

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Shephard.*

BEEMABAI (PLAINTIFF), APPELLANT,

1890.
March 13.

v.

YAMUNABAI AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
RESPONDENTS.*

*Civil Procedure Code, s. 13—Res judicata—Partition suit—Non-joinder—
Declaratory decree.*

A suit for partition of certain land was withdrawn as against one of the defendants who was entitled to part of the land. The plaintiff and the remaining defendants entered into a compromise in the terms of which the Court passed a decree for delivery of a share of the land to the plaintiff. The decree-holder having died without executing the decree, his heir now sued for partition of the land and delivery of the above share, joining as defendants the various persons entitled to shares :

Held, that the decree in the former suit could only operate as a declaratory decree and did not preclude the plaintiff from bringing the present suit.

SECOND APPEAL against the decree of G. W. Fawcett, Acting District Judge of Tanjore, in appeal suit No. 614 of 1888, reversing the decree of T. A. Krishnasami Ayyar, District Munsif of Mannargudi, in original suit No. 344 of 1887.

Suit for partition and delivery to the plaintiff of $\frac{1}{2}$ veli of land part of $2\frac{1}{2}$ velis in the possession of defendants Nos. 1 and 2. The plaintiff sued as widow and heir of one Tiruvadamarudur Krishnasami Royar, deceased, who in 1878 had brought a suit (original suit No. 41 of 1878) against the present first defendant, who was his daughter-in-law, her father (Ramachandra Royar) and Srinivasa Royar, the present second defendant, for partition of the land now in question, and for delivery to him of 1 veli. It was admitted in the plaint in both the suit of 1878 and the present suit that Srinivasa Royar was entitled to three-fifths of the land : but the plaint in the suit of 1878 having been returned for amendment, the suit was withdrawn as against him, and the prayer for the division of the land and the delivery of the plaintiffs'

* Second Appeal No. 672 of 1889.

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share was withdrawn. Subsequently, however, the then plaintiff and the remaining defendants entered into a *razinamah* and a decree was passed as follows :—

“Plaint presented by the plaintiff valuing the suit at Rs. 2,111-4-0 was filed on the 26th February 1878. It is set forth in the plaint that about 18 years ago plaintiff purchased in the name of the said Vasudeva Royar, who was the husband of the first defendant and undivided son of plaintiff, and who was then a minor, the plaint mentioned veli of nanjai land situated in the village of Samudaya karai, in Mannargudi taluk, and they were enjoying the same; that the said Vasudeva Royar died eight years ago; that from the year 1871 the defendants have wrongfully taken possession of and been enjoying the same and that $2\frac{1}{2}$ velis of land made up of the abovesaid land and the $1\frac{1}{2}$ velis of Srinivasa Royar not included in the plaint being common, a decree may be passed directing delivery of possession to plaintiff from the defendants of 1 veli of nanjai land generally, valued at Rs. 2,111-4-0 and appertaining to the $2\frac{2}{3}$ pangu, being the balance after deducting the $\frac{3}{4}$ pangu of the said Srinivasa Royar out of the said land including his land, and awarding subsequent profits and costs.

“In accordance with the *razinamah* presented by the plaintiff’s *vakil* Singaniengar and the plaintiff, and the defendants’ *vakil* Sreenivassa Iyengar and Kayarohaniyar and the second defendant who appeared before Venkatarayar Avergal, District Munsif of Mannargudi, in South Tanjore district, the Court doth decree that, towards the land, profits, and amount of costs, &c., claimed in the said suit, the first defendant do surrender to the plaintiff, within two weeks from this date, a moiety of the suit 1 veli of land along with all the *samudayams* including the excess and deficit appertaining thereto, and the produce, and with regard to good and bad soil; that each party do bear his or her own costs incurred in this suit; and that the first defendant do pay to the plaintiff the expenses of executing this decree.”

The decree-holder applied for execution of his decree by delivery to him of the $\frac{1}{2}$ veli therein referred to, but his application was rejected on the ground that the decree to which Srinivasa Royar was not a party was not an executory decree. The decree-holder died in 1884 and the plaintiff now sued as above to recover the $\frac{1}{2}$ veli.

The District Munsif passed a decree as prayed, but his decree was reversed on appeal by the District Judge, who held that the matter in dispute was *res judicata* by reason of the decree in original suit No. 41 of 1878.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Krishnasami Ayyar* for appellant.

Pattabhirama Ayyar for respondents.

JUDGMENT.—The suit has been dismissed on the ground that the matter is *res judicata* as against the first defendant. It is contended here that the judgment is wrong inasmuch as the plaintiff's husband did not and could not in the former suit ask for partition. He sought to recover the whole veli from the daughter-in-law, and as the plaint originally stood joined the present second defendant; when the plaint was amended and the defendant's name struck out, it is clear that the suit was no longer maintainable as a partition suit. This being so, the decree ought not to have been drawn up in the form in which it was drawn, for it could only operate as a declaratory decree. We think we may construe it in that way in order that justice may be done between the parties. But as this second suit has had to be brought on account of the laches of the plaintiff's husband, we do not think the first defendant ought to suffer for it. While reversing the decree of the District Judge and restoring that of the District Munsif, we must direct that the plaintiff do bear the costs of the first defendant in this and in the Lower Appellate Court.

The second defendant must pay the plaintiff's costs in this and in the Lower Appellate Court.