

**(1868) 08 CAL CK 0010**

**Calcutta High Court**

**Case No:** Special Appeal No. 464 of 1868

Buhal Sing Chowdhry

APPELLANT

Vs

Behrilal

RESPONDENT

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**Date of Decision:** Aug. 26, 1868

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### **Judgement**

L.S. Jackson, J.

This case appears to me so clear that, but for the contrary opinion of Mr. Justice Mitter from whom I am sorry to dissent, I should have no doubt upon it. Section 229 is the last of four sections of the CPC which deal with cases of obstruction to execution of decrees for immoveable property.. The first of these Sections (226) is in these words : "If in the execution of a decree for land or other immoveable property, the officer executing the "same shall be resisted or obstructed by any person, the person in whose favour "such decree was made, may apply to the Court, at any time within one month "from the time of such resistance or obstruction. The Court shall fix a day for" investigating the complaint, and shall summon the party against whom "the complaint is made to answer the same. "Therefore, the section supposes obstruction or resistance actually made, and in such case it enables the party in whose favour the decree was made to complain of it, and from his complaint the party against whom it is made is to be summoned. It will be seen throughout these four sections that the person creating the obstruction is dealt with, as the party complained of or defendant, in the enquiry which is to follow, as the case may be. For Sections 227<sup>3</sup> and 228<sup>4</sup> deal with the case in which the party obstructing is a defendant in the suit, or some person at his instigation. u/s 227, in such case, the Court "may pass such orders as may be proper under the circumstances of the case;" and by Section 228, if the Court be satisfied in such case that the resistance or obstruction was without any just cause, it may commit the person obstructing to custody. u/s 229, we have a different class of cases, in which the person committing the obstruction is some one "other than the defendant claiming bond fide to be in possession of the property on his own account, or on account of some other person than the defendant," and in these cases the claim is to be numbered and registered

as a suit between the decree-holder, as plaintiff, and the claimant, as defendant; "and the Court shall proceed to investigate the claim in the same manner and with the like power, as if a suit for the property had been instituted by the decree-holder against the claimant," that is to say, reversing the position which the claimant (special appellant) has assumed in this case, for he seeks to be dealt with as plaintiff, whereas the claimant in Section 229 is to be the defendant. u/s 230, which deals with a distinct class of cases, viz., "where any person other than the defendant shall be dispossessed of any land or other immoveable property in execution of a decree," such person may apply to the Court; and if it appear that he has probable ground for his application, he is made plaintiff, and the decree-holder, defendant; and the matter is investigated as in a suit so framed. That section, it is admitted, will not apply in the present case, and the sole question is, whether the case can be brought u/s 229. It has been said that this objection has been taken now for the first time; it has also been said that the objection is technical, and one which cannot be entertained in conformity with Section 350 of the Code; and further, that to entertain it now would be an act of injustice to the special appellant, because if it had been taken in the first instance, the special appellant might have gone into the Mofussil, made actual resistance, and so committed a misdemeanour. With great deference, I think that the objection has not been taken too late. The application was not made u/s 229, but, at least as it was understood, and doubtless intended, u/s 230. The Munsiff in the first instance refused to entertain the application, holding that Section 230 was not applicable. The Judge decided that the application is entertainable not u/s 230, but under 229, and remanded the case for trial. In this state of things the decree-holder's remedy was, it may be said, by special appeal. But it has been held that a party is not bound to appeal specially to this Court under a mere interlocutory order, but may reserve such objection to be urged in the appeal against the final order. I think, if the opposite objection had now been made by the claimant, namely, that Section 230 did apply, it would be now in time.

2. Now, as to the observation that the objection is technical and not entertainable by reason of Section 350, the latter part of that section is in these words:-- "But no decree shall be reversed or modified, nor shall any case be "remanded to the Lower Court, on account of any error, defect, or irregularity" either in the decision or any interlocutory order passed in the suit not affecting " the merits of the case or the jurisdiction of the Court." The phrase "jurisdiction of the Court" is, no doubt, one which has been very much misapplied, but it is fully applicable in this case. The question which the special appellant desired to bring under the cognizance of the Court, was one which had not been investigated in the previous suit. It was one which, if he desired to have it investigated under ordinary circumstances he ought to have brought in the form of a suit commencing with a plaint on the prescribed stamp; but under the circumstances set forth in Section 229 or 230, he might be enabled to bring his case under the cognizance of the Court otherwise than by regular suit, but only under such circumstances. Section 230 admittedly would not

apply; and, therefore, the appellant claimed to bring his case u/s 229; and as the claim, in my opinion, could not be made u/s 229, I think the error was one which affected the jurisdiction of the Court to take summary cognizance of the case.

3. It is suggested that the word "resistance" does not necessarily mean resistance by force. I fully agree in this opinion. It is only necessary to bring the case within Section 226<sup>5</sup> and the following sections, that the officer of the Court shall have been obstructed and resisted, and in consequence of that the decree-holder shall have complained. That is not the case in the present instance. I think that the application was one which the appellant was not entitled to make. I am of opinion that the Judge's order was erroneous, and that the proceedings should be set aside.

4. I regret very much that my learned colleague is of a different opinion -; but under the 36th Section of the Letters Patent, I have no option but to give effect to my judgment, and to direct that the special appeal be dismissed with costs.

Mitter, J.

5. The plaintiff, now special appellant before us, preferred an application to the Munsiff of Behar, complaining that the defendants, Beharilal and Ganorilal, having obtained a decree against one Mitrajit Singh, were attempting unlawfully to interfere with his possession in execution of that decree. This application was rejected by the Munsiff, and on appeal to the Judge, the Munsiff was directed to deal with it under the provisions of Section 229, Act VIII of 1859. The Munsiff then gave a decree to the plaintiff, holding that the plaintiff was entitled to remain in possession as a mokurraridar, and that the defendants had no right to interfere with that possession in execution of the decree obtained by them against Mitrajit Singh. Against this decision, an appeal was preferred by the defendants to the Subordinate Judge of Patna, and that officer has reversed it, upon the ground, that the plaintiff has failed to show that the mokurrari pottah relied upon by him was ever delivered to him by his lessors.

6. The plaintiff appeals specially to this Court, but a preliminary objection has been raised before us, upon the ground, that the proceedings in the case are illegal, inasmuch as there was no complaint before the Munsiff that any resistance or obstruction had been offered to the officer who was deputed by the Court to execute the decree. I am of opinion that this objection is of a purely technical character, and as it appears that it was never taken before either of the Lower Courts, I would not entertain it at this late stage of the proceedings. Rightly or wrongly, the case has been already numbered and registered as a regular suit between the parties, and has been dealt with as such by both the Lower Courts. Nor has it been suggested to us that the Munsiff could not have tried this suit, either with reference to the nature of the relief sought for, or with reference to the value of the property involved in it. Under such circumstances, it is clear that the objection is not one which affects either the merits of the case or the jurisdiction of the Court by

which it has been tried; and this Court is not competent, in my opinion, to entertain such an objection under the provisions of Section 350 of the Code. Whether there was a complaint before the Munsiff under the provisions of Section 260<sup>6</sup> or not, it is too late now to enquire. The fact, however, is evident, that whilst the defendants were trying to obtain possession of the property decreed to them, the plaintiff came forward and complained against them before the Munsiff, instead of taking the law into his own hands. If this objection had been taken earlier, the plaintiff might have gone back and resisted the officer who was deputed to deliver possession to the defendants, although I am far from saying that such a course would have been either legal or proper. At any rate, the objection amounts to nothing more than a plea that the plaint has not been engrossed upon a full stamp; but such a plea, I apprehend, is not within the jurisdiction of this Court to entertain when the case has been tried upon its merits by both the Lower Courts. I would, therefore, overrule this objection, and try this special appeal upon the merits.

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<sup>1</sup>[Sec. 229:--If it shall appear to the satisfaction of the Court that the resistance or obstruction to the execution of the decree has been occasioned by any person other than the defendant, claiming bond fide to be in possession of the property on his own account, or on account of some other person than the defendant, the claim shall be numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant, and the Court shall, without prejudice to any proceedings to which the claimant may be liable under any law for the time being in force for the punishment of such resistance or obstruction, proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of this Act, and shall pass such order for staying execution of the decree, or executing the same, as it may deem proper in the circumstances of the case.]

Obstruction by a bond fide claimant other than the defendant.

<sup>2</sup>[Sec. 230:--If any person other than the defendant shall be dispossessed of any land or other immoveable property in execution of a decree, and such person shall dispute the right of the decree-holder to dispossess him of such property under the decree on the ground that the property was bond fide in his possession on his own account, or on account of some other person than the defendant, and that it was not included in the decree, or, if included in the decree, that he was not a party to the suit in which the decree was passed, he may apply to the Court within one month from the date of such dispossession; and if, after examining the applicant, it shall appear to the Court that there is probable cause for making the application, the application shall be numbered and registered as a suit between the applicant as plaintiff, and the decree-holder as defendant, and the Court shall proceed to investigate the matter in dispute in the same manner and with the like powers as if a suit for the property had been instituted by the applicant against the

decree-holder.]

Procedure in certain cases if person dispossessed of immoveable property dispute the right of decree-holder to be put in to possession of such property.

<sup>3</sup>[Sec. 227:--If it shall appear to the satisfaction of the Court that the obstruction or resistance was occasioned by the defendant or by some person at his instigation, on the ground that the land or other immoveable property is not included in the decree or on any other ground, the Court shall enquire into the matter of the complaint, and pass such order as may be proper under the circumstances of the case.]

Obstruction by defendant.

<sup>4</sup>[Sec. 228:--If the Court shall be satisfied, after such investigation of the facts of the case as it may deem proper, that the resistance or obstruction complained of was without any just cause, and that the complainant is still resisted or obstructed in obtaining effectual possession of the property adjudged to him by the decree, by the defendant or some person at his instigation, the Court may, at the instance of the plaintiff and without prejudice to any proceedings to which such defendant or other person may be liable under the law for the time being in force for the punishment or such resistance or obstruction, commit the defendant or such other person to close custody for such period not exceeding thirty days, as may be necessary to prevent the continuance of such obstruction or resistance.]

How defendant may be dealt with, if he persists in obstructing the complaint.

<sup>5</sup>[Sec. 226:---If in the execution of a decree for land or other immoveable property, the Officer executing the same shall be resisted or obstructed by any person, the person in whose favour such decree was made, may apply to the Court at any time within one month from the time of such resistance or obstruction. The Court shall fix a day for investigating the complaint, and shall summon the party against whom the complaint is made to answer the same.]

Obstruction to execution of decree for immoveable property.

<sup>6</sup>[Sec. 260:-- The certificate shall state the name of the person who at the time of sale is declared to be the actual purchaser, and any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs.]

Certificate to state the name of actual purchaser.