APPELLATE JURISDICTION. (*a*)

Special Appeal No. 1 *of* 1862.

MUNIYAN *Appellant.*

PERIYA KULANDAL AMMAI *Respondent.*

Execution cannot be obtained on a merely declaratory decree.

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THIS was a special appeal from the decision of Charles Collett, the Acting Civil Judge of Chittur, in Appeal Suit No. 167 of 1861, affirming in substance the judgment of Krishnamáchári, the District Munsif of Tiruvallur, in Original Suit No. 587 of 1860. The suit was brought to establish the right of the plaintiff to one-fourth of a karai of lands as being her property. The plaint stated that the plaintiff and the first defendant the mother of the second and third defendants were sisters ; that the pattá of the half karai of the land thereunder mentioned was issued in the names of the second and third defendants ; that one-fourth karai thereof was acquired by the plaintiff's husband and was in her own possession, and that therefore the pattá of the said land should be issued in her name and the land enjoined by her. The defendants in their kaifiyat stated that the one-fourth karai of land mentioned in the plaint was not acquired by the plaintiff's husband, nor was it enjoined by the plaintiff, and that it belonged to the defendants and had for the last six years been cultivated by the plaintiff's son-in-law (*marumagan.*) The District Munsif in substance decided in favour of the plaintiff and ordered that a pattá should be issued in her name. On appeal the Civil Judge affirming the judgment of the Court below in substance by declaring the plaintiff to be of right entitled to the lands, but modified it so far as in form it ordered that a pattá should be issued in the name of the plaintiff. The following is an extract from the Civil Judge's judgment :—

" The great difficulty I have had in disposing of this appeal has arisen from the extraordinary form in which the suit has been brought, and the no less extraordinary judgment pronounced in it. The plaint is loosely and inaccurately framed, but in effect the prayer is that the patttá of

(*a*) Present : Scotland, C. J. and Holloway, J.

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certain lands standing in the name of the second and third defendants, but of right belonging to ; and in the possession of, the plaintiff, may be cancelled, and a new pattá for the same issued in the name of the plaintiff.

"The judgment in paragraph 6 expressly orders that a new pattá shall be issued accordingly. Obviously the Court has no means to enforce the execution of such an order. The issue of a pattá is a matter within the discretion of the revenue authorities. I am not to be understood as meaning that there could never be a suit or a decree for the issue of a pattá in the name of a plaintiff. It would not be difficult to suggest such a case, but then the proper revenue authority ought to be a party.

A plaint framed like the present is clearly open to a demurrer : a decree in form such as the present is incapable of being executed. It is true that the parties, neither originally nor in appeal, have taken the objection which has suggested itself to me ; but I do not think that this is such an objection as falls within the principle of the case reported in 3 Moore's I. A. C. 278. I infer from what fell from Sir John Coleridge during the argument of *Fischer* v. *Kamala Naicker* (*a*) that there are some objections which the Court may take notice of, though they are not raised by the parties themselves. I think the present judgment is, in the words of the Master of the Rolls in *Morris* v. *Chambers* (*b*), "encumbered with this difficulty that the declaration and "decree of the Court may be a mere *brutum fulmen*, inca-"pable of being practically enforced against the defendant." Where that is so, the Lord Chancellor, on the same case coming before him on appeal, remarked, that the Court ought not to pronounce a decree even in personam (*c*). I have therefore anxiously endeavoured to see whether, obeying the spirit of section 350 of the Code of Civil Procedure, I may not in the present case overlook the defect in the form of the decision below, and dispose of the suit upon an issue free from objection in respect to form, and which in substance has been duly raised, and really embodies the whole matter in dispute between the parties. Now I think there is such

(*a*) 8 Moor. L. A. C. 182. (*b*) 7 Jur. N. S. 60.
(*c*) 7 Jur. N. S. 690.

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an issue in the present case, and that is, whether the plaintiff is of right entitled to the lands in the plaint mentioned?

"This issue was certainly raised in the Court below; not so in due form, indeed, for the Munsif adheared to the old procedure instead of the new, and did not settle issues, but the first point he gave to the plaintiff was to prove that the lands belong to her. Had the procedure been proper, the issue I have stated must have been that settled. In the appeal it is obviously the substance of the objections to the Court's decree. Really the object of the suit was to establish the plaintiff's title to the lands, and a decision upon the issue of title or no title in the plaintiff must dispose of the whole dispute between the parties. It is true that the plaintiff alleges and the defendants deny that she is in possession of the lands. But except so far as the fact of possession is any ground for presuming a right of property, the fact itself may be disregarded. If the plaintiff is in possession and I decide the issue of right in her favour, then the decree will be simply declaratory, and that section 15 of the Code allows: if she is not in possession, then the decree would be executory, and she may enforce execution of it. But there cannot be a decree declaratory merely of the fact of possession; and I think that in a suit like the present, the fact of possession is a mere matter of evidence proper to be adduced in support of the issue of right, but that there ought not to be any issue settled as to this mere fact itself. Then as to the sole issue upon which I propose to dispose of this appeal, I am of opinion that, viewing the judgment below as a declaration of the plaintiff's right to the land, it ought to be affirmed."

The second defendant appealed against the Civil Judge's decree on the following grounds.

"1. It is contrary to law in that,

1st. Judgment was given in plaintiff's favour, upon evidence inadmissable in law, and found by the Civil Judge to be unsatisfactory and useless.

2nd. Plaintiff had to stand or fall upon the strength her own evidence. After finding that her evidence did not

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agree with her claims, the lower courts made a mistake in having entered into an enquiry of the defendant's title, and gone upon the weakness of his evidence.

3rd. The fact that the suit is barred by the statute of limitation, as the defendant holds adverse possession since 1845, was overlooked by the lower courts.

4th. The rulings of the Sadr Court, which declare that a party who once relinquishes the land or leaves it uncultivated without any reasons, &c., cannot get it back, after the same was duly transferred by pattá to another ryot, were not observed by the lower courts.

5th. The Civil Judge made an error in assuming that the possession by the plaintiff's *marumagan* was tantamount to her possession.

2. It is defective in the investigation of merits, so as to affect the decree in the decision of the material points in that,

1st. The question in whose possession the lands are now remaining, was not decided.

2nd. The question, whether the plaintiff's *marumagan* has not been in possession of a portion of the lands under the sufferance of the defendants, was likewise left undisposed of."

Srinivasacharlu for the appellant, the second defendant.

The following judgment was delivered by

SCOTLAND, C. J. :—In this case we are of opinion that the learned Civil Judge, having decided that the plaintiff was entitled to a declaration of title, acted rightly in confining the decree in the suit to a mere declaration of the plaintiff's title to the land in question; and for the reasons given at the hearing we think the grounds of appeal fail, and that the appeal must be rejected with costs to be paid by the defendants. It would not have been necessary to say more but for a passage in the judgment of the Civil Judge in which we observe he says when alluding to the question of possession " if she (the plaintiff) is not in possession then the decree would be executory and she may enforce execution of it."

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Although there is nothing in this case (notwithstanding that the question of disputed possession is not clearly dealt with) to lead us to the conclusion that any right to the land by mere possession has been acquired, still cases may easily be supposed in which declaratory decrees as regards title might be obtained collusively, without regard being had to valid legal rights acquired by long possession; and to allow possession in such cases to be obtained by means of execution upon a mere declaratory decree, would be to permit parties in possession to be improperly deprived of their legal possessory rights by the process of the Court. No such execution can properly be obtained upon a declaratory decree. It amounts to a binding declaration of the title decided upon and no more, as between the immediate parties to the suit, and does not in any case entitle the party obtaining it to execution for the delivery over of possession of the property in question. If then the learned judge meant to decide that the plaintiff was at liberty if she thought it necessary, to obtain execution upon the decree for the delivery to her of possession, we think he was in error, and that no such execution ought to be allowed.

We are not to be understood from the observations just made, as in any way deciding that this was a case in which substantially upon its merits, the Civil Judge was properly required to make a declaration of title under section 15 of the Civil Procedure Code. The point was not raised, and the circumstances before us do not make it necessary to say anything upon it.

Appeal dismissed with costs.