

## APPELLATE CIVIL.

*Before Mr. Justice Candy, on reference from Mr. Justice Tynbji and  
Mr. Justice Whitworth.*

1901.

January 7.

MANCHARAM (ORIGINAL DECREE-HOLDER), APPLICANT, v.

FAKIRCHAND (ORIGINAL OPPONENT), OPPONENT.\*

*Civil Procedure Code (Act XIV of 1882), section 331—“Possession”—  
Constructive possession—Obstruction to possession in execution of decree—  
Construction.*

The word “possession” as used in section 331 of the Civil Procedure Code (Act XIV of 1882) is not limited to actual physical possession. It includes also constructive possession, such as possession by a tenant. So held by Candy and Tynbji, JJ., Whitworth, J. dissenting.

Where premises sought to be recovered in execution are in the occupation of tenants and the landlord of such tenants obstructs the officer executing the decree, the claim of such landlord may be investigated under section 331 of the Civil Procedure Code.

APPLICATION under section 622 of the Civil Procedure Code (Act XIV of 1882).

Mancharam Jaychand obtained a decree for possession of a certain shop against the tenants in occupation. On proceeding to execute this decree, he was obstructed by his brother Fakirchand and he thereupon applied to the Court under section 328 of the Civil Procedure Code (Act XIV of 1882) to have the obstruction removed.

Fakirchand alleged that the shop was joint family property in which he had an equal interest with his brother Mancharam, and that the tenants against whom Mancharam had obtained the decree were the common tenants of both. He therefore contended that Mancharam was not entitled to recover sole possession in execution.

The Subordinate Judge held that section 331 of the Civil Procedure Code applied, and he directed that Fakirchand's claim should be numbered and registered as a suit between Mancharam as plaintiff and Fakirchand as defendant under that section (331).

Against this order Mancharam applied to the High Court

\* Application under Extraordinary Jurisdiction No. 170 of 1900.

under its extraordinary jurisdiction, contending that section 331 did not apply and that the order made under it was wrong, that the section only applied where the obstruction was caused by a person actually in possession and that Fakirchand was admittedly not in such possession.

A rule *nisi* was granted calling on Fakirchand to show cause why the order of the Subordinate Judge should not be set aside.

The rule came on for hearing in the first instance before a Division Bench (Tyabji and Whitworth, JJ.).

*G. S. Rao* for applicant in support of the rule:—Section 331 does not apply where the person who offers resistance to the execution of the decree is not himself in actual physical possession of the property awarded by the decree. Sections 328, 329, 330 and 332 support this construction. Fakirchand *claims* to be put into possession of the shop in dispute, but he *is* not now in possession. Section 331 contemplates the case of a person who alleges that he is in possession and not of one who merely *claims* possession. The order is wrong as the section does not apply—*Rakhal Churn Mundul v. Watson & Co.*<sup>(1)</sup>

*H. C. Coyaji* for opponent showed cause:—Mancharam and Fakirchand are undivided Hindu brothers. The tenants of the shop who were the defendants in the suit are the tenants of both. Fakirchand is their landlord as well as Mancharam. Mancharam sued and obtained a decree without making Fakirchand a party. But he could not in that way deprive Fakirchand of his rights as landlord. Fakirchand is in constructive possession through his tenants.

The word "possession" in section 331 does not mean merely actual physical possession. It includes constructive possession. It is more comprehensive than the corresponding sections in previous Codes. Compare section 331 of Act X of 1877 and section 229 of Act VIII of 1859—*Moulakhan v. Gorikhan*,<sup>(2)</sup> *Bapujirao v. Fatesing*,<sup>(3)</sup> *Govinda v. Kesava*,<sup>(4)</sup> *Chinnasami v. Krishna*.<sup>(5)</sup>

(1) (1883) 10 Cal. 50.

(2) (1890) 14 Bom. 627.

(3) (1896) 22 Bom. 967.

(4) (1880) 3 Mad. 81.

(5) (1881) 3 Mad. 104.

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TYABJI, J.:—The only question in this case argued before us was whether the word “possession” in sections 328 and 331 of the Civil Procedure Code ought to be confined to actual physical possession as contradistinguished from constructive or symbolical possession.

The facts of the case are extremely simple. It appears that the petitioner obtained a decree for possession of a shop against Lilabhai Dayabhai and Chagoobhai Dayabhai. In execution of the decree the petitioner was obstructed in obtaining possession by the opponent Fakirchand Jaichand. The petitioner thereupon complained to the Court and prayed for the removal of the obstruction under section 328. On inquiring into the matter the Court framed the following issues, namely: Is the opponent in possession of the disputed property? If so, is he so *bona fide* and on his own account?—and it found that the opponent claimed possession *bona fide* on his own account, and ordered the claim of the petitioner to be registered as a suit under section 331 of the Civil Procedure Code.

Against this last mentioned order the petitioner has applied under the extraordinary jurisdiction of this Court, contending that the order of the Subordinate Judge was wrong, inasmuch as the opponent was not in actual physical possession of the shop, but merely claimed constructive possession through the judgment-debtors. As there appears to be no express reported decision on the point, and as the matter appeared to us of some importance, we took time to consider our judgment.

Having now fully considered the provisions of sections 328—332, I see no sufficient ground to interfere with the order of the Subordinate Judge. I can see nothing in those sections to limit the word “possession” to actual physical possession. Possession of immoveable property is not the less real or actual because it is enjoyed through tenants, servants or members of one’s family. Indeed, actual physical possession can exist in but very few cases and that too to a very limited extent even in regard to a small piece of land. Can it be argued that a man is not in possession of a house and garden because he occupies only a small room, the rest being in the occupation of his servants and members of his family? Can it be said that the owner of a

bungalow at Mátherán or Mahábaleshwar is not in possession of that bungalow simply because he lives in Bombay, leaving the property generally in charge of his malee? Again, is not a man in possession of a house if the actual occupant is his tenant, who recognizes his title and pays him rent? It seems to me that we should be doing great injustice if we held that the servants or tenants or members of the owner's family may be dispossessed in execution of a decree to which he was no party, without his being entitled to come in under section 331 and having his claim investigated under the provisions of that section. No case has been cited to us in support of such a contention, and on the contrary I think that the cases of *Moulakhan v. Gorikhan*<sup>(1)</sup> and *Bapaji Rao v. Fatesing*<sup>(2)</sup> support the contrary view. If the contention of the petitioner were correct, the Court would be bound to reject the claim of the objector as soon as it was found that he was not in actual physical possession; but we find it distinctly laid down in section 331 that this is not so and that the enquiry under that section is not to be confined to the question of mere physical possession, but is much wider in its scope. This is inconsistent with the petitioner's contention, for otherwise we should have to hold that a party may illegally get a claim registered as a suit under the false pretence that he was in actual possession and may yet legally support it afterwards, not by possession, but by title. This anomaly is partly or wholly avoided by holding that "possession" in these sections has the wider general meaning, and that it includes constructive and symbolical possession quite as much as actual physical possession. Moreover, a decree for possession is not necessarily passed against a person in actual physical possession of the property. It is often passed against a person who is only in possession through his tenants. How is such decree to be executed, unless the word "possession" includes both physical as well as symbolical possession?

For these reasons I would not interfere with the order of the Subordinate Judge and would dismiss the application with costs; but as my learned colleague Mr. Justice Whitworth takes a

(1) (1890) 14 Bom. 627.

(2) (1896) 22 Bom. 967.

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different view, I think it better that the question should be referred to a third Judge under section 575 of the Civil Procedure Code.

WHITWORTH, J.—The only question in this case is whether the word “possession” in section 331 of the Civil Procedure Code is limited to actual physical possession or extends to the possession of a landlord through his tenants. I think the limited construction is the correct one.

In the first place the provision of law in question is one relating only to the execution of decrees, and a Court executing a decree is concerned only with the parties to the suit and others who may be found in actual and visible possession of the land in dispute.

Secondly, the section itself contemplates that in such a case as the present, it is the tenant and not the landlord whose claim to be in possession is to be recognized. For it uses the words “claiming in good faith to be in possession of the property on his own account or on account of some person other than &c.,” and not any such expression as “claiming in good faith to be in possession himself or through some person other than &c.”

Thirdly, to hold that a person not in actual possession of the land may avail himself of the provision of section 331 would, I think, work injustice: for it would place a claimant in the favourable position of defendant, when according to ordinary principles of law he ought to be in the position of plaintiff and be bound to prove his title. A person claiming in good faith to be landlord in respect of certain land often has to sue to obtain possession of it; but according to the construction sought to be put upon section 331 in this case, such a person would, in the event of a decree being obtained against the person he alleges to be his tenant, merely have to defend his title and not prove it. The *onus* would be on the decree-holder to show that his title was better than the claimants.

The cases of *Moulakhan v. Gorikhan*<sup>(1)</sup> and *Bapujirav v. Patesing*<sup>(2)</sup> have been cited in support of the claimant's conten-

(1) (1890) 14 Bom. 627.

(2) (1896) 22 Bom. 967.

tion. But those cases go no further than to establish that when a case has been registered as a suit under section 331, the whole question of title comes under trial. That, no doubt, is the law since the amendment in 1879 of the corresponding section of the earlier Code. But the question here is not as to the scope of the trial, but whether the case was one to be registered as a suit under section 331 at all. Substantially the question is whether the claimant is to be the plaintiff or defendant in the issue between him and the decree-holder. If the plaintiff's claim was rightly registered as a suit under section 331, then the claimant—the inconvenience of the phraseology is pointed out in *Mahabir Prasad v. Parma*<sup>(1)</sup>—will be defendant; if not, he must bring a suit to establish his claim.

I consider that the possession claimed by the opponent is not such possession as is contemplated by section 331 of the Civil Procedure Code, and would make the rule absolute with costs.

The case was then referred to Candy, J., under section 575 of the Civil Procedure Code (XIV of 1882), before whom it was re-argued.

*Gunpat Sadashiv Rao* for the applicant.

*H. C. Coyaji* for the opponent.

CANDY, J.:—I have heard this application under sections 575, 647, of the Civil Procedure Code. I may remark that no point was taken in the argument before me with reference to the explanation added to section 647 by Act VI of 1892. That explanation is that section 647 does not apply to applications for the execution of decrees, which are proceedings in suits.

The present dispute has arisen with regard to a point of law in reference to section 331 of the Civil Procedure Code, which is to be found in Chapter XIX—Of the execution of Decrees. Section 575 applies to a difference of opinion on a point of law between two Judges composing a Bench which hears an appeal. Section 622 (under which the present application was made to this Court) refers to cases in which no appeal lies to this Court. Section 647 provides that the procedure herein prescribed shall be follow-

(1) (1892) 14 All. 417.

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ed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction other than suits and appeals. Having regard to the explanation to section 647 above quoted, it is questionable whether section 575 is applicable. It would appear under section 36 of the Letters Patent that the proper procedure would be for the opinion of the senior Judge to prevail.

The point in dispute arose in the following manner. The petitioner to this Court, Mancharam, obtained as plaintiff a decree for possession of a certain shop against his tenants, his defendants Lilabhai and Chaganbhai, sons of Dahyabhai.

In execution of that decree Mancharam was obstructed by his brother Fakirchand *alias* Manekchand. Mancharam complained to the Court under section 328.

The Subordinate Judge summoned Fakirchand. On 16th June, 1900, the Subordinate Judge framed the issue—Is the opponent Fakirchand in possession of the disputed property? If so, is he so *bona fide* and on his own account?

On the same day the Subordinate Judge at the instance of the opponent's pleader framed the following additional issue—Whether without going into the inquiry regarding the first issue, the application of the applicant should be registered as a suit?

On the 30th June, 1900, the Subordinate Judge examined the opponent, Fakirchand *alias* Manekchand, who deposed that the shop, the subject of Mancharam's decree, was the joint property of himself and his brother Mancharam; that the rent-note on which Mancharam had obtained the decree for possession against the tenants was passed in Samvat 1923 (A.D. 1867) when he (Fakirchand) was a minor, and that he and his brother Mancharam, and their mother, jointly took the rent of the property. He added: "I claim possession on my behalf and not on behalf of the judgment-debtor." The Subordinate Judge thereupon proceeded to pass the following order:

"On examining the opponent I find that he claims possession *bona fide* on his own account. I therefore decide the first point in the affirmative. As to the second I also find that unless the Court is satisfied that the opponent's application is *bona fide* it cannot be registered as a suit.

"I therefore order the claim of the decree-holder to be registered as a suit under section 331 of the Civil Procedure Code."

Against that order the plaintiff Mancharam filed the present application under section 622, mainly on the ground that the opponent Fakirchand having admitted that the shop in dispute is in the actual possession of the judgment-debtors, and not in his own possession, section 331 does not apply.

This was the point on which the learned Judges who heard the application differed.

Mr. Justice Tyabji held that there was nothing in sections 328—332 to limit the word "possession" to actual physical possession, and therefore he was in favour of not interfering with the order of the Subordinate Judge. Mr. Justice Whitworth held that the word "possession" in section 331 is limited to actual physical possession and does not extend to the possession of a landlord exercised through his tenants.

In deciding the above question as regards its applicability to the present case it is necessary to bear in mind the facts of the case. It is clear that the opponent Fakirchand claims to be jointly interested with the landlord decree-holder-plaintiff in the lease of the shop to the tenant-defendants, though he was not, owing to his minority, a party to the rent-note on which the landlord obtained a decree in ejection against the tenants. Can he in such a decree for ejection claim to intervene in execution, so that this title as joint-owner with his brother may be investigated, and if he is successful the Subordinate Judge may put him into joint possession with his brother? That is the utmost that he can claim, if successful, for his allegation is that he and his brother (and their mother) were jointly receiving the rent. Or should the Subordinate Judge have refused to register the claim as a suit, leaving opponent to establish his rights as joint-owner with the plaintiff in a separate suit against his brother either for partition or for such other relief as would safeguard his alleged rights as joint-owner of the shop?

Sections 328—335 of the Civil Procedure Code come under head H—Of resistance to execution—in Chapter XIX. Section 328 provides that if the Court's officer is resisted or obstructed by any person the decree-holder may complain. There is no indication in that section as to the nature of the resistance or obstruction, but clearly there must be some overt act of opposition

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to the Court's officer on the part of some one who is actually present. Sections 329 or 330 refer to cases in which the Court is satisfied that such obstruction or resistance was occasioned by the judgment-debtor or by some person at his instigation. It is not contended that such was the case here. Plaintiff in his affidavit alleged that opponent unsuccessfully tried to intervene in the suit, and opponent in his deposition before the Subordinate Judge alleged that the defendants in the suit contended that he (opponent) should be made a party; but apparently the Subordinate Judge who tried the suit refused to allow this to be done, as opponent was not a party to the rent-note on which plaintiff claimed to eject the defendant-tenants. Opponent was apparently fighting for his own hand, and not at the instigation of the tenants of the shop. Sections 329-330 were therefore not applicable. Was section 331 applicable? Does the opponent claim to be in possession of the shop on his own account or on account of some person other than the judgment-debtor? At first sight this should apparently be answered in the negative. What he claims is that the tenants had been in possession on the account jointly of himself and the nominal landlord in whose name the rent-note had been passed. The words of the section allow the obstructor to say: "I am in possession on my own account or on account of some person other than the judgment-debtor." But they do not apparently allow him to say: "The judgment-debtor is in possession on my account, or jointly on my account and on account of the decree-holder, and therefore my claim must be registered as a suit between the decree-holder as plaintiff and me as defendant." Sections 329, 330 and 331 do not appear to be exhaustive, so that if the case does not fall within sections 329-330, then the obstructor's claim must be investigated under section 331, whatever may be the nature of his interest claimed in the property in dispute. How far, then, do the decided cases bear out this view?

In *Moulakhan v. Gorikhan*,<sup>(1)</sup> Birdwood, J., pointed out the change which had been made in the Code of 1877, section 331, by the amending Act XII of 1879, the provisions of which are

(1) (1890) 14 Bom. 627.

re-enacted in the present Civil Procedure Code. "The intention of the Legislature in so altering the section was clearly to enlarge the powers of the Courts in the investigation of claims under section 331. Any question of title arising between the contending parties in connection with their right of possession may now be finally determined in such investigation as in an ordinary action on ejectment. The order made under section 331, whether for executing or staying execution, has now the force of a decree determining the title and the right of possession, and it is not intended that the plaintiff should be forced to a fresh suit, or should have the right to bring a fresh suit, if the decree is against him." Jardine, J., took the same view, and held that whatever the law may have been when the Code of 1877 was in force, the Code of 1882 shows that the investigation is not now to be confined to possession.

The above ruling was approved of in the subsequent case (1896) of *Bapujirao v. Fatesing*<sup>(1)</sup> in which plaintiff had obtained a decree for possession of certain land against his tenant Bayaji. On proceeding to execute his decree he was resisted by the defendants, who alleged that they were entitled to the land as the nearest heirs of the last owner, one Jotyaji. It does not appear that they claimed to have been in possession since the death of Jotyaji, either themselves or through their tenants. Plaintiff complained of the defendants' obstruction, and his application was registered as a suit under section 331. On investigation the Subordinate Judge dismissed the suit, holding that the plaintiff's title was not proved, but on appeal to the District Court, the Assistant Judge held that the plaintiff was in possession of the land as against the defendants, and that they had failed to prove a better title than the plaintiff. This view was affirmed in second appeal by the High Court.

As I was a party to the judgment I may remark that in my opinion the first paragraph of the judgment requires to be more accurately stated. It is there remarked that the possession of the plaintiff through his tenant Bayaji was "for the purpose of section 331, Civil Procedure Code, as good as actual possession

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(1) (1896) 22 Bom, 967.

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—*Bhyrub Sircar v. Sham Manjee*<sup>(1)</sup>. What was decided in the Calcutta case, just quoted, was that possession by receipt and enjoyment of rent is as good in law as actual occupation, and there is no reason to hold that the provisions of section 230 apply to those cases only in which the party seeking for relief under that section was in personal occupation. Now section 230 of Act VIII of 1859 refers to cases in which a person other than the defendant dispossessed in execution, disputes the right of the decree-holder to dispossess him, on the ground that the property was *bona fide* in his possession on his own account or on account of some other person than the defendant, and that if included in the decree he was not a party to the suit. If in such a case it appeared to the Court that there was probable cause for making the application, it was to be numbered and registered as a suit between the applicant as plaintiff and the decree-holder as defendant, just as if a suit for the property had been instituted by the applicant against the decree-holder. The provisions of the above section 230 of Act VIII of 1859 are now to be found in section 332 (not 331) of the present Code, the procedure of the intervening Code of 1877 being similar, except that the suit between the applicant as plaintiff and the decree-holder as defendant was to be as if a suit had been instituted under section 9 of the Specific Relief Act of 1877; while now under section 332 of the present Code, instead of the claim of the applicant being investigated as if it was a suit, the Court, if it finds that the ground mentioned in the first paragraph of the section exists (possession of the applicant on his own account or on account of some person other than the judgment-debtor), it shall make an order that the applicant recover possession of the property, and if it does not find as aforesaid, it shall dismiss the application. There are two important provisions to this section 332; first, that in hearing applications under this section the Court shall confine itself to the grounds of dispute above specified; *i.e.* *bona fide* possession on his own account &c. (this was inserted for the first time in the Code of 1877 when the suit was to be as one instituted under section 9 of the Specific Relief Act); secondly, that the

(1) (1871) 15 W. R. 70.

person against whom an order is passed under this section may institute a suit to establish the right which he claims to the present possession of the property. A similar provision is to be found in section 335, which relates to cases in which the purchaser of any immoveable property sold in execution of a decree is resisted by, or dispossesses any person other than the judgment-debtor claiming in good faith a right to the *present possession* thereof; the Court is to pass such order as it thinks fit, and the person against whom such order is passed may institute a suit to establish a right which he claims to the *present possession* of the property.

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The above considerations lead to the conclusion that although the decision in *Bhyrub Sircar v. Sham Manjee* (1) may have been correct in regard to the provision of section 230 of Act VIII of 1859, according to which the matter in dispute was to be investigated in the same manner as if a suit for the property had been instituted by the applicant against the decree-holder, the same ruling does not necessarily hold good with regard to section 332 or 335 of the present Code, in which the investigation is not as if a suit had been instituted and the right claimed is confined to the right to present possession.

But when we come to consider the provision of section 331 of the present Code (answering to section 229 of Act VIII of 1859) the case is different. We find that the claim is to be investigated as if a regular suit were instituted by the decree-holder against the claimant. Act XII of 1879 cancelled the provisions of Act X of 1877 as regards this section also; and the law reverted to what it was under section 229 of Act VIII of 1859. But if (to apply the words of Birdwood, J., above quoted) any question of title arising between the contending parties in connection with their right of possession is to be determined in the suit under section 331, then here Fakirchand may fairly claim that if the tenants under the rent-note are to be ejected, plaintiff should not obtain sole possession, but should be put into joint possession with him (Fakirchand). This was the view taken in *Bapujirao v. Fatesing* (*supra*). The issue sent down by the Chief Justice and myself

(1) (1871) 15 Cal. W. R. 70.

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was not, Are the claimants (the defendants) in present possession of the property? but, "Are the defendants entitled to succeed to Jotyaji's property?" No doubt, as pointed out by Mr. Justice Whitworth, the two rulings of this Court, quoted above, cannot be said to directly establish more than that when a case has been registered under section 331, the whole question of title comes under trial, while the question here is not as to the scope of the trial, but whether the case was one to be registered as a suit under section 331 at all. But if on the face of the provisions of section 331 the claimant in the two Bombay cases had no right to intervene at all, the point would hardly have been overlooked by the Judges who decided those cases. It was obviously present to our minds in the later of the two cases, though, as shown above, the proposition in the first paragraph of the judgment is not accurately stated.

Another point alluded to by Mr. Justice Whitworth is that of *onus*. Under section 331 the decree-holder is plaintiff, on whom the burden of proof would naturally lie. This point was discussed in 1883 in the case of *Rakhal Churn v. Watson and Company*<sup>(1)</sup> with reference to the corresponding section 229 in Act VIII of 1859. Garth, C.J., said (pages 54-55):

"Whether the claimant really had or was entitled to the possession which he claimed under section 229 was a question to be tried in this suit; and the plaintiffs, as I consider, fulfilled *prima facie* the *onus* which the law casts upon them, when they proved that the judgment-debtor, whose rights they had acquired, held possession as against the claimant at the time when the latter made his claim.

If this was not so, section 229 would be productive of the greatest injustice. A man who holds possession of property has a right to retain possession until some other person can show a better right to it. But if a man who merely claims possession under section 229, without in fact being in possession, is to be entitled in law to possession as against the actual possessor, unless the latter proves his title, the consequences would be serious indeed. A claimant under that section, although he had no possession, would then be in a better position than the actual possessor.

The section may often operate unjustly enough against the decree-holder as it is; but the injustice would be far greater if the appellant were right in his contention."

(1) (1883) 10 Cal. 50.

It is clear from the above judgment that it was taken for granted that a claimant under section 229 need not be in actual personal occupation when he makes his claim and becomes defendant in the suit, just as was held in *Bhyrub Sircar v. Shām Manjee*,<sup>(1)</sup> when he makes his claim under section 230 and becomes plaintiff in the suit.

To apply those principles to the present case: the claimant (the present opponent) asserts that if the tenants are ejected, then he is entitled to joint possession with his brother (the plaintiff). The plaintiff has fulfilled *prima facie* the *onus* which the law casts upon him, when he shows that the rent-note was passed to him alone and that he alone has obtained a decree in ejectment on that rent-note. The *onus* is thus shifted on to the claimant to prove what he asserts, that he was interested in the rent-note and received jointly with the plaintiff the rent, and is thus now entitled on the tenants being ejected to joint possession with the plaintiff. The fears as to the plaintiff-decree-holder being put in an unfair position would appear to be groundless.

There is another case (of 1880), *Govinda Naik v. Kesava*,<sup>(2)</sup> in which the lands in dispute were in the possession of the first defendant's tenants who were bound by the decree. In execution of the decree the Court officer was obstructed by Kesava, the brother of the first defendant, who claimed as a member of a 'tarwad' of which the first defendant was 'karnavan.' Kesava was not in actual personal occupation, but the plaintiff having obtained an ejectment decree against Kesava's co-sharer and also the tenants of that co-sharer, Kesava, on account of his joint interest with the first defendant, claimed to intervene in execution under section 331 (as modified by Act XII of 1879?). It was held that he could do so. "Whether such claim is valid or not, and whether he should have obstructed or not, there appears to have existed a claim which required the Munsiff to number and register the application of the plaintiff as a suit between plaintiff and Kesava" under section 331. It was suggested in the above case that the claim of Kesava was not in good faith under section 331 by reason of his interest in the lands in dispute being joint with the first defendant. But their Lordships held:

(1) (1871) 15 Cal. W. R. 70.

(2) (1880) 3 Mad. 81.

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“It seems to us that if Kesava had any interest in the lands C, either as a member of the family or otherwise, which would be affected if plaintiff got possession of C, and if he was in possession in such case, Kesava in respect of his own interest (though joint with the defendant) would claim to be in possession of the property on his own account within section 331. His joint interest with the defendant could not prevent him from claiming in good faith in respect of his own interest.”

In a similar case under section 332—*Cooverji Hirji v. Dewsey Bhoja*<sup>(1)</sup>—Starling, J., held (in 1893) that the claimants who claimed to be in joint possession of the property in dispute with their father, the judgment-debtor, could not be said to be in possession of the land of which they were dispossessed *on their own account* within the meaning of section 332. Reference was apparently not made to the Madras decision above noted.

In 1873 Glover, J., held in *Asgur Ali v. Asgur Ali*<sup>(2)</sup> that possession through a mortgagee (who was in actual possession) was sufficient possession for the purpose of the mortgagor bringing a claim under section 230, Act VIII of 1859 (corresponding with section 332 of the present Civil Procedure Code).

So too in 1874 in *Banee Madhub Dutt v. Nund Lall Mojoomdar*,<sup>(3)</sup> in which it was stated that the person actually in possession was a tenant of the claimant, Markby, J., said: “I cannot lay down as an absolute rule, without restriction, that a person who has parted with the actual occupation of the land to another might not take the advantage of section 230 (Act VIII of 1859). It is quite obvious . . . . that there are many cases where it would be extremely inconvenient if the parties could not do so.”

There is thus a current of decisions in favour of the view that the words “claiming to be in possession on his own account of some person other than the judgment-debtor” may be taken as including a person who is not in personal occupation of the land but who claims to be in possession through the person who is in actual possession. Possession by a gardener or a servant is of course the possession of the owner (*cf.* the remarks of Sir C.

(1) (1893) 17 Bom. 718.

(2) (1873) 20 Cal. W. R. 373.

(3) (1874) 22 Cal. W. R. 123.

Sargent in *Goma v. Narsingrao*<sup>(1)</sup> and see Addison on Tort, 7th Edn., page 264). But possession by a tenant is different : where the alleged tenant is a third party and not the judgment-debtor, and where he is said to be in possession as the tenant of a landlord, who is also not a party to the suit, then the obstruction to the Court's officer would naturally and probably be made by the tenant who is on the spot, and he would then be the person who would be summoned under section 328, and who would be the claimant under section 331 claiming to be in possession on account of his landlord who is other than the judgment-debtor. When such a claim is registered as a suit the person alleged to be the landlord will naturally be joined as a party, and the dispute will then be thoroughly investigated. But where the tenant is the judgment-debtor, and is thus debarred from making a claim under section 331, and the third party who claims to be the landlord of the tenant in possession actually obstructs the Court's officer, then the current of decisions is in favour of the view that such third party is entitled to intervene under section 331.

In this view of the law I do not think that this Court would be justified in the exercise of its extraordinary jurisdiction in interfering with the Subordinate Judge's order or in holding that the Subordinate Judge was exercising a jurisdiction not vested in him by law, when he registered Fakirchand's claim as a suit, in which the decree-holder was to be plaintiff and Fakirchand defendant. At the most it was possibly an error of procedure. In any event the dispute will have to be fought out between plaintiff and Fakirchand. The only effect of the Subordinate Judge's order is that there will not be a fresh suit with a fresh institution fee, and plaintiff will remain in his position as plaintiff; but as pointed out above, he will not be injured thereby in regard to the question of onus.

The rule is therefore discharged with costs. If my doubts as to such a case being referable to a third Judge are correct, and my remarks on the merits thus become mere *obiter dicta*, the result will be the same.

*Rule discharged.*

(1) (1895) 20 Bom. 260 at p. 264.

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v.  
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