

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Starling.

1902. MAHOMED ISUB AND ANOTHER (ORIGINAL DEFENDANTS 2 AND 3),
 Jan 11, 22. APPELLANTS, v. BASHOTAPPA BIN TAKAPPA (ORIGINAL PLAINTIFF),
 RESPONDENT.*

* Civil Procedure Code (Act XIV of 1882), section 331—Specific Relief Act (I of 1877), section 9—Suit for possession—Execution of decree—Obstruction—Application for removal of obstruction registered as a suit—Questions arising in such suit.

In the case of a claim numbered and registered under section 331 of the Civil Procedure Code (Act XIV of 1882) as a suit between a decree-holder and an obstructing claimant, the only issues arising are whether the person obstructing was in possession of the property in question on his own account or on account of some person other than the judgment-debtor (*i. e.*, the defendant in the original suit). No question requiring the decree to be re-opened can be raised.

SECOND appeal from the decision of R. Knight, District Judge of Dhárwár, amending the decree of Ráo Sáheb H. V. Chinmulgund, Subordinate Judge of Gadag.

Suit for possession of certain land.

The land belonged originally to one Imam, who had four sons, viz., Muhomed Amin, Mahomed Isub, Mahomed Yasin and Ahmad Saheb (defendant). In 1894 Mahomed Amin leased the land to plaintiff, Bashotappa, for ten years. After the plaintiff had taken possession, Mahomed Isub and Mahomed Yasin ejected him, whereupon in 1896 the plaintiff sued them (Suit No. 677 of 1896) under section 9 of the Specific Relief Act (I of 1877) to recover possession, and obtained a decree against them. Ahmad Saheb obstructed the plaintiff in executing this decree, claiming to be entitled to the property. Ahmad Saheb's claim was thereupon, under section 331 of the Civil Procedure Code (Act XIV of 1882), registered as a suit by the plaintiff against Ahmad Saheb as defendant.

The defendant alleged *inter alia* that he and his three brothers lived as a united family and that as manager he was in possession of the land, which belonged jointly to him and his brothers; that Mahomed Amin had no authority to lease it to the plaintiff; and

* Second Appeal No. 425 of 1902.

that the decree obtained by the plaintiff in Suit No. 677 of 1893 against Mahomed Isub and Mahomed Yasin did not bind him, as he was not a party to the suit.

The Subordinate Judge found that the land was the joint property of the four brothers, and that Mahomed Amin (the plaintiff's lessor) had no authority to lease more than his share to the plaintiff. He therefore passed a decree giving the plaintiff joint possession with Ahmad Saheb, Mahomed Isub and Mahomed Yasin. In his judgment he said :

It therefore follows that Mahomed Amin and the defendant and their two brothers being all entitled to the property, and it not having been proved that Mahomed Amin was entitled to lease the property of the other co-owners and the said co-owners having now disputed Mahomed Amin's authority to lease the land and plaintiff's right to recover exclusive possession, the plaintiff is not entitled to anything more than getting joint possession with defendant and his brothers. The plaintiff is therefore entitled to step into Mahomed Amin's shoes and get joint possession along with his brothers. The defendant's pleader does not object to this course. I therefore find that plaintiff is entitled to get joint possession of the property in suit along with defendant and his brothers.

The plaintiff has obtained a decree in the former suit maintaining his possession and in execution of that decree he is entitled to get joint possession, and as the decree is being executed within three years from its date, I find that the claim is in time.

I therefore order that plaintiff do recover possession of the land in suit along with defendant and his brothers so far as the right, title and interest of Mahomed Amin are concerned, and I order that defendant should not cause obstruction to the delivery of this joint possession. Under the circumstances of the case I order each party to bear his own costs.

In appeal the question was raised as to whether Mahomed Amin had not derived the property from his uncle Mahomed Husen, and was not therefore the exclusive owner. The Judge accordingly remanded the case to the lower Court for inquiry as to whether the property had belonged to Mahomed Husen, and, if so, whether Mahomed Amin was his sole heir. In his remanding judgment he said :

As a preliminary remark, I am certainly disposed to accede to appellant's contention that assuming each brother to own a quarter interest in the land, plaintiff is, by virtue of his lease from one brother and of his successful suit against two others, entitled to at least three-fourths of the whole land. Isub and Yasin have taken no steps to question the summary decree under section 9 of the Specific Relief Act (I of 1877), and it is good as against them; and Amin does not repudiate the lease.

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The case that defendant sets up is that the land, whatever its original character, has become the joint family property of himself and his brothers.

I do not at the present stage discuss the evidence already adduced, for it is clear that the real question at issue lies rather between Amin and his brothers than between the present plaintiff and one brother. That question is whether the property was in the sole ownership of Mahomed Husen or whether it is the family property in which his brother's sons are entitled to share. To a suit of this character it is highly desirable that all the brothers should be parties; and I therefore direct that Mahomed Amin, Mahomed Isub and Mahomed Yasin be joined to the suit, the first-named as a plaintiff, if he wishes it, the others as defendants. It is needless to observe that the two latter will not be absolved hereby from the consequences of their failure to question the summary decree.

The lower Court, on remand, found both the above points in the negative. The Judge, in accordance with the opinion above stated in his judgment, varied the decree by awarding to the plaintiff joint possession with Ahmad Saheb only. In his judgment he said :

From what has already been said, however, it is clear that the plaintiff is entitled to joint possession with Ahmad only and not with all the brothers. The other three have already ceded their claims to him for the currency of his lease. I amend the decree of the lower Court accordingly.

Under the circumstances, I think it fair to direct that plaintiff, who has failed in his main contention regarding Amin's sole ownership, do bear his own appellate costs and two-thirds of respondent's.

Mahomed Isub and Mahomed Yasin (defendants 2 and 3) preferred a second appeal.

Shivram V. Bhandarkar for the appellants (defendants 2 and 3):—
The Judge having found that each of the brothers had a fourth share in the property, he ought to have awarded us joint possession with Ahmad Saheb (defendant 1) and the plaintiff, who of course is entitled to Mahomed Amin's share under his lease. We have always had possession and it was not necessary for us to bring a suit to get rid of the effect of the decree in the summary suit. It has been so ruled in similar cases under the Mamlatdars' Act (Bombay Act III of 1876): *Nemava v. Devandrappa*⁽¹⁾; *Ramchandra v. Ravji*.⁽²⁾ There is no limitation provided in the Limitation Act for a suit to set aside a decree in a summary suit except perhaps the ordinary provision of twelve years. That provision for the recovery of possession

(1) (1890) 15 Bom. 177.

(2) (1895) 20 Bom. 351.

cannot apply, and no cause of action accrues unless the party against whom the decree in the summary suit is passed loses his possession. Now that we have been brought on the record, and if it be necessary, the case may be remanded to determine the question of title: *Mowlakhan v. Gorikhan*.⁽¹⁾

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Narayan M. Samarth for the respondent (plaintiff):—We obtained a decree under section 9 of the Specific Relief Act (I of 1877) against the present appellants (defendants 2 and 3). This is a proceeding in execution of that decree. They cannot be allowed to question in execution our right to be restored to possession. The original defendant, Ahmad Saheb, can keep us out of possession only in so far as his one-fourth share is concerned. The title of our judgment-debtors cannot be gone into in the present case. The Judge should not have made them parties at all even with the reservation he made in doing so. Our lessor (Mahomed Amin) does not and cannot object, and the present appellants cannot obstruct us. We are entitled to execute our decree and obtain possession of the land except in so far as Ahmad Saheb's one-fourth share is concerned. We are also entitled to our costs of this second appeal from the present appellants.

BARRY, J.:—In this case the plaintiff having in a previous suit obtained a decree against two brothers, now appellants, for possession under section 9 of the Specific Relief Act, was resisted by a third brother, Ahmad Saheb, the original defendant in the present suit, and in accordance with section 331 of the Code of Civil Procedure (Act XIV of 1882) the claim was numbered and registered as a suit between the decree-holder as plaintiff and the obstructing claimant as defendant. The issues that properly arose in such a suit under the provisions of that section were whether the person obstructing was in possession on his own account or on account of some person other than the judgment-debtor; and no question of title between the plaintiff and his judgment-debtors requiring the decree against them to be re-opened could possibly be adjudicated upon in such a proceeding. The joinder of the judgment-debtors was admittedly an irregularity. But the lower

(1) (1890) 14 Bom. 627.

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Appellate Court abstained, or apparently intended to abstain, from consummating that irregularity by deciding on the title as between the decree-holder and the judgment-debtor.

We have been asked to remand the case in order that that question of title might now be investigated, and referred to the case of *Moulakhan v. Gorikhan*⁽¹⁾ beginning at page 627. But that was a case between a decree-holder and a person resisting execution claiming under a title *adverse* to the judgment-debtors; and obviously the question of title, as between those parties, necessarily required decision in that case. We think it is equally obvious that the question of title between the judgment-debtors and the decree-holder cannot be gone into in this case arising in execution of the decree, as it would enable the judgment-debtors to re-open in execution a decree purporting to be in force against them, and this was certainly never contemplated in section 331 or any other provisions of the Code, and would frustrate the provisions of section 9 of the Specific Relief Act.

We think, however, that the District Judge's judgment is so far open to objection as it seems to suggest that the question of the title between the plaintiff and the present appellants, his judgment-debtors, was susceptible of discussion in this case, and ought to be decided against the judgment-debtors on the strength of the decree for bare possession. All passages in that judgment which could bear the construction that they decided on the question of title between the plaintiff and the judgment-debtors must be regarded as *obiter dicta*, as no issue on that point could arise in this case.

We therefore think that the form of the decree should be that the plaintiff is entitled to execute his decree as against the claimant Ahmad Saheb (defendant 1), except in so far as concerns the one-fourth share which has been declared to be the property of Ahmad Saheb. Appellants to bear costs of this appeal. The order as to costs in the Court below remains undisturbed.

Decree varied.

NOTE.—Ahmad Saheb was found entitled to one-fourth of the land. His share was unaffected either by the lease granted by Mahomed Amin or by the decree obtained in the possessory suit against Mahomed Isub and Mahomed Yasin. The plaintiff, therefore, was awarded possession of three-fourths jointly with him.

(1) (1890) 14 Bom. 627.