

dered them liable to assessment for the year in question. We must, therefore, allow the appeal, and set aside the decree of the Subordinate Judge and dismiss the suit with costs throughout.

RAGHAVAN
v.
ALAMELU
AMMAL.

APPELLATE CIVIL.

Before Mr. Justice Miller.

KOLINTAVITA MAMA AMMA (SECOND DEFENDANT),
PETITIONER,

1907

October 8, 10.

v.

KOLINTAVITA HAJI KANDU AND ANOTHER (PLAINTIFFS AND
FIRST DEFENDANT), RESPONDENTS. *

Civil Procedure Code, Act XIV of 1882, s. 244—Claim for damages by auction Purchaser against judgment-debtor and others for injury done to property purchased after confirmation of sale not a question relating to execution within s. 244.

Where after confirmation of a sale of property in execution at a Court auction and before delivery of possession to the auction purchaser, the judgment-dabtor and others not parties to the decree trespass upon such property and cause injury to it, the claim of such auction purchaser for damages in respect of such injury, is not a 'question relating to the execution of the decree, within section 244 of the Code of Civil Procedure and must be enforced by separate suit and not in execution Proceedings.

Obiter: Even supposing that such a claim was one relating to execution, the auction purchaser is entitled but not bound to implead all the wrong doers in one suit and ought not to be compelled to proceed against the judgment-debtor under section 244 and against those not parties by a separate suit.

THE facts are stated in the judgment on appeal, the material portion of which was as follows:—

• "First defendant obtained a decree against second defendant, in execution of which plaintiff purchased the point property. Plaintiff alleges that the materials of the plaint house purchased by him have been removed by defendants Nos. 1 to 5. The District Munsif held that plaintiff's remedy against defendants Nos. 1 and 2 lies in an application under section 244, Civil

* Civil Revision Petition No. 246 of 1907, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the decree of W. W. Phillips, Esq., District judge of North Malabar, in Appeal Suit No. 319 of 1906, presented against the order of the District Munsif of Kuthuparamba in Original Suit No. 846 of 1904.

KOLINTAVITA Procedure Code, and accordingly returned the plaint for amendment
 MAMA AMINA by striking out the names of defendants Nos. 1 and 2.
 v.

KOLINTAVITA There can, I think, be no doubt that plaintiff's present request
 HAJI KANDI. amounts to an application relating to a question arising in relation
 to the execution of a decree for he seeks to recover the property
 sold in execution of a decree in the same condition as it was when
 sold. Under section 244(c), Civil Procedure Code, such questions
 arising between parties to the suit or their representatives are to
 be decided in execution proceedings. The dictum of Moore, J., in
Kasinatha Aiyar v. Uthumansu Rowthan (1) is authority for holding
 that plaintiff is the representative of the judgment-creditor, *i.e.*,
 first defendant. This dictum is also upheld in the case reported in
 I. L. R., 28 Mad., 87, although there was a decision to the
 contrary in an unreported case from this District. (Appeal against
 Appellate Order No. 77 of 1903.) I cannot however find any
 authority for treating plaintiff as the representative of the judgment-
 debtor (second defendant). The ruling reported in I. L. R., 28
 Mad., 119 is not applicable here as the circumstances are quite
 different. Plaintiff comes into Court as the auction-purchaser and
 as such the representative of the judgment-creditor. He does not
 claim to represent second defendant who is the person in possession
 and against whom the decree-holder's rights are to be enforced.
 So far then as plaintiff and second defendant are concerned, the
 question between them is one arising between the parties or their
 representatives, but as regards first defendant the case is different.
 Section 244 does not apply to questions arising between parties
 and their representatives, that is when a party and his representa-
 tive are ranged on opposite sides. Plaintiff only comes in under
 section 244 as representative of first defendant. I think therefore
 that section 244 cannot apply to a dispute between a party and
 his representative. Therefore so far as first defendant is concerned,
 plaintiff's suit is maintainable. As against second defendant his
 remedy is under section 244.

I therefore hold that the plaint should not have been returned
 for amendment and direct the District Munsif to restore it to file
 and dispose of it on its merits. As I have held that second
 defendant should not be sued, he will necessarily be exonerated in
 the suit."

The second defendant applied to the High Court under section
 622 of the Code of Civil Procedure.

V. Rynu Nambiar for petitioner.

J. L. Rosario for respondent.

KOLINTAVITA
MAMA AMINA

v.

KOLINTAVITA
HAJI KANDI.

JUDGMENT.—The plaintiff purchased a paramba in Court auction and the sale was confirmed, but before he obtained possession the decree-holder and judgment-debtor, so he alleges, joined with three other persons and carried away some of the materials of a building standing upon the land. He sued them all together for damages which he estimates at the value of the property removed, and the question is whether as against the parties to the decree in execution of which his purchase was made, he is entitled to maintain the suit.

He is clearly entitled though he is not bound to implead in one suit all the joint wrong doers, and that being so, he ought not to be compelled, none of the parties being improperly joined, to proceed in one proceeding (under section 244 of the Civil Procedure Code) against some of them and in another (by way of suit) against others.

It is not however necessary to decide whether the provisions of section 244 of the Civil Procedure Code are such as to necessitate this undesirable course in a case in which that section applies as to some of the parties to the dispute and not to others, for in this case I am of opinion that section 244 has no application. The question between the parties is not one relating to the execution of the decree. The plaintiff is not seeking the aid of the Court to obtain possession of what he has purchased; he is asking only for damages for injury done to that property after it had vested in him on the confirmation of the sale. He has obtained delivery of possession without obstruction and he does not say that the possession delivered to him was incomplete or that the Court could give him any thing more.

Wide as are the provisions of section 244, and liberally as the Courts have construed them, I am unable to see how they can be held to cover the present case. It may be correct to hold that in as much as it is in the power of the Court executing the decree to put the purchaser at its sale into possession of the property purchased, a question arising on the purchaser's attempt to obtain possession is a question relating to the execution of the decree. That however is not the present case. The plaintiff asks for compensation for a trespass committed by the defendants and the carrying off of his property, and there is no connection that I can

KOLINTAVITA see between that trespass and the execution of the decree. Again
 MAMA AMINA v. it does not appear that the legislature contemplated the decision of
 KOLINTAVITA such questions as this by the Court executing the decree, for even
 HAJI KANDI. when the decree is for possession of the property in question a suit
 for mesne profits is expressly saved by the section, and such a suit
 is not altogether dissimilar from the present action so far as the
 present order is against the second defendant. I therefore agree
 with the District Judge that the plaint ought not to have been
 returned for amendment and that the District Munsif must dispose
 of it on the merits, but I do not agree with his view that it will be
 the duty of the District Munsif to exonerate the second defendant
 or to treat the plaint in his case as an application under section
 244 of the Civil Procedure Code. I do not say that there would
 be any objection to his so treating it if the section was applicable,
 and the fact that another application subsequently made under
 this section has been held to be barred by limitation, would not
 effect the question, but the second defendant is a proper party
 to the suit and the suit must proceed against him accordingly.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Boddam.

THE SESSIONS JUDGE OF MANGALORE.

v.

MALINGA *alias* SOMAPPA.*

Criminal Procedure Code, Act V of 1898, ss. 436, 287, 288—District Magistrate may, under the section himself, commit for trial—Committing Magistrate in ss. 287, 288 means Magistrate who held preliminary enquiry.

Under section 436 of the Code of Criminal Procedure, it is competent to a District Magistrate to make a committal himself or to direct a Subordinate Magistrate to make a committal.

The words "Committing Magistrate" in sections 287, 288 mean merely the Magistrate holding the preliminary inquiry. Where, therefore, the District Magistrate himself commits for trial, the evidence recorded by the Subordinate Magistrate who held the preliminary inquiry will be receivable as evidence under sections 287, 288 of the Code.

* Criminal Miscellaneous Petition No. 190 of 1907, praying that, in the circumstances stated therein, the High Court will be pleased to issue orders as to whether the commitment in Sessions Case No. 28 of 1907 should be quashed and fresh commitment ordered or what should be done.