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April 16.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

KALKA PRASAD (DEFENDANT) v. BASANT RAM (PLAINTIFF).*

Civil Procedure Code, section 244—Execution of decree—Party to suit in which the decree was passed—Party against whom no decree was passed not precluded from bringing a suit.

Section 244 of the Code of Civil Procedure presupposes a decree enforceable by the decree-holder against the person between whom and the decree-holder the question referred to therein arises. It has no application to questions arising between the decree-holder and persons against whom there is no decree to be executed.

Where therefore certain persons had intervened in a suit as defendants, and the suit was disposed of without any decision of the claim set up by them and without any decree being passed affecting them, it was held that they (or their assignee) were not precluded from bringing a suit to have released from attachment the property claimed by them in the former suit, but as to their title to which there had been no adjudication.

Chowdhry Wahed Ali v. Jumae (1) followed; *Nagamuthu v. Savarimuthu* (2), *Gour Kishore Chowdhry v. Mahomed Hassim Chowdhry* (3), *Kameshwar Pershad v. Bun Bahadur Singh* (4), *Masih-ullah v. Kifayti* (5), *Jangi Nath v. Phundo* (6), and *Mukarrab Husain v. Hurmat-un-nissa* (7), approved; *Ramaswami Sastrulu v. Kameswaramma* (8), *Sankaravadivammal v. Kumarasamy* (9), *Vibhudapriya Thirthasami v. Vidanidhi Thirthasami* (10), and *Gowri v. Vigneshvar* (11), dissented from; *Basti Ram v. Fattu* (12), *Dhani Ram v. Chaturbhuj* (13), and *Gadicherla China Seetayya v. Gadicherla Seetayya* (14) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Sundar Lal, Babu Jivan Chandar and Babu Devendra Nath Ohdedar, for the appellant.

Pandit Madun Mohan Malaviya and Munshi Gokul Prasad, for the respondent.

STRACHEY, C. J. and BANERJI, J.—This is an appeal from an order of remand under section 562 of the Code of Civil Procedure. The Court of first instance dismissed the suit on the preliminary ground that it was barred by section 244 of the Code of Civil Procedure. On appeal the lower appellate

* First Appeal from order No 47 of 1900, from an order of L. Stuart, Esq., District Judge of Benares, dated the 26th March 1900.

(1) (1872) 11 B. L. R., P. C., 149.

(2) (1891) I. L. R., 15 Mad., 226.

(3) (1868) 10 W. R., C. R., 191.

(4) (1888) I. L. R., 12 Calc., 458.

(5) Weekly Notes, 1893, 67.

(6) (1888) I. L. R., 11 All., 74.

(7) (1895) I. L. R., 18 All., 52.

(8) (1899) I. L. R., 23 Mad., 361.

(9) (1885) I. L. R., 3 Mad., 473.

(10) (1898) I. L. R., 22 Mad., 191.

(11) (1892) I. L. R., 17 Bom., 49.

(12) (1886) I. L. R., 3 All., 146.

(13) Weekly Notes, 1899, p. 184.

(14) (1897) I. L. R., 21 Mad., 45.

Court held that the suit was not barred, and remanded the case to the first Court for trial on the merits. The question is, which of the Courts below was right.

A suit was brought by one Gobardhan upon a simple money bond executed by Ram Das. It was brought after the death of Ram Das against his widows as his legal representatives. Two cousins of Ram Das, Sarju and Dwarka, were added as defendants to the suit upon their own application. They pleaded that Ram Das and themselves formed a joint Hindu family; that upon his death all his rights and interests vested in them by survivorship, and that he left no estate against which the plaintiff's claim could be enforced. On the 28th June, 1889, the Court passed a decree, of which the material part was as follows:—"Plaintiff's claim with *ex parte* costs be decreed against defendants Nos. 1 and 2, Musammats Manki and Bhagi, and the answering defendants will bear their costs." Thus the Court did not decide the question raised by Sarju and Dwarka, and passed no decree against them, though the decree did not state in terms that the suit as against them was dismissed. At all events, there was no decree which could be executed against Sarju and Dwarka by the decree-holder. Subsequently the decree-holder, in execution of the decree against the other defendants, attached and put up for sale a fixed-rate holding as the property of Ram Das, and it was purchased by the present defendant, Kalka Prasad. The plaintiff in this suit claims under an assignment made by Sarju and Dwarka in 1899. He seeks to recover possession of the fixed-rate holding on the ground that on the death of Ram Das it passed by survivorship to the assignors, Sarju and Dwarka, and could not afterwards be sold in execution of a decree as assets of Ram Das in the hands of his representatives. The question is, whether the suit is barred by section 244(c) of the Code as raising a question between the parties to the suit in which the decree was passed or their representatives relating to the execution, discharge, or satisfaction of the decree. The plaintiff is a representative of Sarju and Dwarka within the meaning of section 244(c). The section has been held to apply to a suit brought by a party to the former suit, or his representatives, to recover from an auction-purchaser the property sold in execution, on the ground that the sale was illegal. *Basti*

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Ram v. Fattu (1), *Dhani Ram v. Chaturbhuj* (2). The appeal raises two questions. The first is whether a defendant against whom no decree is passed is a party to the suit within the meaning of section 244 (c). The second is whether, assuming him to be a party to the suit, any question raised by him or his representatives in proceedings taken by the decree-holder in execution against another defendant is a question relating to the execution, discharge, or satisfaction of the decree within the meaning of the section. Upon these questions there are various rulings of the High Courts, some of which are conflicting. All, or almost all of them, entirely overlook the most important authority on the subject—the judgment of the Privy Council in *Chowdhry Wahed Ali v. Jumae* (3). That case was decided upon the construction of section 11 of Act No. XXIII of 1861, the terms of which, so far as regards the present questions, are substantially the same as section 244 (c) of the Code, but in which there was no express mention of the representative of parties to the suit in which the decree was passed. The respondent was one of the defendants in a suit for possession and mesne profits. She claimed part of the property in suit in her own right. As regards other parts, she was sued in a representative capacity. The first Court, though stating in its judgment that her title to the share which she claimed in her own right was proved, nevertheless gave the plaintiff a general decree for possession and mesne profits against all the defendants. On appeal the High Court held that she had been unnecessarily made a party to the suit, and ordered that she should be released from it, and the suit dismissed as against her with costs (see 2 B. L. R., Full Bench, at p. 75). In their judgment the Privy Council pointed out that although the grounds of the High Court's decision did not touch the respondent's liability in her representative capacity, still, owing probably to some mistake in drawing up the decree, her release from liability was absolute. That decree, the Privy Council held, stood unreversed and unamended. In execution of his decree for mesne profits the plaintiff caused a part of the property which belonged to the respondent in her own right to be attached and sold. After various

(1) (1886) I. L. R., 8 All., 146.

(2) Weekly Notes, 1899, p. 184.

(3) (1872) 11 B. L. R., P. C., 149

complicated proceedings she brought a suit to obtain a declaration that the execution sale should be set aside and her possession of the property confirmed. The substantial question considered by the High Court in Full Bench and by the Privy Council was whether the suit was barred by section 11 of Act No. XXIII of 1861. The High Court held that it was not on the ground that a party sued in a representative capacity was not a party to the suit within the meaning of the section. The Privy Council agreed with the High Court's conclusion but not with its reasons. At pages 156 and 157 of the report they say :—" In a case, then, in which a decree has been properly passed and proceedings taken under it to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to the suit, with respect to any question which may arise between him and the other parties relating to the execution of the decree, within the meaning of section 11 of the Act of 1861. But their Lordships consider that there are other grounds upon which the judgment in the present case may be supported. In their view it is not satisfactorily established that there is an existing decree which warranted any execution whatever against the respondent. It has been already pointed out that the original decree was amended by the High Court on appeal by a decree directing Jumae to be released from the suit altogether * * *. In point of form, therefore, the decree releasing her altogether was left standing. * * * When, therefore, the appellant insists that the present suit is not competent, because the questions relating to the execution ought to have been determined in the former suit A, his objection, which relates only to procedure, may, their Lordships think, be properly met by the counter-objection that in point of procedure his own decree in suit A is ineffectual, as actually drawn up to support any execution against Jumae, and that the proceedings which may have virtually set it right and warranted some execution have lost all efficacy for that purpose by his own acts. Their Lordships cannot find, after the incongruous proceedings above described, that there exists any decree authorizing an execution against the respondent's estate; and consequently the question in the present suit is one not properly

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relating to the execution of a decree but to a sale under orders which have not the support of any decree."

Two points are noticeable. First, having regard to the first sentence quoted from page 156, it is doubtful whether their Lordships would hold a defendant, whether sued in a representative capacity or otherwise, to be "a party to the suit" within section 11 of Act No. XXIII of 1861 or section 244 of the present Code, unless "a decree has been properly passed and proceedings taken under it to obtain execution against" him. Secondly, their Lordships clearly hold that a question regarding the liability of property to attachment and sale in execution raised by a defendant, against whom the decree does not warrant any execution whatever, but who is released by it altogether from liability, is "one not properly relating to the execution of a decree" within the meaning of those sections.

This case has so often been cited as an authority on the first point discussed in the judgment, namely, as to a person against whom a decree has been passed and execution taken in a representative capacity being a party to the suit, that it is strange that its bearing on the second point should have been generally overlooked. That part of the decision is not referred to in the head-note of the report.

In Madras the latest case is the decision of the Full Bench in *Ramaswami Sastrulu v. Kameswaramma* (1). It was there held that "when a party, defendant in a suit, is exonerated from such suit, the suit being dismissed against him and a decree passed against a co-defendant in the suit, and in execution of that decree property belonging to, and in the possession of, the defendant who was so exonerated from the suit is attached and sold, the latter is not entitled to maintain a suit for recovery of possession of the property, and that the question of his claim to, and to recover possession of, the property is a question falling within section 244, Civil Procedure Code of 1882, so as to debar him from maintaining such suit." The judgment approves of *Sankaravadiwammal v. Kumarasamy* (2) and *Vibhudapriya Thirthasami v. Vidianidhi Thirthasami* (3). It distinguishes

(1) (1899) I. L. R., 23 Mad., 331.

(2) (1885) I. L. R., 8 Mad., 473.

(3) (1898) I. L. R., 22 Mad., 131.

Gadicherla China Seetayya v. Gadicherla Seetayya (1) on the ground that there the names of the defendants exonerated were removed from the suit, and they had thereby ceased to be parties.

In regard to this decision it is to be observed that neither in the judgment nor apparently in the argument was the judgment of the Privy Council in *Chowdhry Wahed Ali v. Jumae* (2) referred to. In the second place, it is based upon a consideration of the question whether an exonerated defendant is a party to the suit within the meaning of section 244; and only a slight and indirect reference is made to the equally important question dealt with by the Privy Council whether, assuming him to be a party to the suit, a question between him and the decree-holder can be considered a question relating to the execution of the decree within the meaning of the section. This is the more singular because the Full Bench mentions, with a mere expression of dissent, the judgments of Mr. Justice Shephard and Mr. Justice Wilkinson in *Nagamuthu v. Savarimuthu* (3), in which, although the judgment of the Privy Council is not referred to, the learned Judges express a view entirely in accordance with that of the Judicial Committee. That view is that, assuming a defendant, against whom a suit has been dismissed, to be nevertheless a party to the suit, yet, as between him and the decree-holder, no question relating to the execution of the decree within the meaning of the section can arise, because against him there is no decree to be executed. At page 228 of the report Mr. Justice Shephard says:—"In my opinion, regard being had to the language of the section, a question relating to the execution of the decree presupposes a person against whom execution is sought, and cannot arise as between the decree-holder and persons who, so far as concerns execution, are complete strangers. In the present case the defendants were dismissed from the prior suit on appeal. But a much stronger case might be put to illustrate the inconvenience of giving a larger operation to the section. For instance, in a suit against two defendants, the plaintiff might withdraw the suit against one, with or without liberty to bring a fresh suit, and obtain a decree against

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(1) (1897) I. L. R., 21 Mad., 45. (2) (1872) 11 B. L. R., P. C., 149.
 (3) (1891) I. L. R., 15 Mad., 226.

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the other. The defendant against whom the suit was withdrawn would, of course, be a party to the suit in which the decree was passed. But he would have no concern in the execution of the decree, and, in my opinion, no question relating to the execution could arise between him and the decree-holder. If it be correct to say that the object of the section is to put a limit to litigation and prevent one suit growing out of another, it is clear that in such a case as the one put the section ought not to be applicable. It cannot have been intended to prohibit suits between persons as between whom no adjudication in respect of their right has as yet taken place."

The only reported Bombay case is *Gowri v. Vigneshwar* (1), which is to the same effect as the decision of the Madras Full Bench. The learned Bombay Judges quote a passage from the judgment of the Privy Council, but entirely overlook the greater part of what the Privy Council discussed and decided. The only question which they consider is, whether a person against whom there is no decree can be considered a party to the suit within the meaning of section 244, and this they answer in the affirmative on the ground that the contrary view requires that the words of the section should be read as if they were "parties to the decree in the suit or in the appeal in which the decree was passed." As to whether, assuming such a person to be a party to the suit, the question between him and the decree-holder is of the nature contemplated by section 244 the judgment is altogether silent.

There are two Calcutta cases on the point.—*Gour Kishore Chowdhry v. Mahomed Hassim Chowdhry* (2) and *Kameshwar Pershad v. Run Bahadur Singh* (3). In the former it was held that a defendant who was excluded from the decree in favour of the plaintiff, though "a party to the suit," must, as regards the execution of the decree from whose operation he was released, be considered a stranger to the suit, in which he had no further interest or concern, and was not precluded from suing by section 11 of Act No. XXIII of 1861. In the latter case the opinion of Mitter and Agnew, JJ., is exactly the same as that of

(1) (1892) I. L. R., 17 Bom., 49. (2) (1868) 10 W. R., C. R., 191.
 (3) (1886) I. L. R., 12 Calc., 458.

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Shephard and Wilkinson, JJ., in *Nagamuthu v. Savarimuthu* (1). They say (at page 464) that section 244(c) does not apply, because, although the respondent was a party to the suit, no decree was passed against him. "Although he was a party to the suit, still the question that has arisen is not a question relating to the execution of the decree which was passed in the suit in favour of the plaintiff." Though the learned Judges do not mention the judgment of the Privy Council, their opinion is entirely in accordance with it.

In this Court there are three cases, all of which support the conclusion arrived at in this case by the lower appellate Court. The first is *Masih-ullah v. Kifayati* (2), where a decree against one of the defendants was set aside on appeal. On an objection made by her to the attachment and sale of a house in execution of the decree against another defendant, it was held that she was not a party to the suit, raising a question in the sense of section 244. In *Jangi Nath v. Phund* (3) a decree was passed against the obligor of a hypothecation bond personally and for sale of the hypothecated property. There was another defendant who was made a party only because she claimed the hypothecated property. Upon the decree-holder seeking to enforce the decree against property other than the hypothecated property, she objected in the execution department. It was held that, so far as the decree was sought to be enforced against property other than the hypothecated property, she was a stranger to the action, and the question did not fall within section 244(c). That decision was followed in *Mukarrab Husain v. Hurmat-un-nissa* (4). It was there held that a defendant who was by the decree released from all liability was not a party to the suit within the meaning of section 244(c), and that, as there was no decree against him, a question arising between him and the decree-holder was not a question relating to the execution of the decree within the meaning of the section.

The result is that the decisions of this Court and of the Calcutta High Court are substantially in accordance with the judgment of the Privy Council. The decision of the Madras

(1) (1891) I. L. R., 15 Mad., 226.

(2) *Weekly Notes*, 1893, p. 67.

(3) (1888) I. L. R., 11 All., 74.

(4) (1895) I. L. R., 18 All., 52.

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Full Bench and of the only reported judgment of the Bombay High Court overlook the effect of the judgment of the Privy Council, and we cannot follow them.

Apart from authority, we entirely agree with the observations of Mr. Justice Shephard and Mr. Justice Wilkinson in *Nagamuthu v. Savarimuthu* (1). Mr. Justice Shephard gives an instance of a plaintiff withdrawing a suit against a particular defendant, with or without permission to bring a fresh suit, and obtaining a decree against another. It would be unreasonable to hold that in such a case, as the first defendant was a party to the suit in which the decree was passed, any objection raised by him in execution of the decree against the other defendant would fall within section 244. A particular person may be added as a defendant on obviously insufficient grounds, by mistake, or for vexatious purposes only. Is the fact of his having been so added, though no decree is passed against him, to deprive him of his rights of suit, or to confine the determination of his rights to the execution department, if in execution against another person the decree-holder chooses to attach his property? Why should he, merely on account of the wholly unreasonable and unjustifiable joinder, be placed in a different position from any other person who, on the attachment of his property, would have a right to establish his title by suit? In our opinion section 244(c) was not intended to prohibit, and does not prohibit, a separate suit in such circumstances. It presupposes a decree enforceable by the decree-holder against the person between whom and the decree-holder the question referred to arises, and has no application to questions arising between the decree-holder and persons against whom there is no decree to be executed.

For these reasons we think the order of remand passed by the lower appellate Court was right, and we dismiss this appeal with costs.

Appeal dismissed.

(1) (1891) I. L. R., 15 Mad., 226.