

SHEPHARD, J.—I am of the same opinion. I think that the rules 1 and 23, so far as they purport to make it obligatory on boat owners to ply for hire, are *ultra vires*, and therefore void and of no effect. It is only with regard to boats plying for hire that section 6 of the Act gives the Government authority to make rules.

QUEEN-
EMPRESS
*.
THOMMAYYA
CHETTI.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

UPENDRA BHATTA (COUNTER-PETITIONER), PETITIONER,

v.

RANGANATHA BHATTA (PETITIONER), RESPONDENT.*

1893.
February 8.
March 8.

Code of Civil Procedure—Act XIV of 1882, ss. 244, 278 to 283—Questions to be determined by the Court executing a decree—Grounds of objection.

Where the question is whether the property in dispute belongs to the judgment-debtor or to his estate or not, and the question is raised in a proceeding in execution between parties to the suit or their representatives, it matters not on what grounds the objection is taken to the property being made the subject of execution, and the question is one to be determined in execution, and section 244 of the Code of Civil Procedure bars a separate suit. *Abeedoonissa Khatoon v. Ameeroonissa Khatoon*(1) followed.

PETITION under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of the District Judge of South Canara in civil miscellaneous appeal No. 88 of 1890.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

Pattabhirama Ayyar for petitioner.

Narayana Rau for respondent.

JUDGMENT.—The petitioner, Upendra Bhatta, obtained a money decree in original suit No. 206 of 1883 on the file of the District Munsif of Karakal against one Shridhara Bhatta. Shridhara Bhatta having died, execution was applied for against his sons, widow and undivided brothers as his heirs. In course of execution a certain piece of land called Mudanga bettu was attached and advertised for sale. Counter-petitioner, Runganatha Bhatta,

* Civil Revision Petition No. 33 of 1892.

(1) L.R., 4 I.A., 66.

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one of the brothers of the deceased Shridhara Bhatta, objected to the sale on the ground that this land under the will of Sridhara Bhatta's father belonged to a certain temple. The District Munsif found that the land in question did not form portion of the land devised to the temple by the will, and ordered execution to proceed. Present counter-petitioner appealed to the District Court, which, after calling for a further finding from the District Munsif, reversed his order and dismissed the execution petition so far as it related to the Mudanga bettu land. The judgment-creditor, Upendra Bhatta, objects by this revision petition to the proceedings of the District Court on the ground that that Court had no jurisdiction to entertain the appeal against the District Munsif's order, inasmuch as that order was passed under the claim sections of the Civil Procedure Code, ss. 278 to 283, and therefore by section 283 no appeal lies against such order, but counter-petitioner's remedy was by regular suit. The objection was not raised in the District Court, but being one relating to jurisdiction, we cannot but entertain it.

The argument on the other side is that the question which the District Munsif had to decide was one between the parties to the suit or their representatives, and relating to the execution of the decree, within the meaning of section 244 of the Civil Procedure Code, and therefore was one to be decided by the Court executing the decree, and not by separate suit. This view is in accordance with the later decisions of all the High Courts. In some earlier decisions of the Allahabad High Court distinctions were drawn between cases where the judgment-debtor or his representatives set up a title in themselves, and those when they set up a title as trustees on behalf of third parties or of charities. But the later decisions adopting the principle laid down by the Privy Council in *Abeedoonissa Khatoon v. Ameeroonissa Khatoon*(1) have established that when the question is whether the property in dispute belongs to the judgment-debtor or to his estate or not, and that question is raised in a proceeding in execution between parties to the suit or their representatives, it matters not on what grounds the objection is taken to the property being made the subject of execution, and the question is one to be determined in execution, and section 244 bars a separate suit *Kuriyali v.*

(1) L.R., 4 I.A., 86.

Mayan(1), *Ravuni Menon v. Kunju Nayar*(2), *Punchannun Bundopadhya v. Rabia Bibi*(3), *Nimba Harishet v. Sitaram Paraji* (4), *Mulmantri v. Ashfaq Ahmad*(5), and *Seth Chand Mal v. Durga Dei*(6).

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We must hold that the District Judge had jurisdiction to entertain the appeal and dismiss this revision petition with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

QUEEN-EMPRESS

v.

BUTCHI.*

1893.
May 5.

Penal Code—Act XLV of 1860, s. 378, illustration (o)—Theft—Whether a dishonest removal by a wife of her husband's property left in her custody amounts to theft.

There is no presumption of law that a wife and husband constitute one person in India for the purpose of criminal law. If the wife, removing her husband's property from his house, does so with dishonest intention, she is guilty of theft.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code by A. W. B. Higgins, District Magistrate of Gódvári, in his letter dated 23rd February 1893, No. 89.

In this case a married woman, during the absence of her husband in Burmah, removed his movable property left in her charge from his house to the house of her paramour with whom she was residing. The husband on his return charged the wife and her paramour with theft. The Second-class Magistrate convicted both of theft, but the Deputy Magistrate, on appeal, acquitted the wife on the strength of illustration (o) to section 378 of the Indian Penal Code, which he interpreted as meaning that the paramour, and not the wife, should be treated as the thief in such cases.

On this the District Magistrate referred the case for the orders of the High Court.

(1) I.L.R., 7 Mad., 255. (2) I.L.R., 10 Mad., 117. (3) I.L.R., 17 Cal., 711.
(4) I.L.R., 9 Bom., 458. (5) I.L.R., 9 All., 605. (6) I.L.R., 12 All., 313.

* Criminal Revision Case No. 88 of 1893.