

transactions were had with the usurping Zamindár in possession, and the failure in any way to connect the loans made to them with the debts contracted by the former and lawful Zamindárs, we think that the Civil Judge was right in dismissing the suit as against the 1st defendant, and we affirm the decree below with costs.

1866.
December 22.
R. A. No. 59
of 1866.

Appeal dismissed.

APPELLATE JURISDICTION (a)

Civil Petition No. 156 of 1866.

BUDDU RÁMAIYA.....*Petitioner.*

C. VENKAIYA*Counter-Petitioner.*

The words in Sec. II, Act XXIII of 1861, " questions arising between the parties to the suit," cannot be limited to questions arising between those who were parties to the suit at the date of the decree, but, after decree, the representative of a decree holder, or the representative of a defendant against whom an execution is sought under Secs. 210 and 216 of the Code, become parties to the suit for the purpose of execution and questions arising between them are questions arising between the parties to the suit within the meaning of Sec. 11 of the Amending Act.

THIS was a petition against an order of E. B. Foord, the Civil Judge of Berhampore, dated the 26th April 1866.

1866.
December 10.
C. P. No 156
of 1866.

Rangachariyar, for the petitioner.

Miller, for the counter-petitioner.

The Court made the following

ORDER :—The material facts appear to be these. A decree was passed by the late Civil Court of Chicacole, in Suit 49 of 1863, and a copy of that decree was transmitted for the purpose of execution to the Civil Court of Vizagapatam.

In January 1866 application was made to the Civil Judge of Vizagapatam for execution against the present petitioner as heir of the 6th defendant. He received notice of that application, appeared upon it and objected that the 6th defendant had died before the decree was

(a) Present : Bittleston, Ag. C. J., and Ellis, J.

1866.
December 10
C. P. No 156
of 1866.

given, and that the plaintiff had by a memorandum filed in that suit abandoned his right to revive the suit against the petitioner as heir of the 6th defendant. The decree however upon the face of it appeared to be a decree against the 6th defendant, and the Civil Judge had no sufficient evidence before him of the fact that the 6th defendant had died before decree. He offered, however, to stay the execution in order to afford time for an application to the Civil Court of Berhampore, if the petitioner would give security. But the petitioner did not give security and the execution was ordered. The petitioner then went to the Berhampore Court, and presented his petition praying to be exonerated from responsibility under the decree ; but his petition was rejected on the ground of lapse of time ; and against that order he appeals to this Court.

Now the 1st question is, whether there is any appeal against that order, and there is none, unless it be an order relating to the execution of a decree within Section 11 of Act XXIII of 1861. If there be no appeal, this Court has no jurisdiction to interfere, and the petitioner's only remedy would be by another application to the Berhampore Court, or by trying in a suit the validity of the attachment by the Vizagapatam Court.

Now the application of the petitioner was certainly in form [he prays to be exonerated from the responsibility of the decree] an application relating to the execution of the decree—and it was made in consequence of the application of the plaintiff to another Court that the decree should be executed against him—but the ground of the application was that there had been in fact no valid or binding decree against the 6th defendant whom he represented ; and the application was in effect an application to correct the decree by striking out the name of the 6th defendant, who was dead when it was passed. Still the substantial question to be decided is, whether the 6th defendant, if alive, would have been, and whether the petitioner as his representative is, liable to execution under the decree. The late Sadr Court in Proceedings, 17th August 1860, directed with reference to Section 221 of the Civil Procedure Code

that "if the person against whom it is sought to execute the decree plead that he never was defendant in the suit, the Court must enquire into the plea after notice to the decree-holder, and pass such order as may appear just and proper;" adding "if the plea be substantiated the judgment cannot be enforced against him." (See *Rules of Practice*) thus treating a question as to liability under the decree as a question relating to execution; and for all practical purposes it is so certainly.

1866.
December 10.
C. P. No. 150
of 1866.

But supposing the question raised in this case as to the liability of the petitioner under the decree to be a question "relating to the execution of the decree," is it a question "arising between the parties to the suit in which the decree was passed"—within the meaning of Section 11 of Act XXIII of 1861? It arises between the plaintiff in that suit and a person who is charged as representative of one who was a defendant in the suit, and is alleged by the plaintiff to be bound by the decree as a defendant. Now it seems to us that the words in Section 11 "questions arising between the parties to the suit" cannot be limited to questions arising between those who were parties to the suit at the date of the decree—but just as a representative who is substituted for a deceased party before decree becomes a party to the suit as regards all subsequent proceedings, so after decree, the representatives of the decree-holder, or the representative of a defendant against whom execution is sought under Sections 210 and 216 of the Code, become parties to the suit for the purpose of execution; and so questions arising between them are questions arising between the parties to the suit within the meaning of Section 11. It seems to us at variance with the intention of the Legislature, as indicated by the provisions in the Code, regarding execution by and against representatives of deceased parties, to put any narrower construction on the 11th Section of the Amending Act. We come to the conclusion, then, that the order of the Berhampore Court is an order determining a question relating to the execution of the decree and arising between the parties to the suit, and is open therefore to appeal. We do not mean to say that we should

1866.
 December 10.
 C. P. No. 150
 of 1866.

arrive at the same conclusion in the case of a person who was an entire stranger to the suit, and who might, we think, safely abstain from making any application to the Court by which the decree was passed, and in which it was sought to obtain process of execution against him. He would not be deprived by Section 11 of Act XXIII of 1861 of his right to bring a suit, if his property or his person should be taken in execution of a decree to which he was no party.

But in this case the 6th defendant was a party to the suit, and there is a decree of the Court against him as a party to the suit. That being so, the representative of the 6th defendant raises a question whether he is liable to execution under that decree ; and it seems to us that that case falls within the provisions of Section 11. Then, was the order of the Civil Judge of Berhampore right ?

He rejected the application as barred by lapse of time ; and on that ground certainly the order cannot be sustained. It was not incumbent on the petitioner to take any step until application was made for execution of the decree against him ; and that application was first made in January 1866, when he appeared and opposed it. Then in April he applied to the Berhampore Court to exonerate him from liability under the decree.

Now it appears from the letter of the Civil Judge of Berhampore (who was requested to send up the memorandum alleged to have been filed by the plaintiff in suit 49 of 1863) that, though the memorandum itself cannot be found, there is an entry of such a memorandum in the Register Book ; so that there is good reason to believe that in fact the 6th defendant did die before decree, and that the plaintiff did abandon his right to revive against the petitioner. If this be so, it is manifest that the decree ought not to be executed against the petitioner ; but then there is the order of the Civil Judge of Vizagapatam, unappealed against and in force, directing the decree to be executed against the petitioner ; and the Judge of the Berhampore Court has no authority to reverse that order. Still Sections 290, 291 and 292 of the Code clearly contem-

plate an application to the Court by which the decree was passed, pending an application for execution in another Court, and as the Vizagapatam Court could not inquire into the validity of the decree (for the want of jurisdiction, if it existed, did not appear upon the face of the decree), we think that the Berhampore Court was competent under the circumstances to declare the decree not binding on the petitioner, though by reason of his failing to give security, the Vizagapatam Court did not stay the execution ; and though, generally, the execution of a decree belongs only to one Court at a time, and whilst a decree is in course of execution by one Court applications for execution cannot be entertained by any other Court.

1866.
December 10.
C. P. No. 150
of 1866.

The circumstances of this case are peculiar, and we think that they warrant us in setting aside the order of the Civil Judge of Berhampore and remanding the case to him, to ascertain whether the 6th defendant died before decree, and if so whether the suit was revived against the petitioner : and further, if it should appear that the 6th defendant did die before decree and the suit was not revived against the petitioner, in directing him to pass an order amending the decree by striking out the name of 6th defendant, and to transmit a copy of that order to the Civil Judge of Vizagapatam.

Case remanded.