APPELLATE CIVIL.

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

SATTAPPA CHETTI AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

JOGI SOORAPPA (PLAINTIFF), RESPONDENT.*

1893. February 9.

Civil Procedure Code—Act XIV of 1882, *ss.* 53, 245, 647—*Amendment of execution petition—Appeal—Limitation.*

One, being entitled under a decree of 1809 to a share in the income of a zamindari, obtained a decree in a suit of 1887 against certain recent purchasers of the zamindari, declaring that he had a valid charge on the estate and awarding to him, besides his costs, the amount due in respect of one year. He now applied in execution of the latter decree for payment of the amount due in respect of five years as well as his costs. An application to amend the petition for execution by inserting a reference to the former decree was made after the right of the petitioner in respect of some of the years in question had become barred by limitation. This application was refused by the Court of First Instance :

Held, that under the circumstances of the case the amendment should have been allowed to be made.

APPEAL against the order of T. Weir, District Judge of Madura, in civil miscellaneous appeal No. 34 of 1891, reversing the order of P. Narayanasami Ayyar, Subordinate Judge of Madura, West, made on execution petition No. 94 of 1891.

Petition for execution of a decree. The petitioner was entitled to a share of the income of a certain zamindari under the terms of a compromise entered into in a suit of 1809. The respondents purchased the zamindari in 1885 and resisted the claim of the petitioner, who accordingly brought a suit against them in 1887. In that suit a decree was passed declaring the right of the present petitioner to a charge on the zamindari in respect of his claim and awarding to him payment on account of one year and also costs. By the present petition execution was sought in respect of the payments due for five years and for costs. The petition was made in the suit of 1887 only. It was objected that the relief sought could not be obtained under the decree in that suit, and the

* Appeal against Appellate Order No. 76 of 1891.

SATTAPPA CHETTI v. JOGI SOORAPPA.

Subordinate Judge upheld this objection and refused an application to amend the petition by inserting a reference to the decree of 1809. On appeal the District Judge allowed this amendment to be made, and directed the Subordinate Judge "to restore the "application to the file and proceed to dispose of it according to "law."

The judgment-debtors preferred this appeal.

Desikachariar for appellants.

Subramanya Ayyar and *Sundara Ayyar* for respondent.

JUDGMENT.—The application for execution was certainly defective, the error being not merely one of form. So far as respondent's claim to one-fourth of the future profits of the zamindari was concerned, the decree in original suit No. 16 of 1887 was only declaratory and therefore incapable of execution, except for the mesne profits for fasli 1295. The decree that was capable of execution, as regards the mesne profits for other faslis claimed in the proceedings the subject of this appeal, was the compromise in the suit of 1809, which has been treated as a decree from its date. This, therefore, was the decree which should have been mentioned in the application as the decree sought to be executed as regards the faslis subsequent to 1295. The substantial question is whether, in the peculiar circumstances of this case, the amendment ought to have been allowed.

We cannot agree with the contention of appellant's pleader that section 245 of the Civil Procedure Code is a bar to the amendment. That section is, in our opinion, analogous to the provisions of section 53, which directs the Court to return plaints before filing for amendment in certain particulars. It does not, therefore, take away the power of the Court under section 647, by analogy to section 53, to amend the application for execution at any time before disposal.

The next contention is that the amendment ought not to be allowed, because at the date it was applied for the right to profits for some of the faslis—the subject of the original application—was barred. No doubt the ordinary rule is that an amendment should be allowed only if it can be without prejudice to the rights of the opposite parties as existing at the time of the application for amendment. But this principle is to be applied with reference to

SATTAPPA CHETTI v. JOGI SOORAPPA.

the special circumstances of each case. See *Weldon* v. *Neal*.(1) In the present case we are of opinion that there are peculiar circumstances which take it out of the ordinary rule. The object of the application was perfectly clear, although there was an error in the reference to the decree, an error not unnatural, considering the complicated nature of the previous proceedings. We also observe that even execution for fasli 1295 to which respondent was clearly entitled on his application as it stood was not granted by the Subordinate Judge. Four objection petitions were presented by appellants, and it was not until the last of them was presented, nearly a year after the application for execution was first made, that the present objection was taken. We are of opinion that the general principle laid down by the Privy Council in *Bissessur Lall Sahoo* v. *Maharaja Luchmessur Singh*(2) should be followed unless its application is precluded by express provisions of the legislature. Looking, therefore, at the substance of the application and the prior proceedings which are of a complicated character, we think that the decision of the District Judge was right, and we dismiss this appeal, but under the circumstances each party will bear his own costs.

APPELLATE CIVIL.

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

1893. August 3. September 11

ILLIKKAPAKRAMAR AND OTHERS (PLAINTIFFS NOS. 1 AND 3 TO 13), APPELLANTS,

v.

KUTTI KUNHAMED AND OTHERS (DEFENDANTS NOS. 1 AND 3 TO 9), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 566—*Remand for trial of a new issue—Malabar law—Mapillas.*

The karnavan of a tavwad in Malabar sued to recover property acquired by his sister (deceased) and now in the occupation of the defendants, her children. The

(1) L.R., 19 Q.B.D., 395. (2) L.R., 6 I.A., 233.

* Second Appeal No. 1586 of 1892.