thereof. There is some conflict of judicial opinion on this point and several decisions have been cited at the Bar. As the decision on the second point is sufficient for the disposal of this appeal, it is unnecessary to discuss this question.

In the result, the second appeal should be allowed as the plaintiff is not entitled to sue for specific performance of the plaint-mentioned agreement, and his suit is therefore dismissed with costs of second defendant in all the Courts.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

K. V. SRINIVASATHATHACHAR (PETITIONER—SECOND PLAINTIFF), APPELLANT,

1932, August 26.

v.

NARAVALUR SRINIVASATHATHACHAR (RESPONDENT—DEFENDANT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 54—Applicability of—Portion of undivided estate—Partition of—Decree for, if falls within sec. 54.

Section 54 of the Code of Civil Procedure refers to the partition of an estate assessed to the payment of revenue and not necessarily to the partition of such an estate accompanied by apportionment of the revenue.

Where the plaintiff and the defendant are entitled to a portion of an undivided estate, a decree directing that that portion should be divided into two equal halves does not fall within the terms of section 54. A share of an estate is not equivalent to a share of a portion of an estate; when the decree relates to the separate possession of a share of a portion, that decree does not fall within the terms of section 54.

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* Appeal against Order No. 112 of 1931.

SRINIVASATHATHACHAR v. SRINIVASATHATHACHAR.

APPEAL against the order of the Subordinate Judge of Salem, dated 14th November 1930 and made in Interlocutory Application No. 269 of 1928 in Original Suit No. 62 of 1926.

C. S. Venkatachariyar for appellant.

B. Sitarama Rao for respondent.

JUDGMENT.

VENKATASUBBA RAO J.

VENKATASUBBA RAO J.—The question raised relates to the construction of section 54, Civil Procedure Code. The lower Court has made an order directing the decree to be forwarded to the Collector for partition being effected. Mr. Venkatachari for the appellant contends that the order is wrong. It is first urged that the section does not apply unless the partition is not only of the land but also of the revenue assessed on it; in other words, unless the division of the land is to be followed by the apportionment of the revenue. This construction is opposed to the plain provisions of the section. What the section refers to is the partition of the estate *assessed to the payment of revenue* and not the partition of the estate *as well as* the revenue. Why in construing the section, which is plain and unambiguous, words not to be found there should be imported into it, I fail to see. I agree with the observations of RANKIN C.J. on this point in the two cases cited at the Bar, namely, *Abdul Razak* v. *Shreenath Ghosh*(1) and *Rai Kiran Chandra Roy Bahadur* v. *Rama Nath Dutta Chowdhury*(2). But it is unnecessary to pursue this point, as the second contention of Mr. Venkatachari is, in my opinion, clearly well-founded. He argues that what the section contemplates is an *entire* undivided estate and not merely *a part* of it. In the present case,

(1) (1930) I.L.R. 58 Calc. 122. (2) (1930) 34 C.W.N. 895.

the plaintiff and the defendant were entitled to a *portion* of the undivided estate and the decree directed that that portion should be divided into two equal halves. Such a decree does not fall within the terms of the section. Is this decree one for the partition of an undivided estate? Or again, is it for the separate possession of a share of such an estate? The answer is in the negative. A share of an estate is not equivalent to a share of a portion of an estate; when the decree relates to the separate possession of *a share of a portion*, that decree does not fall within the terms of the section. TREVELYAN J. expresses this tersely in *Jogodishury Debea* v. *Kailash Chundra Lahiry*(1), in a passage extracted by RANKIN C.J. in the first of the two cases already cited. Says TREVELYAN J :—

"The section applies only to a case where the decree comprehends the partition of the whole of the estate paying revenue to Government. A decree for possession of a share of a portion of an undivided estate is not a decree for 'possession of a share of an undivided estate' in any sense." (page 894).

The intention of the statute seems to be that, where the duty is cast upon the Collector of executing the decree, the partition he has to effect is to be both complete and perfect, that is, not only is the land to be divided, but the revenue also is to be allocated, the object being that the interests of the Government are safeguarded and there is also a final adjudication of the rights and liabilities of the parties in the sense that one sharer shall no longer be at the mercy of the other co-owners; and such a course the Collector can appropriately adopt only when the decree relates to the whole, and not merely a part of, the undivided estate and all the parties interested and to be affected by the proposed division are before him.

(1) (1897) I.L.R. 24 Calc. 725 (F.B.).

SRINIVASA-THATHACHAR v. SRINIVASA-THATHACHAR. — VENKATA-SUBBA RAO J.

I agree with the view taken of the section by the learned Judges of the Calcutta High Court in *Abdul Razak* v. *Shreenath Ghosh*(1) and *Rai Kiran Chandra Roy Bahadur* v. *Rama Nath Dutta Chowdhury*(2), referred to by me. The result is, the Subordinate Judge's order is set aside and the appeal is allowed with costs.

I must point out that there was some difficulty in the lower Court as regards getting a proper officer appointed for effecting the partition. The commissioner selected reported that without the aid of an expert surveyor he was unable to make a partition. We direct the Court to appoint a fresh commissioner and would suggest that, if possible, a trained surveyor should be appointed.

REILLY J.

REILLY J.—It appears in this case that the agraharamdars of this village in 1876 by an arrangement among themselves allotted certain plots of land in the village to each other to be enjoyed separately in accordance with their vrithis, reserving, we are told, certain other plots still to be enjoyed in common. In course of time plots of land representing about 7/9ths of the whole village, we are told, came into the possession of the plaintiff and the defendant in this suit. The suit is for the partition of those plots between the plaintiff and the defendant. It appears to me quite clear that such a suit does not come within the meaning of section 54 of the Code. It is certainly not a suit for the partition of an undivided estate within the words of the section. It is not a suit for the partition of the whole agraharam village. Nor is it a suit for the separate possession of a share of that village. If it were a suit for the separate possession of a share of that village, not only would the plaintiff and the defendant

(1) (1930) I.L.R. 58 Calc. 122. (2) (1930) 34 C.W.N. 895.

be parties, but all the agraharamdars would have to be parties to the suit. Here we are quite outside the provisions of section 54 of the Code, as I understand them. Perhaps I may also say with respect that I entirely agree with the interpretation of section 54 of the Code given by RANKIN C.J. in *Abdul Razak* v. *Shreenath Ghosh*(1).

I agree that this appeal should be allowed with costs and that the revision petition should be dismissed but without costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

S. R. M. M. SEETHARAMAN CHETTIAR (FIRST RESPONDENT), APPELLANT,

1932, September 7.

v.

A. RM. N. CHIDAMBARAM CHETTIAR AND THREE OTHERS (PETITIONERS 1 AND 2 AND RESPONDENTS 2 AND 3), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 47—Execution of decree—Sale in, of property attached before judgment—Application for—Right to intervene in—Purchaser of same property under decree in another suit filed after attachment before judgment, purchase, however, being prior to application for sale, has—Intervenor's decree and purchase attacked by applicant for sale as being fraudulent and collusive and benami—Executing Court if bound to decide question or can refer applicant to a regular suit.

The appellant, who had attached before judgment the immovable property of his judgment debtor, filed, after obtaining a decree in his suit, an execution petition for the purpose of

(1) (1930) I L.R. 58 Calc. 122.

* Appeals against Orders Nos. 110 and 111 of 1929.

SEETHARAMAN CHETTIAR v. CHIDAMBARAM CHETTIAR.

bringing the attached property to sale. The respondent was a purchaser of the same property from one *M*, who had in the meantime, but subsequent to the attachment before judgment, filed a suit against the same judgment-debtor and purchased the property in execution of the decree therein. The respondent intervened in the execution petition filed by the appellant and filed an execution application asserting his right to the property and resisting the execution of the appellant's decree. The appellant urged that the decree obtained by *M* was fraudulent and collusive, that the respondent was a benamidar for the judgment-debtor and that in point of fact the property in question continued to be in the possession of the latter. The Court below allowed the respondent to intervene in the execution petition filed by the appellant, but without deciding the question raised by the appellant referred him to a regular suit for the purpose of getting rid of the decree obtained by *M* and the sale held in pursuance of it.

Held that the respondent was the representative of the judgment-debtor and that, as the question was one relating to the execution of the appellant's decree, the respondent had properly been allowed to intervene under section 47 of the Code of Civil Procedure in the appellant's execution petition.

Held further that the Court below ought to have decided the question raised by the appellant in execution under section 47 and ought not to have referred him to a regular suit for the purpose.

Paragraphs one and two of section 47 should be read together and under them, when once it is held that resort to section 47 is the proper remedy, the Court has no option but is bound to decide the question in execution under that section.

APPEALS against the orders of the Court of the Temporary Subordinate Judge of Devakotta, dated 16th August 1928, and made in Execution Application No. 91 of 1928 in Execution Petition No. 39 of 1927 in Original Suit No. 39 of 1924 Subordinate Court, Kumbakonam, and in Execution Petition No. 39 of 1927 in Original Suit No. 39 of 1924 on the file of the Court of the Subordinate Judge of Kumbakonam.

S. Panchapagesa Sastri and *K. R. Krishnaswami Ayyar* for appellant.

N. Muttuswamy Ayyar for respondents.

Cur. adv. vult.

JUDGMENT.

VENKATASUBBA RAO J.

VENKATASUBBA RAO J.—Before stating the point of law raised, it is necessary that I should set out briefly the facts which have given rise to these appeals. The decree that is under execution is the one passed in Original Suit No. 39 of 1924. The plaintiff in that suit (the appellant) attached before judgment the immovable property in question. Having obtained a decree in his suit, he has filed Execution Petition No. 39 of 1927 for the purpose of bringing the attached property to sale. In the meantime, but subsequent to the attachment before judgment, one Meyappan Ambalam filed Original Suit No. 498 of 1924 against the same judgment-debtor and, in execution of the decree he obtained, he brought the same property to sale, purchased it in Court auction and conveyed it to the respondent. As such purchaser, he is interested in resisting Execution Petition No. 39 of 1927 filed by the appellant. He first sought to assert his right by filing a claim petition under Order XXI, rule 58, Civil Procedure Code. But that petition was summarily rejected on the ground that at the time of the attachment before judgment the respondent had no right to the property and his claim petition therefore was unsustainable. Having failed in this, he had recourse to another method for asserting the same right, that is, he intervened in Execution Petition No. 39 of 1927 under section 47, Civil Procedure Code, claiming that, as the representative of the judgment-debtor, he could assert his right to the property and resist the execution of

SEETHA-RAMAN CHETTIAR v. CHIDAM-BARAM CHETTIAR.

VENKATA-SUBBA RAO J.

the decree in Original Suit No. 39 of 1924. The application he filed for the purpose was Execution Application No. 91 of 1928. The first point that has to be decided is, whether the respondent is the representative of the judgment-debtor and whether he can intervene under section 47. There can be no doubt that, as the purchaser of the property belonging to the defendant, he should be regarded as his representative and the question is undoubtedly one relating to the execution of the decree; see *Veyindramuthu Pillai* v. *Maya Nadan*(1). His application therefore under section 47 was properly made and this is also the view taken by the lower Court. Mr. Panchapagesa Sastri, the appellant's learned Counsel, does not question the correctness of this part of the learned Judge's order. The question then arises: what was the proper procedure the lower Court should have adopted, after it held that the respondent could rightly come in under section 47? The appellant's contention was that the decree obtained by Meyappan Ambalam was collusive and fraudulent, that the respondent was a benamidar for the judgment-debtor and that in point of fact the property in question continues to be in the possession of the latter. The lower Court, without deciding this question which is the subject of issues 1 and 3 framed by it, has referred the appellant to a regular suit for the purpose of getting rid of the decree obtained by Meyappa and the sale held in pursuance of it. It is this part of the order that Mr. Panchapagesa Sastri impugns. The learned Judge apparently seems to think that he has an option either to dispose of the application under section 47 or refer the parties to a regular suit. In this he seems to be wrong. Is a question to be

(1) (1919) I.L.R. 43 Mad. 107 (F.B.).

agitated under section 47 or by a separate suit? Once it is held that resort to section 47 is the proper remedy, the Court has no option but is bound to decide the question in execution under that provision. The first paragraph of the section shows that it is incumbent on the Court to decide the questions referred to there under that very section. The words used are "shall be determined by the Court executing the decree and not by a separate suit." These words are imperative and vest no discretion in the Court. The second paragraph is no doubt not happily worded, but both the parts should be read together and the interpretation I have suggested is the only proper one. The order made by the lower Court reads thus:—

"Under the above circumstances, I would declare, in Execution Application No. 91 of 1928, that the property sought to be sold in Execution Petition No. 39/27 is not liable to be sold until the decree-holder gets the Court sale in favour of the vendor of the petitioner in Execution Application No. 91/28 set aside by a decree of Court and also obtains a declaration that the sale in favour of the petitioner in Execution Application No. 91/28 is benami for the judgment-debtor and is not valid and binding on him (the said decree-holder) and I would dismiss Execution Petition No. 39/27 with a direction to the decree-holder (petitioner in the said Execution Petition No. 39/27) to comply with the abovesaid direction before he seeks to bring the property to sale in execution of his decree."

This order cannot be sustained and the lower Court should itself decide under section 47 the question of fact raised by the appellant.

The respondent's Counsel in supporting the lower Court's order contends that an executing Court cannot take upon itself the responsibility of setting aside a decree passed by a competent Court. This argument is based upon a fallacy. In this case, the executing Court is not called on to pronounce upon the validity of the decree which it is executing. The respondent's

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VENKATASUBBA RAO J.

title to the property depends upon some decree and the question is whether that decree is vitiated by fraud or collusion. That is not the decree which the lower Court is executing and there is nothing to prevent it from deciding whether that was properly obtained or not, as incidental to the main question, namely, is the appellant's objection that the respondent is a benamidar well-founded? The case relied upon by the respondent's learned Counsel, *Venkatasami Naidu* v. *Gurusami Aiyar*(1), does not help him. The point under discussion did not arise for decision there. A suit had already been instituted and it was taken for granted that the parties were to be governed by the result of that suit.

The orders of the lower Court are set aside and Execution Petition No. 39 of 1927 and Execution Application No. 91 of 1928 are remanded to it for disposal in the light of these observations.

The appellant's conduct disentitles him to costs. He raised several objections in the lower Court which were untenable and repeated them in the memorandum of appeal filed by him here. For this reason I direct each party to bear his costs of the appeal.

REILLY J.

REILLY J.—I agree. Mr. Muttuswami Ayyar for the respondent here, that is the petitioner in Execution Application No. 91 of 1928, has maintained that his client rightly preferred that application to the Subordinate Judge's Court under section 47 of the Code, and in that we agree with him. But he has gone on to contend that, although he came in rightly under that section, the Subordinate Judge had no jurisdiction to make any but one order on that application, viz. that he was bound to give effect to the applicant's objection without going into the answer of the decree-holder in

(1) (1919) 38 M.L.J. 441.

Original Suit No. 39 of 1924, who was the execution-petitioner before the Subordinate Judge. That appears to me an obviously impossible contention. The answer of the decree-holder in Original Suit No. 39 of 1924 was that Mr. Muttuswami Ayyar's client was merely a benamidar for the judgment-debtor in Original Suit No. 39 of 1924, which would be an effective answer, if true. It is quite impossible for Mr. Muttuswami Ayyar to maintain that his client had the right to come in with a petition under section 47 of the Code but that his opponent had no right to urge his answer and to claim that his answer should be heard under that section.

I agree with the order proposed by my learned brother in regard to the disposal of the appeals and as to costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

K. G. ETHIRAJULU CHETTIAR (RESPONDENT), APPELLANT,

v.

THE OFFICIAL RECEIVER, EAST TANJORE, NEGAPATAM (PETITIONER), RESPONDENT.*

1932, October 3.

Provincial Insolvency Act (V of 1920), sec. 52—Property "in the possession of the Court" within the meaning of—Immovable property—Decree creating charge on—Sale of property in execution of—Stay of—Interim receiver's right to apply for—Property in such a case not property "in the possession of the Court"—Application under sec. 52 by interim receiver impleaded as party to a suit in execution—Order on—Appeal from—Right of.

Immovable property which a judgment-creditor seeks to bring to sale on the ground that his decree creates a charge on

* Appeal against Order No. 226 of 1932.