

## APPELLATE CIVIL.

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

VIRARAGHAVA AND ANOTHER (DEFENDANTS NOS. 1 AND 3),  
APPELLANTS,

1892.  
April 29.  
August 1.

*v.*

VENKATA (PLAINTIFF), RESPONDENT.\*

*Civil Procedure Code—Act XIV of 1882, ss. 244, 294—Order cancelling an execution-sale of land—Subsequent suit for possession brought by judgment-debtor.*

A decree-holder attached land of his judgment-debtor and brought it to sale and himself became the purchaser in execution of his decree. The purchase having been made without the permission of the Court, the sale was set aside on the application of the judgment-debtor, who now sued to recover possession of the land :

*Held*, that the suit was not maintainable under Civil Procedure Code, s. 244.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 85 of 1891, reversing the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in original suit No. 31 of 1890.

Suit for possession of land which had been brought to sale and purchased by the defendant and delivered to him in execution of a decree which he had obtained against the plaintiff in original suit No. 104 of 1876, on the file of the Subordinate Court of Kumbakonam. The above purchase had been made without the permission of the Court, and on this ground an order was made cancelling the sale on the application of the judgment-debtor who now sued as above to recover possession of the land in question.

The Subordinate Judge held that the suit was not maintainable with reference to the provisions of Civil Procedure Code, s. 244. The District Judge held otherwise and passed a decree as prayed.

The defendant preferred this second appeal.

*Bhaslyam Ayyangar and Gopalasami Ayyangar* for appellants.

*Pattabhirama Ayyar* for respondent.

\* Second Appeal No. 1657 of 1891. .

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JUDGMENT.—The suit is one to recover possession of land with *mesne* profits. Veeraragava Ayyangar, the first defendant, obtained a decree for money against the plaintiff, Venkata Chari, in original suit No. 104 of 1876. In execution of that decree, he attached and brought to sale the plaint and other lands. In July 1878, at the Court auction, first defendant himself purchased the plaint land and was put in possession. Plaintiff thereupon filed a suit to set aside the sale on the ground that first defendant had purchased without the permission of the Court. It was held in second appeal (*Viraraghava v. Venkata*(1)) that a suit would not lie and that plaintiff's remedy, if any, was in execution. Plaintiff then applied to the Subordinate Court which passed orders cancelling the sale. Plaintiff now brings a suit for possession. The Subordinate Judge was of opinion that, as the matter is one which arises in the execution of the decree, the suit is barred by the provisions of section 244 of the Civil Procedure Code. On appeal, the District Judge held that the order cancelling the sale was not a decree and was therefore not capable of execution, and that as section 294 contained no provision for giving possession. Plaintiff's only remedy was by suit.

On second appeal it is argued that no suit would lie. Plaintiff's remedy, if any, being in execution.

In *Viraraghava v. Venkata*(1) the learned Judges held that the question whether the sale could be impugned on any ground was a question relating to the execution of the decree, and therefore a question which the parties were prohibited from raising by separate suit. If, they went on to say, the decree-holder purchased without having obtained leave to bid, the Court executing the decree would, on that ground, be bound to declare the sale void. Application was then made to the Subordinate Court to declare the sale in execution void, and in September 1882 the Subordinate Court cancelled the sale. Instead of applying for possession, the plaintiff has filed this suit. But the same objection appears to us to be valid against this suit, as was held to be valid against the former suit. In execution of the decree in a suit to which both plaintiff and first defendant were parties, first defendant obtained possession of the land. The question as to first defendant's right to hold the land appears to us to be a question relating to the exe-

(1) I.L.R., 5 Mad., 217.

cution of the decree. The Court executing the decree has already declared the sale void and it is that Court which must replace plaintiff in possession. The decree in original suit No. 104 was satisfied by the amount of the first defendant's bid having been set off against the amount due by the plaintiff. That satisfaction having now been cancelled by the order of the Court executing the decree, the question as to defendant's possession is one arising between the parties to the suit relating to the execution and satisfaction of the decree, and therefore one which must be disposed of under section 244 and not by separate suit.

On behalf of the plaintiff-respondent it is argued that, as an order under section 294 is appealable under section 588 (16), the provisions of section 244 do not apply to this case. This is the argument adopted by the District Judge. He says that the question is how, when the sale has been set aside, is the person in whose favour the order is made to get re-delivery. The answer appears to us to be clear; the Court which did the erroneous act, that is, which put the first defendant in possession must undo it, and that is the Court executing the decree. The fact that an appeal is provided against an order passed under section 294 in no way bars the applicability of the general principle laid down in section 244. According to what appears to us to be the proper construction of that section, the only Court which can grant the relief which the plaintiff seeks is the Court executing the decree and a suit for possession will not lie.

The decree of the District Judge must be reversed, and that of the Subordinate Judge restored with costs in this and the Lower Appellate Court.

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