to supply water to a ryot. It dissents from an earlier ruling in *Ramachandra* v. *Narayanasami*(1) and is dissented from in a later decision by Subrahmania Ayyar, J., in *Sankaravadivelu Pillai* v. *Secretary of State for India*(2).

As between the Crown and the ryot different considerations may arise. The Crown claims the right of periodical revisions of assessment and the right to distribute the water for the benefit of the public subject only to the ryots' claim for such supply as is sufficient for his requirements and, for that purpose, to make the necessary alterations in the sources of such supply. The melvaramdar has neither the right of such revision of assessment nor was under any obligation to any other than the ryots of the plaint village for the distribution of this tank water.

Whatever might be the case therefore as between the Crown and the ryot, the right of the plaintiffs' kudivaramdars to the customary supply of water from the tank is a proprietary right appurtenant to their ownership of the lands.

In this view of the case we dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sankaran-Nair.

VENKATAKRISHNAMA CHARLU (DEFENDANT), APPELLANT,

v.

KRISHNA RAO (PLAINTIFF), RESPONDENT.*

1909. January 21, 22.

Civil Procedure Code—Act XIV of 1882, s. 244—Jurisdiction of Court to entertain separate suit in respect of matters falling within s. 244—Time for objecting to the maintainability of such suit.

Where matter which ought to be decided in execution under section 244 of the Code of Civil Procedure is tried in a separate suit by the Court executing the decree, such Court does not act without jurisdiction, as the section does not affect the jurisdiction of the Court but only prescribes the form of procedure.

Purmessuree Pershad Narain Singh v. *Jankee Kooer* (1873) (19 W.R., 90).

Pasupathy Iyer v. *Kothanda Rama Iyer*, [(1905) (I.L.R., 28 Mad., 64)], referred to.

The objection should be taken in the original Court.

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(1) (1893) I.L.R., 16 Mad., 333. (2) (1905) I.L.R., 28 Mad., 72 at p. 81.

*Second Appeal No. 435 of 1906.

BENSON AND SANKARAN-NAIR, JJ.

VENKATA-KRISHNAMA CHARLU v. KRISHNA RAO.

SECOND APPEAL against the decree of A. T. Forbes, District Judge of Bellary in Appeal Suit No. 32 of 1904, presented against the decree of V. G. Narayana Ayyar, District Munsif of Bellary, in Original Suit No. 290 of 1902.

The present plaintiff brought a suit against the defendant and his two brothers *G.* and *K.* to recover money due from them.

The defendant and *K.* were exonerated with costs and a decree was passed against *G* alone. In execution of the decree, a printing press was attached. The defendant intervened with a claim petition under section 278 of the Code of Civil Procedure and the attachment was raised. The plaintiff filed this suit against the defendant for a declaration that the press was liable to be attached in execution of the decree against *G*. The Munsif held that the press belonged to defendant and dismissed the suit. An appeal was preferred by plaintiff. After the appeal was heard on the merits, the defendant for the first time raised the plea that the suit was in contravention of section 244 of the Code of Civil Procedure. The District Court disallowed the plea and, on the merits, decided in favour of the plaintiff.

The defendant appealed.

L. A. Govindaraghava Ayyar for appellant.

The respondent not appearing in person or by vakil.

JUDGMENT.—This suit is brought to declare the plaintiff's right to attach certain property in execution of the decree in Original Suit No. 479 of 1899 which he obtained against one Gopalacharlu. The defendant also was a party to that suit. The Judge has therefore held that the question is one that should have been determined in execution and not by separate suit. But as the Court which tried this original suit is also the Court for executing the decree, he held that the Court has not acted without jurisdiction and disallowed the contention of the appellant that the suit must be dismissed on the ground that it is barred by section 244 of the Civil Procedure Code of 1882.

The same contention is raised before us. In the earliest reported case, brought to our notice which has been subsequently followed in delivering the judgment of the Court, Couch, C J., said:—"With regard to the objection that this ought not "to be by a separate suit, but by a proceeding in execution "of the decree, the answer appears to us to be that the objection "ought to have been taken in the Court of the Subordinate Judge,

"where it appears by the written statement it was not "taken.

"Section 11, Act XXIII of 1861, no doubt, provides that "questions arising between the parties to the suit in which the "decree was passed and relating to the execution of the decree, "shall be determined by order of the Court executing the decree, "and not by separate suit. But that, we consider, does not "affect the jurisdiction of the Court, but only the form of "procedure. Here, a separate suit has been brought in the same "Court as would have had the execution of the decree. There "was a wrong form of proceeding, but there was not, in our "opinion, a want of jurisdiction which can be made a ground of "objection in the present stage of the suit. Whatever language "may have been used by the learned Judges in the case Mr "Allan quoted must be considered with reference to the case "before them, which was one where the party was suing in the "wrong Court, in the Civil Court, when he ought to have sued in "the Revenue Court. Here, the Subordinate Judge decided that "the question between the parties could not be entertained in "executing the decree, but must be tried by a separate suit. "Supposing in that he decided wrongly, we consider that it is not, "as we have said, a question of want of jurisdiction. The "plaintiff has been led by that decision to bring the present "suit. She has acted perfectly *bonâ fide*, having been misled by "the decision of the Judge." *Purmessuree Pershad Narain Singh* v. *Jankee Kooer*(1). This was followed in *Azizuddin Hossein* v. *Ramanugra Roy* 2) where it was similarly pointed out there is no exercise of jurisdiction by the munsif which he did not possess in determining the question in a separate suit if any application under section 244 to determine such question also would have been inquired into by him. It was also held where the point was not raised by the pleadings, the High Court should not allow it to be raised before that Court. This was followed in *Biru Mahata* v. *Shyama Churn Khawas*(3). In that case the plaintiff had failed to get any relief in execution proceedings under section 244 The High Courts of Allahabad and Madras took the same view in *Jhamman Lal* v. *Kewal Ram*(4), *Mayan*

(1) (1873) 19 W.R., 90. (2) (1887) I.L.R., 14 Calc., 605 at p. 608.
(3) (1895) I.L.R., 22 Calc., 483, 485. (4) (1900) I.L.R., 22 All., 121.

BENSON AND SANKARAN-NAIR, JJ.

VENKATA-KRISHNAMA CHARLU v. KRISHNA RAO.

Pathuti v. *Pakuran*(1) and *Pasupathy Ayyar* v. *Kothanda Rama Ayyar*(2).

It was contended by Mr. Govinda Raghava Ayyar that the suit brought by the respondent cannot be treated as a proceeding under section 244, as there was already an application under that section on which an order was passed against him. But there were similar applications and orders in *Pasupathy Ayyar* v. *Kothanda Rama Ayyar*(3), *Biru Mahata* v. *Shyama Churn Khawas*(4) and in the case of *Purmessuree Pershad Narain Singh* v. *Jankee Kooer*(5). It must also be noticed that the reason of the rule is, as pointed out by Couch, C.J., that the question is only one of procedure and does not affect the jurisdiction of the Court. We therefore disallow this contention.

It has also to be pointed out that this question was not raised before the munsif nor before the Judge till he had written his judgment on the other questions raised in the case ; and according to the decisions in *Purmessuree Pershad Narain Singh* v. *Jankee Kooer*(5) and *Azizuddin Hossein* v. *Ramanugra Roy*(6) the appellant ought not to have been allowed to raise this question at that stage.

We dismiss the second appeal.

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(1) (1899) I.L.R., 22 Mad., 347. (2) (1906) I.L.R., 28 Mad., 64.
(3) (1905) I.L.R., 28 Mad., 64. (4) (1895) I.L.R., 22 Calc., 483, 485.
(5) (1873) 19 W.R., 90. (6) (1887) I.L.R., 14 Calc., 605 at p. 608.