APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

1885.
August 31.
September 4.

SUDINDRA (APPELLANT),
and
BUDAN (RESPONDENT).*

Civil Procedure Code, s. 244.

B obtained a decree on a settlement of accounts made with V as trustee of a mutt. V's title as trustee having subsequently been negatived by decree and the title of S declared, B applied to execute his decree against the property of the mutt and to have S substituted as party to the suit in place of V.

The application was rejected by the Múnsif, but on appeal the District Judge made S a party and reserved for determination in execution proceedings the question whether the debt was contracted for the benefit of the mutt:

Held, that S was properly made a party, but that it was not open to him to raise this question in execution proceedings.

THIS was an appeal against an order of J. W. Best, District Judge of South Canara, reversing an order of K. Krishna Ráu, District Múnsif of Udipi, passed in execution of the decree in suit 374 of 1882.

The facts appear sufficiently, for the purpose of this report, from the judgments of the High Court (Hutchins and Parker, JJ.).

Rámáchandra Ráu Saheb for appellant.

Srinivása Ráu for respondent.

PARKER, J.—The plaintiff made a settlement of accounts with defendants Nos. 1 and 2 as representatives of the mutt in September 1882. He sued on that settlement of accounts in original suit 374 of 1882 and obtained a decree in October 1882. Defendants Nos. 1 and 2 had been declared trustees of the mutt as against defendant No. 3 by the District Court on 20th April 1881, but, at the time of the settlement of accounts and of the decree in suit 374, an appeal by defendant No. 3 was pending in the High Court.

That appeal (66 of 1881) was decided by the High Court in favor of defendant No. 3 in May 1883, defendant No. 1 being pronounced illegitimate and his consecration to the priesthood of

* Appeal against Order 69 of 1885.

the mutt invalid. The plaintiff then substituted defendant No. 3 for defendants Nos. 1 and 2 as the representative of the mutt on the record, and applied for execution.

The District Múnsif refused the application on the ground that the decree had been obtained against the wrong party, but the District Judge on appeal allowed defendant No. 3 to be taken as the representative of the mutt in succession to defendants Nos. 1 and 2, but reserved as open to be considered under s. 244, Code of Civil Procedure, the question whether the debt had been contracted for the service of the mutt, and remitted the application to be disposed of by the District Múnsif after taking the necessary evidence.

Defendant No. 3 appeals against this order on the grounds that s. 244 does not apply, that he cannot be bound by a decree obtained against trespassers, and that plaintiff's decree in suit 374 was fraudulently and collusively obtained.

The plaintiff, in dealing with defendants Nos. 1 and 2, was dealing with persons who had been pronounced by a Court of competent jurisdiction as rightfully representing the mutt. He could not have settled his accounts with defendant No. 3 as representing the mutt, but, as he brought his suit *pendente lite* without including defendant No. 3, he of course got his decree subject to the risk of having it questioned by defendant No. 3 should he succeed in his litigation.

Defendant No. 3 complains that the decree is not binding upon him. It is however binding on the mutt against which it has been given, and his only interest in the matter is as the representative of the mutt.

The question referred by the Judge to the District Múnsif really re-opens the whole litigation in an execution proceeding. The case relied on *Arundadhi* v. *Natésha*(1) is not in point, as in that case the plaintiff had been impleaded as the legal representative during the pendency of the suit and had been wrongly directed by the District Múnsif to bring a regular suit to try questions arising in execution.

In a suit brought by Sebaits entrusted with the property of an idol to set aside decrees obtained against their predecessors in the Sebaitship, it was held by the Privy Council in *Prosunno*

(1) I.L.R., 5 Mad., 391.

SUDINDRA v. BUDAN.

Kumari Debya v. *Golab Chand Baboo*(1) that, in the absence of proof of fraud and collusion, the judgments upon which these decrees were founded were not open to review, but were entitled to the force due to judgments of competent Courts. It was observed, however, that, before applying the principle of *res judicata* to judgments of this character, the Courts should take care to be satisfied that the decrees relied on are untainted by fraud or collusion, and that the necessary and proper issues were raised, tried and decided in the suits which led to them.

It appears, therefore, that it is open to defendant No. 3 to bring a suit to have plaintiff's decree set aside on the ground of fraud or collusion, in which suit the plaintiff would not necessarily be allowed to plead *res judicata*. The initiative, however, must rest with defendant No. 3 upon whom lies the *onus* of coming forward and taking steps to set aside a decree, which, as it stands, is binding upon the mutt represented by him. This is quite a different thing to allowing a new trial in execution proceedings, in which the plaintiff would certainly be entitled to plead that the cause was already heard and determined in his own favor.

We must set aside so much of the Judge's order as directs the District Múnsif to determine in execution whether the debt was contracted for the service of the mutt, and must allow the plaintiff to execute the decree.

Defendant No. 3 (appellant) must pay plaintiff's (respondent's) costs in this appeal.

HUTCHINS, J.—I think the conclusion arrived at with learned colleague is right.

The first question is whether the appellant is the representative of the former Tirthaswámi in the sense that he can be original the record and the decree executed as against him. Vijayendra Tirthaswámi had been for some time the *de facto* trustee as manager of the mutt before the appellant brought his suit in 1881, decree of the District Court, dated February 1881, dismissed the suit and confirmed Vijayendra in his position as mahánt. Although there was an appeal pending, the respondent could not have settled his accounts with any one but Vijayendra in fact, though he might perhaps have joined appellant as a defendant in defending his suit, it is obvious that appellant, being out of possession of

(1) 14 B.L.R., 450.

without access to the accounts, would have been placed at a great disadvantage in contesting the debt; indeed it is doubtful if he, a mere claimant as he then was, could have effectually resisted a suit on a settlement of accounts by the recognized trustee. The decree was given expressly against the mutt, though as represented by Vijayendra. Now that the appellant has succeeded in establishing his preferential title, he takes Vijayendra's place as representative of the mutt against which the decree was passed. I think the Judge has rightly held that he ought to be substituted for Vijayendra on the record as guardian and representative of the mutt.

But I also agree with Mr. Justice Parker that in execution the appellant cannot dispute the correctness of the decree. Under s. 244 the questions to be decided in execution are questions relating to the execution, discharge or satisfaction of the decree. A question whether the decree was obtained by fraud or collusion is not one which relates to the execution of the decree, but which affects its very subsistence and validity. Such a question can only be raised by a separate suit.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan (Officiating Chief Justice) and Mr. Justice Muttusámi Ayyar.

SUBBA

against

THE QUEEN-EMPRESS.*

1885. Sept. 18, 23. October 2.

Criminal Procedure Code, ss. 286, 288—Witnesses, Examination of—Irregularity.

At a trial before a Sessions Court, the Attorney who appeared for the prisoner suggested to the Court that, to expedite the trial, certain depositions of witnesses for the prosecution, taken before the Magistrate, should be read, and that he should be allowed to cross-examine the witnesses thereupon; to this course the Government Prosecutor and the Court consented.

Held, that this procedure was illegal, but that, inasmuch as it had not occasioned a failure of justice, a new trial should not be granted.

THIS was an appeal from the sentence of J. W. Reid, Sessions Judge of Coimbatore, in case No. 33 of 1885.

* Criminal Appeal 404 of 1885.