

VEERANA  
PILLAI  
v.  
MUTHU-  
KUMARA  
ASARY.

necessary for me to state the facts of the case or to do more than state my conclusions as shortly as possible after the very full judgment of Sir Subrahmanya Ayyar, J.

The cause of action in the former suit was to recover the mortgage amount by sale of the mortgaged premises. The present suit is a suit to recover possession of the land from persons who are in wrongful possession.

Although the first and second defendants in the present suit were joined as defendants in the first suit, as persons claiming an interest in the land, the present claim formed no part of the cause of action in that suit nor was it a cause of action upon which the plaintiffs could rely in the alternative or otherwise in support of the relief they sought in that suit. The cause of action in the present suit is totally distinct and different and therefore the suit is not barred. The appeal should be dismissed with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.*

1903.  
April 18, 17.

VEERAPPA CHETTIAR (FIFTH DEFENDANT, COUNTER-PETITIONER),  
APPELLANT,

*v.*

RAMASWAMI AIYAR (PLAINTIFF, PETITIONER), RESPONDENT.\*

*Civil Procedure Code—Act XIV of 1882, s. 234—Personal decree by one partner against another for dissolution and for a definite sum of money—Death of judgment-debtor—Right of decree-holder to execute—Joinder of undivided brother of deceased—Legality—Hindu Law.*

Petitioner had obtained a decree against his three partners dissolving the partnership and ordering the first defendant to pay him a definite sum of money. Before the decree was executed, first defendant died, and petitioner now sought to execute it, under section 234 of the Code of Civil Procedure, against the widow and undivided brother of first defendant who had been joined as defendants as the legal representatives of the deceased. The first defendant had not been sued in a representative capacity, as managing member of his family, nor was it shown that the business was a family business :

*Held*, that inasmuch as the decree was purely *in personam* against the first defendant, and not a decree against any property represented by him, or one

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\* Civil Miscellaneous Appeal No. 142 of 1902, presented against the order of E. B. Elwin, District Judge of South Arcot, dated the 27th September 1902, in E.P. No. 36 of 1902 (M.P., No. 413 of 1902), in Original Suit No. 8 of 1900.

winding up the affairs of the partnership and providing for payment of its debts and for distributing the surplus according to the shares of the partners, petitioner was not entitled to execute it as against the brother by attaching and bringing to sale joint family property which had come to him by survivorship, whether it was ordinary family property or property acquired for the family by the partnership trade.

*Held*, further, that execution should proceed only against the widow, who alone was the legal representative of the first defendant, and the brother's name should be removed from the record. Execution should be granted, under section 234, against the widow, as the legal representative of the deceased first defendant. If the deceased had left any separate property it could be attached even in the hands of the fifth defendant, just as it might be attached if it were found in the hands of any stranger.

EXECUTION petition. Petitioner had brought a suit against three defendants, his partners, for dissolution of partnership and for winding it up. A decree was passed (after a reference to arbitration and receipt of award) dissolving the partnership and ordering first defendant to pay a definite sum of money to plaintiff. Before that decree was executed first defendant died, and petitioner brought his widow on the record as fourth defendant and his undivided brother as fifth defendant, these being joined as the legal representatives of the deceased first defendant. There was nothing on the record to show that first defendant had been sued in his representative capacity as managing member of the family; nor was it shown that the trade was a family business. The District Judge ordered execution to issue against these defendants and such property as had come into their possession, holding that first defendant had managed both partnership and joint family property, and fifth defendant was liable though he was not a party to the decree.

Fifth defendant preferred this appeal.

*V. Krishnaswami Ayyar* and *S. Srinivasa Ayyar* for appellants.

*P. R. Sundara Ayyar*, *T. Rangaramanuja Charariar* and *T. V. Gopalaswami Mudaliar* for respondent.

JUDGMENT.—The plaintiff brought this suit against the first defendant and two other partners for dissolution of partnership and for winding it up. After making a reference to arbitration and receipt of an award, a decree was passed dissolving the partnership, and ordering the first defendant to pay a definite sum of money to the plaintiff. Before the decree was executed by the plaintiff the first defendant died and the plaintiff now seeks to execute the decree under section 234, Civil Procedure Code, against

VEERAPPA  
CHETTIAR  
v.  
RAMASWAMI  
AIYAR.

VEERAPPA  
CHETTIAR  
v.  
RAMASWAMI  
AIYAR.

the widow and undivided brother of the first defendant. The District Judge has joined the widow and brother as defendants Nos. 4 and 5 and has allowed execution to proceed against them in respect of such property as has come into their possession, evidently meaning to include not only the separate property, if any, of the deceased, but also the partnership property which had been in the hands of the first defendant and which, after the first defendant's death, had come into the hands of the fifth defendant. We are unable to uphold the order of the District Judge as it stands.

The principal question which has been argued before us in support of the order is that the decree against the first defendant was a decree against him as managing member of the family in respect of the trade which he carried on in partnership with the plaintiff and the second and third defendants, and that the decree can be executed after his death against the surviving member of the family, viz., the fifth defendant, just as if he had been a party to the suit.

The decree against the first defendant which is sought to be executed is not a decree against any property represented by the first defendant, nor is it a decree winding up the affairs of the partnership providing for payment of its debts and distributing the surplus according to the shares of the partners (*vide* section 265, Indian Contract Act); but it is purely a decree *in personam* against him.

We may also add that there is nothing on the record to show that the first defendant was sued in his representative capacity as managing member of the family nor is the trade in respect of which the suit was brought one that is necessarily a family business and not the first defendant's individual trade. That being so, we are clearly of opinion, following the Full Bench decisions of this court in *Karnataka Hanumantha v. Andukuri Hanumayya*(1), *Karpakumbal Ammal v. Ganapathi Subbayyan*(2), and *Muttia v. Virammal*(3) that the decree cannot be executed against the fifth defendant by attaching and bringing to sale joint family property which has come to him by survivorship whether it is ordinary family property, or property acquired for the family by the partnership trade.

(1) J.L.R., 5 Mad., 232.

(2) I.L.R., 5 Mad., 234.

(3) I.L.R., 10 Mad., 258.

The other question argued before us on behalf of the appellant is that execution should proceed only against the widow who alone is the legal representative of the first defendant, and that execution cannot proceed against the fifth defendant even if he be in possession of any portion of the first defendant's assets that was his separate property.

VEERAPPA  
CHETTIAR  
v.  
RAMASWAMI  
AIYAR.

We think that this contention is well founded. The name of the fifth defendant should be struck off the record and execution should be granted under section 234 against the widow as the legal representative of the deceased first defendant. If the latter has left any separate property the same may be attached, even in the hands of the fifth defendant, just as it might be attached if it were found in the hands of any stranger.

In the result we allow the appeal with costs and setting aside the order of the District Judge we direct him to restore the petition to his file and to dispose of it afresh according to law.

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## APPELLATE CIVIL.

*Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.*

MAHARAJA OF JEYPORE (APPELLANT), PETITIONER,

v.

SRI NILADEVI PATTAMAHADEVI AND ANOTHER (RESPONDENTS),  
RESPONDENTS.\*

1902.  
November 28,  
December  
9, 10, 17.

*Vizagapatam Agency Rules—Rule XXXI—Right to petition Government—Rule of a substantive character—Revision in execution proceedings.*

Rule XXXI of the Agency Rules for the District of Vizagapatam is of a substantive character and provides for revision in execution and other petitions in regard to which no right of appeal has been given.

Rule XXXI is not *ultra vires*.

EXECUTION Petition, filed in the Court of the Agent to the Governor, Vizagapatam. An order was passed on the petition by the Acting Senior Assistant Agent, against which the petitioner

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\* Civil Miscellaneous Petition No. 792 of 1900 under rule 31 of the Agency Rules for Vizagapatam District praying in the circumstances stated therein for review of the judgment of W. O. Horne, Agent to the Governor at Vizagapatam, dated 5th April 1900, in Miscellaneous Appeal No. 1 of 1900, presented against the proceedings of W. Lys, the Senior Assistant Agent at Vizagapatam, dated 22nd December 1899, in the matter of Civil Miscellaneous Petition No. 10 of 1899.