to be sold. This inconvenience ought to be prevented by the Court.

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ORDER.

SARGENT, C. J.—We agree with the opinion expressed by the Calcutta High Court in *Deefholts v. Peters* (1) that proceedings by way of claim as provided by s. 278 of the Civil Procedure Code are not applicable to a case of *this* kind. As to s. 287, it has no application to a case of this nature. The Subordinate Judge has acted, therefore, without jurisdiction. The rule must be made absolute, and the Subordinate Judge's order discharged. Costs of this application to be paid by the opponent.

Rule made absolute.

18 B. 100.

APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice
and Mr. Justice Bayley.*

GULABSINGJI AND OTHERS (*Original Plaintiffs*), *Appellants*
v. LAKSHMANSINGJI (*Original Defendant*), *Respondent*.^{*}
[18th January, 1893.]

Court-fees Act, VII of 1870, s. 7, cl. 4 (c)—Act VII of 1887, s. 8—Stamp—Consequential relief—Valuation of suit—Injunction—Talukdari Act, Bombay Act VI of 1888, s. 11—Jurisdiction.

Where plaintiff sued for a declaration that they were entitled to share in certain talukdari estates and for an injunction to restrain defendant from cutting and removing timber from certain forests, or, if the injunction was not granted, for an order to defendant to keep a correct account of the timber removed, the First Class Subordinate Judge rejected the claim for want of jurisdiction.

Held, that the suit was one for a declaration and consequential relief under s. 7, cl. 4 (c) of the Court-Fees Act, and that as the claim was valued at [101] Rs. 230 only, the appeal lay under Act VII of 1887, s. 8, to the District Court.

An injunction is in the nature of consequential relief.

[F., 6 C.L.J. 427=11 C.W.N. 705 (707); R., 20 B. 265 (267); 20 B. 736 (741); 5 Bom. L.R. 195 (196); 6 O.C. 255 (258).]

APPEAL from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad.

Plaintiffs sued for a declaration of their shares in certain talukdari estates, and for a temporary injunction to restrain defendant from cutting

^{*} Appeal No. 138 of 1892.

(1) 14 C. 631.