

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

1891.
November 12.
December 15.

NAGAMUTHU AND OTHERS (DEFENDANTS NOS. 1, 2 AND 4),
APPELLANTS,

v.

SAVARIMUTHU (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 244—“Parties to the suit”—Questions relating to execution—Separate suit.

A plaintiff, alleging that her husband (deceased) had advanced money on the security of land belonging to a family of four Hindus, sued them to enforce his lien and obtained a decree. The representatives of one of the defendants only appealed, and the decree was reversed as regarded them. The decree was executed as against the other defendants by the attachment and sale of their shares of the land, and the plaintiff became the purchaser. The successful appellants obstructed her in her attempts to obtain possession, and she now sued them for partition of the three-quarters share purchased by her :

Held, that the suit was not precluded by Civil Procedure Code, s. 244.

SECOND APPEAL against the decree of H. H. O'Farrell, Acting District Judge of Trichinopoly, in appeal suit No. 146 of 1888, affirming the decree of V. Swaminatha Ayyar, Additional District Munsif of Trichinopoly, in original suit No. 559 of 1887.

Suit for the partition of certain land and for possession of a three-quarters share therein. The land in question had belonged to an undivided family consisting of four brothers, of whom the eldest (Chinnamuthu Veeran) was the father of the defendants, and it was mortgaged to Srinivasa Thathachari. While this mortgage was subsisting the four brothers effected a partition, and a question was subsequently raised whether the land above referred to was left in common or fell to the share of Chinnamuthu. It appeared, however, that in 1854 he mortgaged it to Maruthanayakam Pillai to pay off the other mortgage. In 1879 one of his brothers, Kuppumuthu, brought a suit to redeem the mortgage of 1854 and by the consent of the mortgagee obtained a decree for possession, conditional on his paying the mortgage amount into Court, which he did, having previously borrowed from the present

* Second Appeal No. 1297 of 1890.

plaintiff's husband, as she now alleged, Rs. 600 on the security of the same land. Subsequently, in the same year, Chinnamuthu sued to redeem the same mortgage, which he alleged he had, in great part, paid off. This suit was dismissed, and the decree dismissing it was confirmed on appeal on the ground that the plaintiff's remedy, if any, was to be sought against the decree-holder who had paid the money into Court. Chinnamuthu then sued his brother and failed, it being found that the land was not his divided property, but belonged to the family in common. In 1884 the present plaintiff sued Chinnamuthu and his brothers to enforce the mortgage lien of her husband (deceased). In the Court of first instance the plaintiff was held to have a valid charge to the extent of Rs. 400, and a decree was passed for that amount. Against this decree an appeal was preferred by the sons of Chinnamuthu alone, and the decree was reversed as against them. It remained, however, in force as against the other defendants and was executed by the attachment and sale of their three-quarters share in the land. The plaintiff was the purchaser at the Court sale, and having been obstructed by the sons of Chinnamuthu in her attempts to obtain possession, she now sued as above for partition.

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The District Munsif passed a decree for the plaintiff, which was affirmed on appeal by the District Judge.

The defendants preferred this second appeal.

Mr. *Subramanyam* for appellants.

Ramasami Mudaliar for respondent.

SHEPHERD, J.—The only question argued was whether the maintenance of the suit was precluded by the provisions of section 244 of the Civil Procedure Code by reason of the plaintiff and the defendants having been parties to a prior suit. As far as the plaintiff is concerned, there can be no doubt that, although it is in the character of purchaser at the sale in execution of her decree that she now brings the suit to secure possession of the lands sold to her, she is, nevertheless, a party to the suit in which the decree was obtained within the meaning of section 244 of the Civil Procedure Code. The defendants, also having been defendants in the prior suit, are parties to that suit, and none the less so, because ultimately it was as against them dismissed, while as against their co-defendants, who did not appeal, the decree in the plaintiff's favour remained standing. But, although both the plaintiff and

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the defendants are parties to the former suit, I do not think that the question now raised is one "arising between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree" within the meaning of the section. As between the plaintiff and the defendants no such question can arise, because there is no decree against the defendants to be executed, discharged or satisfied. They are not judgment-debtors of the plaintiff. No doubt the present suit is occasioned by the decree-holder's desire to give effect to his decree, and may be said to arise out of the execution of his decree. But in my opinion, regard being had to the language of the section, a question relating to the execution of the decree presupposes a person against whom execution is sought and cannot arise as between the decree-holder and persons who, as far as concerns execution, are complete strangers. In the present case the defendants were dismissed from the prior suit on appeal. But a much stronger case might be put to illustrate the inconvenience of giving a larger operation to the section. For instance in a suit against two defendants the plaintiff might withdraw the suit against one with or without liberty to bring a fresh suit and obtain a decree against the other. The defendant against whom the suit was withdrawn would of course be a party to the suit in which the decree was passed. But he would have no concern in the execution of the decree, and in my opinion no question relating to the execution could arise between him and the decree-holder. If it be correct to say that the object of the section is to put a limit to litigation and prevent one suit growing out of another, it is clear that in such a case as the one put the section ought not to be applicable. It cannot have been intended to prohibit suits between persons as between whom no adjudication in respect of their right has as yet taken place.

In my opinion the District Judge was right in the conclusion at which he arrived, and therefore the appeal should be dismissed with costs.

WILKINSON, J.—I am of the same opinion. The question is not, as the District Judge puts it, whether the present suit is a part of the execution proceedings, but whether, within the meaning of section 244, Civil Procedure Code, the plaintiff and defendants were parties to the suit in which the decree was passed. In one sense no doubt they were so, and the defendants, having been

allotted their costs in appeal, are or were entitled to take out execution of the decree. But the question at issue between the parties in the present suit is not one relating to the execution, discharge or satisfaction of the decree in that suit. The defendants are not, with reference to the subject-matter of the present suit, judgment-debtors, but occupy the position of third parties, who, being in possession of the land for which the plaintiff has obtained a decree, obstruct delivery to her. If the provisions of section 244 applied, it must be held that the plaintiff could execute her decree as against the defendant. But if the plaintiff were to take out execution proceedings against the defendants, she would be met by the plea that there is no decree to be executed, the decree so far as the defendants were concerned having been quashed. None of the cases quoted in argument apply. In *Viraraghava v. Venkata*(1) the parties were parties to the suit in which the decree was passed. In *Vallabhan v. Panguuni*(2) the parties were the decree-holder and the judgment-debtor, and in *Muttia v. Appasami*(3) the question was one relating to the execution of the decree between the representative of the original decree-holder and one of the judgment-debtors, the decree-holder having become, as the plaintiff in this case has, the purchaser of the property. The present defendants cannot, in my opinion, be regarded as occupying any one of these positions. The second appeal fails and is dismissed with costs.

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(1) I.L.R., 5 Mad., 217. (2) I.L.R., 12 Mad., 454. (3) I.L.R., 13 Mad., 504.
