

1895.

RUSSOBÁI  
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The uncle's sons are indeed mentioned in pl. 4 of Ch. II, sec. 5, of the Mitákshara, which introduces them as belonging to the class described in section 3 as "sprung from the same family with the deceased and connected by *funeral* oblations, *i.e.* the paternal grandfather and the rest," but they cannot be regarded as specially mentioned in the succession so as to exclude the operation of the above rule. Moreover, there is force in what is said in West and Bühler (3rd Ed.), p. 472, that the step-mother "ought to be placed, on account of her near relationship to the deceased, immediately after the paternal grandmother, up to whom only the succession is settled by special texts."

We must, therefore, reverse the decree of the Court below and declare that the plaintiff is the nearest heir of Háji Jackeria, and send back the case for disposal after finding on the remaining issues. Costs to abide the result.

*Case remanded.*

Attorneys for appellant:—Messrs. Tyabji, Dayabhai and Co.

Attorneys for defendant:—Messrs. Bháishankar and Kánga.

## ORIGINAL CIVIL.

*Before Mr. Justice Starling.*

1895.

June 15.

JEYNA'RA'YAN MEGHRA'J AND ANOTHER, PLAINTIFFS, v. ISMA'IL  
KURIMALI AND OTHERS, DEFENDANTS.\*

KHETSIDA'S HURMOOKHROY—CLAIMANT.

*Execution—Decree—Attachment under decree of High Court of property already attached under decree of Small Causes Court—Claim to attached property, by what Court decided—Civil Procedure Code (Act XIV of 1882), Sec. 272—Jurisdiction—Practice—Procedure.*

In execution of a decree obtained in the High Court the plaintiffs, on the 22nd of March, 1895, attached certain property of the defendant, which, however, had been already attached on the 22nd of February, 1895, by one Rájbaí, who had obtained a decree against defendant in the Court of Small Causes. The plaintiffs' attachment was, therefore, effected under section 272 of the Civil Procedure Code (Act XIV of 1882) by a notice addressed by the Prothonotary of the High Court to the Registrar of the Small Causes Court. The claimant was mortgagee in possession and the defendants were his tenants. On the 2<sup>nd</sup> of February he had lodged a claim in the Small Causes Court.

\* Suit No. 143 of 1894.

to the said property as mortgagee in possession, and on the 25th March, 1895, a consent order was passed by the Chief Judge of that Court directing that Rájbaí's attachment should stand subject to the claimant's claim.

On the 22nd April, 1895, the claimant applied to the Chief Judge of the Small Causes Court to issue a notice to the plaintiffs in this suit, under section 272 of the Civil Procedure Code, to determine the question of priority of claim to the attached property between him and the plaintiffs. His application was refused, the Chief Judge being of opinion that he could not interfere in a High Court suit. The claimant then filed his claim in the High Court, and took out this summons to remove the plaintiffs' attachment.

*Held*, that under section 272 of the Civil Procedure Code the Small Causes Court was the only Court to decide the question of priority between the claimant and the plaintiffs.

IN chambers. Summons taken out by the claimant (Khetsidás Hurmookhroy) dated 15th May, 1895, calling on the plaintiffs to show cause why an attachment levied by them on certain property as belonging to the defendants should not be removed, &c.

The plaintiffs obtained a decree in this suit against the defendants for a sum of Rs. 5,839. In execution of this decree they on the 2nd March, 1895, attached certain goods as belonging to the defendants. This property had been already attached on the 28th February, 1895, in execution of a decree obtained by one Rájbaí against the defendants in the Bombay Court of Small Causes (Suit No. 27498 of 1894). The attachment of the plaintiffs on the 2nd March, 1895, was, therefore, effected by a notice under section 272 of the Civil Procedure Code (Act XIV of 1882) addressed by the Prothonotary of the High Court to the Registrar of the Small Cause Court.

The claimant was the landlord of the house in which the attached property was lying, and the defendants were his tenants. He had on the 28th February, 1895, lodged in the Court of Small Causes a claim to the said goods as mortgagee in possession under a Gujaráti writing dated the 20th February, 1895. This claim came before the Chief Judge of that Court for investigation on the 25th March, 1895, and a consent order was passed directing that Rájbaí's attachment should stand subject to the claimant's claim.

On the 22nd April, 1895, the claimant applied to the Chief Judge to issue a notice to the plaintiffs, under section 272 of the

1895.

JEYNARAYAN  
MEGHRAJv.  
ISMA'IL  
KURIMALL

1895.

JEYNARAYAN  
MEGHRAJ

v.

ISMA'IL  
KUBIMALL.

Civil Procedure Code (Act XIV of 1882), to attend in order to determine the question of priority of claim to the said property as between the claimant and the plaintiffs, but the Chief Judge declined to grant the application, being of opinion that he had no jurisdiction to issue such a notice against the plaintiffs. In his order he said:—

“I am of opinion that applicant should commence by filing a claim in the High Court, which may, if that Court so order, be transferred here for this Court to adjudicate under the proviso of section 272. It would not, I think, be right for this Court to issue the notice prayed for, as that only could be done by in effect assuming a jurisdiction in the High Court suit which this Court does not possess.”

The claimant thereupon filed his claim to the said property as mortgagee in possession, and on the 15th May, 1895, took out the abovementioned summons to remove the plaintiffs' attachment.

*Motilal*, for the claimant, in support of the summons.

*Inverarity*, for the plaintiffs, *contra*.

STARLING, J.:—A suit (No. 27498 of 1894) having been filed in the Court of Small Causes against the defendant in this suit, a decree was passed against him, and certain moveable property was attached in execution thereof and taken into the custody of that Court. The plaintiff in this suit having obtained a decree herein applied to attach the same property in execution, and in accordance with the provisions of the first portion of section 272 of the Civil Procedure Code (Act XIV of 1882), the Prothonotary sent a notice of attachment to the Court of Small Causes. Thereupon the present claimant applied in that Court to raise the plaintiff's attachment on the ground that the defendant had no attachable interest in the property. The Chief Judge of the Court of Small Causes refused to issue a notice on the ground that such an act would in effect be assuming a jurisdiction in a High Court suit which his Court did not possess. On this the claimant took out the present summons calling upon the plaintiff to show cause why his attachment should not be raised.

At first sight it may seem strange that the Court of Small Causes should be competent to decide upon the validity of an attachment issued by the High Court; but the whole question turns upon what course of procedure has been provided by the Legislature in the Civil Procedure Code. Now, the same section

1895.

JEYNARAYAN  
MEGHRA'J.v.  
ISMA'IL  
KURIMALI.

which points out how the attachment of property deposited in or in the custody of any Court is to be effected also provides that in such a case "any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment, or otherwise shall be determined by such Court," *i.e.*, the Court in whose custody the property is. The words of this section seem to me to be too clear to admit of any argument; and in my opinion the Court of the Small Causes is the *only* Court which under the Code can decide the question now raised before me.

The point does not seem to have come up directly before any of the Courts for decision; but in the case of *Debee Pershad v. Gujadhari Ram*<sup>(1)</sup> the meaning of section 237 of the Civil Procedure Code of 1859, which is similar in effect to section 272 of the present Code, and the latter portion of which is almost word for word the same as the latter portion of section 272, was discussed in connection with the question whether the Court in which the attached property was, could decide a question as to the validity of an attachment in a miscellaneous proceeding, or whether it was necessary to file a suit. In delivering judgment, Couch, C. J., said: "Where money or a security is deposited in a Court of justice, any question of title or priority arising between the decree-holder and other persons than the defendant shall be determined by that Court, the reason apparently being that there may not be an unseemly conflict between the Courts."

This is in exact conformity with the opinion which I had formed before I found this case, and I must, therefore, hold that this Court is not the one in which the question which the claimant seeks to raise, can be determined. I must, therefore, dismiss the summons with costs.

As the Chief Judge of the Court of Small Causes has only refused to issue a notice, I see no objection to a fresh application being made to him, and I have no doubt that he will now hear the matter; but if he considers that he is bound by his previous refusal, the only course open to the claimant will be an appli-

(1) 20 Cal. W. R. (Civ. Rul.), 73.

1895.

JEYNARAYAN  
MEGHRAJv.  
ISMAIL  
KURIMALI.

cation to this Court on its appellate side to exercise its extraordinary jurisdiction under section 622 of the Civil Procedure Code.

Attorneys for the claimant:—Messrs. *Bicknell, Mervánji and Motilál.*

Attorneys for the plaintiffs:—Messrs. *Matubhai and Jamiet-rám.*

## CRIMINAL REVISION.

*Before Mr. Justice Jardine and Mr. Justice Ránade.*

### IN RE NABISHAH.\*

1894.  
September 27.

*Criminal Procedure Code (Act X of 1882), Sec. 431—Appeal by accused against conviction—Death of appellant—Abatement of appeal—Appeal—Remedy open to the deceased appellant's heirs—Practice.*

Two persons, Mahomadsháh and Nabisháh, were convicted of criminal breach of trust and each was sentenced to one year's rigorous imprisonment and a fine of Rs. 1,000. Both prisoners filed an appeal to the High Court. Nabisháh died pending his appeal. On Mahomadsháh's appeal the High Court passed an order acquitting him and reversing his conviction and sentence. Thereupon one of the relatives of the deceased Nabisháh applied to the High Court to set aside the conviction and sentence passed in his case, and order the fine to be refunded.

*Held*, that on Nabishah's death his appeal abated under section 431 of the Code of Criminal Procedure (Act X of 1882).

As the case turned on the appreciation of evidence, the High Court declined to interfere in the exercise of its revisional jurisdiction, referring the legal representatives of the deceased to the Governor in Council for redress.

THIS was an application for the exercise of the High Court's criminal revisional jurisdiction under section 439 of the Criminal Procedure Code (Act X of 1882).

Two persons, Mahomadsháh Rahimansháh and Nabisháh Rahimansháh, were convicted by the Sessions Judge of Sátára of the offence of criminal breach of trust, and sentenced each to one year's rigorous imprisonment and a fine of Rs. 1,000.

Against the said convictions and sentences both the accused, Mahomadsháh and Nabisháh, appealed to the High Court.

On 18th August, 1894, and after the appeals had been filed in the High Court, Nabisháh died.

\* Application for Criminal Revision, No. 229 of 1894.