

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Birdwood.

1885.
April 6.

NIMBA HARISHET (ORIGINAL DEFENDANT), APPELLANT, *v.* SITA'RAM PA'RAJI (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), Sec. 244—Decree—Execution—Question as to title raised and decided in execution proceedings—Omission to appeal—Fresh suit brought to establish title.

The defendant obtained a decree against the plaintiff as representative of his (the plaintiff's) deceased uncle, and in execution he attached the property in dispute. The plaintiff objected to the attachment, but his objection was disallowed, and the property was sold. The plaintiff did not appeal against the order disallowing his objection, but filed the present suit to establish his right. Both the lower Courts allowed the plaintiff's claim. On appeal by the defendant to the High Court,

Held, reversing the decree of the Courts below, that the plaintiff's suit was not maintainable. The question raised in the present suit was one which ought to have been taken in the execution proceedings in the former suit under section 244 of the Civil Procedure Code (Act XIV of 1882); and having been, as a fact, raised and decided against the plaintiff, he could not bring a separate suit.

THIS was a second appeal from the decision of H. F. Aston, Acting Assistant Judge (F.P.) of Thána, at Násik.

In execution of a money decree obtained by the defendant against the plaintiff as legal representative of his (the plaintiff's) deceased uncle (Váman) the property in dispute was attached. The plaintiff objected to the attachment, on the ground that the property was joint ancestral property, and had vested in him on the death of his uncle; but the Court executing the decree overruled the objection, and the property was put up to auction and sold.

The plaintiff then brought the present suit to establish his title to the property, and obtained a decree in the Court of first instance. The defendant appealed, and the Judge of the lower appellate Court confirmed the decree with the following remarks:—

“ I think that the lower Court has rightly held, for the reasons recorded in its judgment, that the share of Váman Bhagvant, which vested at his death in Sitáram Páráji (plaintiff), a surviving co-parcener, was not ‘assets’ in the hands of Sitáram liable to the separate debt of Váman Bhagvant, decreed not against

*Second Appeal, No. 526 of 1883.

Sitárám personally, but to be paid out of the estate of Váman Bhagvánt in the hands of Sitárám—*Udárám v. Ránu Pánuji*⁽¹⁾. The Privy Council's decisions in *Deendyal's Case*⁽²⁾ and *Máruṭi v. Liláchand*⁽³⁾ show also that attention must be confined to the terms of the judicial sale, which in this instance was a sale of the right, title, and interest of Váman Bhagvánt in the property in suit. After Váman Bhagvánt had died, his share therein had vested in the surviving co-parcener Sitárám. In other words, (as I understand the matter) it is not sufficient to prove that a certain liability attaches; it must also be shown that the judgment-creditor has taken the proper proceedings to enforce such liability by bringing to sale the interests bound by it.

“In the present case neither of these essential matters has been proved. A doubt having arisen in my mind, whether this suit is barred by section 244 of the Code of Civil Procedure by reason of the question now raised being one arising between the parties to the suit in which a decree has already been passed and relating to the execution or satisfaction of that decree, the appellant's pleader cited the cases of *Polokdhári Rái v. Radhápersad Singh*⁽⁴⁾; *Luchmeeput Singh v. Sitánáth Doss*⁽⁵⁾; *Mithibái v. Limji Nowroji Bánáji*⁽⁶⁾, to show that the order of the Court, which was executing the previous decree, was made under section 244, and was appealable, and that under section 244 of the Civil Procedure Code the present suit does not lie. It has, however, been answered by respondent's pleader, and I think successfully, that in the previous proceedings Sitárám was joined as legal representative of Váman Bhagvánt, and in this suit he sues in his own behalf.”

The defendant appealed to the High Court.

Shántárám Náráyan for the appellant.—The plaintiff's suit is not maintainable. The question in this suit was a question in execution proceeding—Civil Procedure Code, sec. 244. It was decided against him, and he might have appealed, but he did not.

(1) 11 Bom. H. C. Rep. at p. 86.

(2) I. L. R., 3 Calc., 198.

(3) I. L. R., 6 Bom., 564.

(4) I. L. R., 8 Calc., 28.

(5) *Ibid.*, 477.

(6) I. L. R., 5 Bom., 45.

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He cannot now bring a suit. See *Paránjpe v. Kánade*⁽¹⁾; *Arundadhi Ammyar v. Natesha Ayyar*⁽²⁾; *Chowdhry Wahed Ali v. Mussámut Jumáee*⁽³⁾; *Ameerunnissa Khatoon v. Meer Mozuffer Chowdhry*⁽⁴⁾; *Oseemooonissa Khatoon v. Ameerooonissa Khatóon*⁽⁵⁾

Máneksháh Jehángirsháh for the respondent.—An order under section 244 of the Civil Procedure Code (Act XIV of 1882) is not appealable—*Abdul Rahman v. Muhammad Yar*⁽⁶⁾. In the former suit the plaintiff was sued as representative, and objected, but his objection was disallowed. This does not operate as *res judicata*, or prevent him, under section 244 of the Code, from now bringing a separate suit—*Kanai Lal Khán v. Sashi Bhuson Biswas*⁽⁷⁾.

SARGENT, C. J.—The decisions in *Chowdhry Wahed Ali v. Mussámut Jumáee*⁽⁸⁾; *Ameerunnissa Khatoon v. Meer Mozuffeer Hossein Chowdhry*⁽⁹⁾; and *Oseemooonissa Khatoon v. Ameerooonissa Khatoon*⁽¹⁰⁾ show that the question raised in this suit was one which ought to have been raised in execution proceedings in the former suit, as provided by section 244, Code of Civil Procedure. The decision in *Abdul Rahman v. Muhammad Yar*⁽¹¹⁾, to which we have been referred, conflicts with the above decisions; but the decision of the Privy Council in *Chowdhry Wahed Ali v. Mussámut Jumáee*⁽¹²⁾ would appear not to have been brought to the notice of the Court. Now, as a fact, the question was raised by the plaintiff in the execution proceedings in the former suit and decided against him, and if he omitted to appeal, he cannot rectify that omission by a separate suit—*Arundadhi Ammyar v. Natesha Ayyar*⁽¹³⁾. We must, therefore, reverse the decree of the Court below, and dismiss the plaintiff's suit, with costs throughout.

Decree reversed.

(1) I. L. R., 6 Bom., 148.

(2) I. L. R., 5 Mad., 391.

(3) 11 Beng. L. R., 149.

(4) 12 Beng. L. R., 65.

(5) 20 Calc. W. R., 162.

(6) I. L. R., 4 All., 190.

(7) I. L. R., 6 Calc., 777.

(8) 11 B. L. R., 149.

(9) 12 B. L. R., 71.

(10) 20 Calc. W. R., 162.

(11) I. L. R., 4 All., 190.

(12) 11 B. L. R., 149.

(13) I. L. R., 5 Mad., 391.