

APPELLATE JURISDICTION (a)

Regular Appeal No. 59 of 1866.

CHIDAMBARA SETTI.....Appellant.

SRIMATU MUTTUVIJEYA.....	} Respondents.
RAGUNÁTHA RÁNI.....	
KATTAMMA NÁCCHIYAR and another...	

Where it was sought to charge a Zamindári with debts, contracted by persons who were at the time usurpers in wrongful possession of the Zamindári, solely on the ground that the documents evidencing the loans recited that they were for the purpose of discharging the kists due to Government.

Held, that in the absence of any evidence on behalf of the creditor as to the circumstances in which the transactions were had with the usurping Zamindár in possession, and the failure to connect the loans with the debts contracted by the former and lawful Zamindárs, the Suit was rightly dismissed.

The case reported at VI. Moo. I. A. 393, distinguished.

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THIS was a Regular Appeal from the decree of R. R. Cotton, the Civil Judge of Madura, in a Original Suit No. 99 of 1865.

The Suit was brought for the recovery of Rupees 1,05,766-1-3 with interest. The plaint set forth that in adjustment of the accounts of the sums borrowed of the Plaintiff's grandfather, by the Istimrár Zamindár, Gaurí Vallaba Tevar, and his successor Bodagurnsámi Peria Udeiya Tevar on different occasions, in order to meet the demands upon the Zamindári, the latter (Peria Udeiya) executed two bonds on the 20th August 1836 to the plaintiff's father for the principal and interest due up to that date on condition that the same should be liquidated from and out of the Revenues of the Zamindári; that the debts under the said bonds having been but partially liquidated, his (plaintiff's) elder brother sued the ex-Zamindár (2nd defendant), who assumed the estate in or about 1860, for the recovery of the balance; that he (the ex-Zamindár) compromised the Suit by a Razináma dated 12th December 1860, for Rupees 1,50,000 payable by 5 instalments com-

(a) Present : Collett and Ellis, J. J.

mencing from the 31st December 1861. That in or about 1864, two instalments having fallen due, plaintiff applied for execution against the 1st defendant, but that the Court referred him to a regular action, on the ground that the 1st defendant, a lawful proprietress ought not to be compelled to satisfy a Razináma entered into by her enemy, the ex-Zamindár. Hence the plaintiff brought this action.

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The 1st defendant denied her liability to the plaintiff's claim, and pleaded that the acts of B. Peria Udeiya Tevar and of his successors alluded to in the plaint were not binding upon her, inasmuch as their possession was wrongful, and that the revenues of the estate were over and above the demand of peshkash payable therefrom. She further pleaded the statute of limitation.

The 2nd defendant was *ex parte*.

The Civil Judge decreed for plaintiff against the 2nd defendant alone and ordered plaintiff to pay 1st defendant's costs.

The plaintiff appealed.

Advocate General and Rajagopala Charlu, for the appellant, the plaintiff.

O'Sullivan for the first respondent, the defendant, the second respondent not appearing in person or by Counsel.

The Court delivered the following

JUDGMENT :—This is an appeal from so much of the decree of the Courts below as dismissed the Suit as against the first defendant. The Razináma, upon which the Suit is brought, was executed by the second defendant, who has now been declared by a decree of Her Majesty in Council to have been in wrongful possession of the Zamindári at the time. The Razináma was in substitution of two prior bonds, Exhibits C and D, executed in 1836 by one who has also by the same decree been found to have been at the time an usurper of the Zamindári. There is no evidence to connect the sums due under Exhibits C and D with the debts contracted with the plaintiff's father by prior but lawful possessors of the Zamindári, and which transactions are evidenced by other exhibits in the Suit.

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The object of the Suit, as against the first defendant, is thus to charge the Zamindári with the debts contracted by persons who were at the time usurpers in wrongful possession of the Zamindári ; and this is sought solely on the ground that the documents evidencing the loans recite that they were for the purpose of discharging the kists due to Government ; but there is no evidence otherwise that the debts were contracted (whether necessarily and reasonably or not) for the purpose recited. In support of this contention, the case reported in 6 Moo. I. A. 393(a) was referred to, and in particular the passages in the judgment at p. 413 and pp. 418 and 419. The facts of that case differ, though, materially from those of the present case, for there the mother, by whom the debt was contracted, never did claim to hold adversely to her minor son, the lawful proprietor. There are at p. 413 expressions which seem to go to the extent that, owing it would seem to the specialities of the law relating to Zamindáries, a debt contracted by a mere usurper, who had wrongfully intruded into the estate, might constitute a charge upon the Zamindári in the hands of the lawful owner. But if the judgment is to be taken as going to this length, yet the observation in the judgment at pp. 418 and 419 would seem to be rightly applied in a case of such a nature, by holding that as between the lawful owner and the creditor who has contracted with a mere usurper in possession, the burden of proof is upon the creditor who is seeking to set up a charge in his favour, made by one who was in possession but without title. He may be reasonably expected to allege and prove facts presumably better known to him than to the lawful owner who was out of possession, namely those facts which embody the representations made to him of the alleged needs of the estate and the motives influencing and justifying the loan. There is, besides, the obvious ground of the danger otherwise of collusion between creditors and usurpers in fraud of the lawful owner out of possession.

In the present case, in the absence of any evidence on behalf of the creditor as to the circumstances in which the

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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.

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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.

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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.