

QUEEN-
EMPRESS
v.
RAMI REDDI.

was under the circumstances clearly illegal. Section 16 of Act V of 1882 (Madras) lays down that the Governor in Council may publish a notification declaring a forest to be reserved when certain events have occurred, and that such forest shall become reserved from the date specified in that notification. One of the events which must have occurred before the Governor in Council can declare a forest reserved is the disposal of all claims made by owners or occupiers of land. It has not been shown in the present case that the claim of the petitioner who is an owner or occupier of land (*Reference under s. 39 of Act V of 1882(1)*) was disposed of prior to the notification of 16th July 1885; and the fact that in April 1887, subsequent to the publication of the notifications of 20th August 1886 and 8th February 1887, the Forest Officer was negotiating with the petitioner, would appear to show that his claim had never been disposed of according to law. The prosecution did not assert that the petitioner did not prefer a claim within the period required by law, and unless he had failed to do so, his right would not have been extinguished. He appears to have continued to gather the produce of the trees in his *patta* up to October 1887. We accordingly reverse the findings and sentences of the Courts below. The fine will be repaid.

APPELLATE CIVIL.

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

KETLILAMMA (PLAINTIFF), APPELLANT,

v.

KELAPPAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 43, 244—Separate suit on disallowance of objection to execution—Evidence Act—Act I of 1872, s. 44—Competent Court.

In execution of a decree the defendant, who was sued as the representative of her deceased brother, objected under s. 244 of the Code of Civil Procedure to the attachment of certain lands to which she set up independent title. The objection was disallowed and the land was sold. She then sued the execution purchaser to set aside the Court sale and obtained a decree against which no appeal was preferred. She now sued for possession :

(1) *Ante* page 203.

* Second Appeal No. 1508 of 1888.

Held, that the suit lay notwithstanding the order under s. 244.

Per curiam: The words "not competent" in s. 44 of the Evidence Act refer to a Court acting without jurisdiction.

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SECOND appeal against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in appeal suit No. 261 of 1887 affirming the decree of S. Ragunatha Ayyar, District Munsif of Tellicherry, in original suit No. 542 of 1886.

Suit by plaintiff No. 1 to recover possession of certain land with arrears of rent, as on the expiry of a demise to defendants Nos. 1 and 2. Plaintiff No. 2 was joined as having obtained a subsequent lease from plaintiff No. 1. Defendant No. 3 claimed to be a member of the same taveri as plaintiff No. 1 and denied her right to sue, his name however was removed from the record.

Defendant No. 4 claimed title under the following circumstances:

The land in question had been attached in execution of a decree obtained against plaintiff No. 1 and her brother as representatives of another brother, one Kunhi Raman Nambiar (deceased), in Small Cause Suit No. 360 of 1883 on the file of the Subordinate Court of North Malabar. Plaintiff No. 1 intervened in execution of the above decree under s. 244 of the Code of Civil Procedure and objected that the land was her own and was not liable to satisfy the decree. But her objections were disallowed and the land was sold and purchased by defendant No. 4, who obtained the sale certificate, and was put into possession in June 1884.

Plaintiff No. 1 then sued defendant No. 4 in original suit No. 508 of 1884 on the file of the Court of the District Munsif of Tellicherry to set aside the Court sale, and obtained a decree. No appeal having been preferred against that decree, she now sued as above for possession. Both the District Munsif and on appeal the Subordinate Judge dismissed the suit on the ground that the order under s. 244 had the force of a decree, and the proceedings in original suit No. 508 of 1884 were erroneous and therefore void. *Kuriyali v. Mayan*(1) was referred to.

The plaintiff preferred this second appeal on the following grounds:—

- i. That the Lower Appellate Court is wrong in holding that the suit is barred by s. 244 of the Code of Civil Procedure.

(1) I.L.R., 7 Mad., 255.

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ii. The decree in original suit No. 508 of 1883 is *res judicata* in favor of the plaintiff, and the Court cannot go behind the said decree by holding that s. 244 was a bar to the maintenance of that suit, and that, therefore, the whole proceedings in that suit were void.

Govinda Menon for appellant.

Sankaran Nayar for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Parker, J.).

JUDGMENT.—It is conceded that had it not been for the intermediate suit No. 508 of 1884 the decrees of the Courts below would be right, but it is argued by the learned Pleader for the appellant that the fourth defendant's remedy against the erroneous decree was by appeal, and that he cannot now resist a suit for possession, the sale to him having been set aside. On the other hand, s. 44 of the Evidence Act* is relied upon as showing that it is open for the fourth defendant to show that the decree in suit No. 508 of 1884 was passed by a Court not competent to pass it.

We are of opinion that the words "not competent" refer to a Court acting without jurisdiction. In this view, there is no question as to the competency of the Court, though the provisions of s. 244 of the Civil Procedure Code might have been pleaded as a bar to the suit.

There was no appeal from the decree in suit No. 508, and therefore, as far as the fourth defendant is concerned, it is a final decree, and though wrong he is not in a position to resist it. The other defendants were not parties to the suit in which the order under s. 244 of the Civil Procedure Code was passed and therefore the suit as against them is not barred by the provisions of that section.

The Subordinate Judge has disposed of the appeal upon the preliminary point.

We must, therefore, reverse the decree and remand the appeal for re-hearing. Costs will abide and follow the result.

* Section 44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections forty, forty-one or forty-two, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.