

**(1872) 02 CAL CK 0006**

**Calcutta High Court**

**Case No:** Special Appeal, No. 996 of 1871

Kunku Shaw and  
Another

APPELLANT

Vs

Amjad Ali

RESPONDENT

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**Date of Decision:** Feb. 20, 1872

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### **Judgement**

Markby, JJ.

For the purpose of deciding the question which is now before us, namely, whether the present suit will lie, I will assume that the facts, which the plaintiff is desirous to establish in proof, have been alleged at the proper time and in the proper manner in the plaint or otherwise; and that he has also stated, with sufficient clearness and accuracy, the nature of the decree which he seeks to obtain. In other words, I will consider the question independently of any technical rules as to the form in which the allegations in a suit ought to be made, or the plaint drawn. The case of the plaintiff, as I understand it, is that he was the proprietor of certain land which was let to one Man Sing; and that whilst Man Sing was in possession, and whilst there were still some few months to run before his tenancy expired, a creditor took out execution against him, and put up for sale the future profits of the property (wasilat) which would come into the hands of Man Sing, alleging that the interest of Man Sing was not, as the plaintiff says, that of tenant, but that of a usufructuary mortgagee. The plaintiff says that upon this he put in a claim under s. 246, but that his claim was rejected; and the present suit is said to be brought under that section to establish the truth of the plaintiff's assertion, that Man Sing's interest in the property was that of a tenant only, and not that of a usufructuary mortgage. It is stated by the plaintiff that, on the expiration of Man Sing's settlement, he re-let it to a fresh tenant; so that whatever may have been the nature of Man Sing's interest, there is no assertion by any one that that interest is now in existence. The terms of the order of adjudication of the plaintiff's claim are not stated; nor are the terms of the order for attachment and sale; but the plaintiff states that the latter did not specify any period of time during which the profits of the land were attached.

2. Now, putting all or any part of the above facts into the most formal shape possible, they do not seem to me to present any ground for maintaining a suit. It is not attempted to assert that they lay the foundation for a declaratory decree under the general law, but it is contended that the plaintiff's claim in execution having been disallowed, he is at liberty to bring a suit "to establish his right" u/s s. 246. Certainly the words of that section are not very precise, but I take it that, in order to maintain a suit under it, the plaintiff must be prepared to prove two things: first, that the right which he put forward has been investigated, and disallowed; and, secondly, that the right which he seeks to have declared is still in existence. It has been held that, if the claim has been investigated and disallowed, the claimant is bound to bring his suit within the year; but that, if the execution is allowed to proceed without the claim having been investigated, the ordinary rule of limitation applies. This is upon the ground that the latter part of s. 246 only applies where the claim has been investigated and disallowed; and therefore, unless the plaintiff's claim has been investigated and disallowed, no suit, will lie at all under the section, and the plaintiff is left to his ordinary remedy,--that is to say, he may bring a suit when and not until his right has been disturbed. So also, upon a reasonable construction of the words of this section. I do not think the Court could be called upon to investigate the claim, if the claim made and disallowed had ceased to exist. That might be material if any rights of the plaintiff had been infringed, and the plaintiff were seeking compensation, or to recover possession. But the object of the suit contemplated by this section, and the plaintiff's object in this suit, is not to obtain compensation for any injury, or to recover possession. We have at present nothing to do with that. The object is to establish a right which has been imputed by the proceedings in execution, and I do not think the Legislature can have intended that, apart from any claim for compensation or possession, the time of the Court should be, taken up in inquiring into a dispute which, for any present or future purpose is wholly immaterial.

3. It is said that the plaintiff's claim having been dismissed, it must have been disallowed; but that does not follow. The question which the plaintiff raised by his claim was whether Man Sing's interest was that of a tenant or a usufructuary mortgagee. The plaintiff himself states in his plaint, as I am informed, that the attachment of the profits to accrue was made without any specification of time or other particulars. And it being admitted that the judgment-debtor had some interest, the execution may have been ordered to proceed without any disallowance of the present plaintiff's claim. So it is also clear that it is not an existing right which the plaintiff now seeks to establish. He seeks to establish that, at a time now gone by, he was owner of this land, and that Man Sing was his tenant, and not his usufructuary mortgagee. It seems to me that no claim being made for compensation or for possession, and there having been no infringement of the plaintiff's right, that this would be a perfectly useless inquiry. The pleader for the plaintiff was unable to suggest any possible advantage that would arise by this right being declared; and, as I have already said, I do not think it was intended by s. 246 that we should prosecute an inquiry which would produce no result.

4. It was said that this objection was not taken below: nor was it, in precise form in which it is taken now, though the suit was dismissed by the Munsif on some what different ground as informally brought. For the reasons I have stated, I think that judgment was right, and that it ought to be affirmed, and it is unnecessary to consider in this case whether, after a suit has been heard and determined without objection, the Court of Appeal will allow an objection to be taken that the suit, as brought, will not lie.

5. I think the suit should be dismissed, and that the plaintiff should pay the costs in this Court and the Courts below. But I think that the plaintiff may be at liberty to bring afresh suit, upon condition of his first paying to the defendant the costs which he has been ordered to pay in this suit.

Bailey, J.

-I am of the same opinion. Under the facts of the case, the plaintiff's pleader could show no real cause of action, or specific subject-matter of injury, but wanted a declaration vaguely of a right, the actual destruction or injury of which right is not shown. I concur in all the order proposed by Markby, J.