his case. It is true that he paid Rs. 200 into Court; but in his written statement he says expressly that he believes that no damage has been done: that the plaintiff is not entitled to any damages whatever, and that the Rs. 200 are paid [495] into Court merely for the sake of pleas and to avoid litigation. Thus the defendant has put the plaintiff to prove his case, and the plaintiff has done so. I think if a party substantially succeeds he is entitled to his costs. The plaintiff must have his costs of the hearing in the Court below, and each party must pay his own costs of this appeal and of the proceedings on the rule for an injunction obtained before trial.

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Attorney for the plaintiff:—Mr. *Khanderao Moroji.*

Attorneys for the defendant:—Messrs. *Chitnis, Motital and Malvi.*

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ORIGINAL CIVIL.

Before Mr. Justice Starling.

AHMED BIN SHAIK ESSA KHALIFFA AND OTHERS (*Plaintiffs*), *v.* SHAIK ESSA BIN KHALIFFA AND OTHERS (*Defendants*).*

[23rd June, 1894.]

Civ. Pro. Code, (XIV of 1882). *s.* 244—*Decree—Execution—Questions arising in execution between the parties—Decree incapable of execution by reason of events subsequent to decree—Decree giving an option to the parties—Practice—Procedure.*

A partition suit brought by a son against his father was referred to arbitration. On the 9th January, 1890, the award was published, and on the 27th March, 1890, the defendants moved for and obtained a decree in terms of the award. By this decree it was ordered that in satisfaction of the plaintiff's claim the defendant should pay to him Rs. 1,05,000 in the manner therein stated, *viz.*, Rs. 40 000 to be paid forthwith and the balance of Rs. 65,000 to be paid "upon the plaintiff's delivering to the defendant certain specified property, which included two vessels or buglows, called respectively the 'Nasri' and 'Sambuk'." In no event was defendant to be required to pay the Rs. 65,000 before the 15th November, 1890. At the date of the decree the vessel "Sambuk" was at sea on a voyage, and on the 18th June, 1890, while still on the voyage, she was lost. On the 15th November, 1890, the plaintiff's attorneys demanded payment of the balance of Rs. 65,000. They offered to deliver the other properties specified in the decree, but stated that the vessel "Sambuk" had been lost. They offered to pay its value, which they estimated at Rs. 1,000. The defendants, however, demanded the delivery of the buglow, which they stated to be worth a very large sum. The defendant having, under the circumstances, refused to pay the Rs. 65,000, the plaintiff applied for execution of the decree, which was refused. He then obtained a rule calling on the defendant to show cause why the decree of the 27th March should not be amended or rectified by stating [496] therein the amount of money to be paid to the defendant as an alternative of its delivery of the vessal "Sambuk" could not be made, such delivery having become impossible.

That rule was discharged. The plaintiffs then took out a summons calling on the defendant to show cause why an order should not be made, under s. 244 of the Civil Procedure Code, directing the plaintiffs to pay to the first defendant, in lieu of the delivery of the vessel "Sambuk," such sum of money as might be fixed by the Court as the value of or compensation for the loss of the vessel "Sambuk" in the decree mentioned, and why an order should not be made that on payment of such sum and delivery of the other properties mentioned in the decree which the plaintiffs were to deliver under the decree to the first defendant on payment by the latter to them of Rs. 65,000, the first defendant should pay to the plaintiffs Rs. 65,000 and interest thereon from the 15th day of November 1890, mentioned in the said decree, and in the event of its being held that the

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first defendant was not bound to pay the said sum of Rs. 65,000 then why an order should not be made that the property mentioned in the decree which the plaintiffs were to hand over to the first defendant on payment of Rs. 65,000 should not be retained, used and appropriated absolutely by the plaintiffs for their own use and benefit freed and discharged of all claims on the part of the first defendant, and why the first defendant should not be directed to withdraw the claims made by him to the said debt of Rs. 22,000, or thereabouts mentioned in the said affidavit of Ahmed bin Essa Khaliffa, and why such further or other order as to the Court might seem fit and the justice of the case may require should not be made in the premises and in relation to the properties mentioned in the decree which were to be delivered over by the plaintiffs to the first defendant on receiving from him Rs. 65,000, and why, in the alternative, this suit should not be restored on the board for trial.

It was contended by the plaintiff that the questions raised in the summons were questions arising in execution to be dealt with by a Judge in chambers under s. 244 of the Civil Procedure Code (XIV of 1882), and that a fresh suit was not necessary.

Held, (dismissing the summons) that the application was not one in execution of a decree, nor was the question one arising in the course of execution, but that the decree having become incapable of execution the summons asked the Judge to decide what were the rights of the parties in consequence of its non-execution.

Held, also (as to the part of the summons asking for restoration of the suit) that the matters in issue in the suit had been fully heard and determined and the rights of all parties had been settled by the decree, and consequently there was nothing further to be tried. The Court could not in this suit after passing a decree proceed to ascertain the rights of the parties under a state of facts quite different from those which appeared in the pleadings and arising subsequently to the decree.

[R., 5 Bom. L. R. 1036 (1040).]

IN chambers.

Suit for partition. The first plaintiff was the son of the first defendant, and he brought this suit in September, 1886, praying that the property of his grandfather Khaliffa bin Abdulla **[497]** might be divided and partitioned among the parties entitled thereto according to their rights and interests therein.

By a consent order, made in the suit on the 15th August, 1889, the suit and *all matters in difference* between the parties were referred to arbitration. On the 9th January, 1890, the arbitrator made and published his award, which was filed on the 11th March, 1890. On the 27th March, 1890, on a motion made on behalf of the defendants, a decree was passed in terms of the award.

By this decree it was ordered that in full satisfaction of the claim of the plaintiff the first defendant should pay to the plaintiff the sum of Rs. 1,05,000 in the manner therein provided, *viz.*, that the sum of Rs. 40,000 should be forthwith paid by the said defendant and the balance of Rs. 65,000 should be paid "*upon the said plaintiff delivering over to the* said Shaik Essa bin Khaliffa the five boxes mentioned in paragraph 5 of the plaint and two buglows (ships) 'Nasri' and 'Sambuk' referred to in the affidavit of Ahmed bin Essa, and the whole of the immoveable property in the Persian Gulf, &c." The said decree further provided that in no event should the defendant be required to pay the said balance of Rs. 65,000 before the 15th November, 1890.

At the date of the said award and decree, the vessel "Sambuk" was at sea on a voyage, and on the 18th June, 1890, while still on the voyage, was lost.

On the 15th November, 1890, the plaintiffs' attorneys wrote to the defendants' attorneys reminding them that the sum of Rs. 65,000 had become due on that day, and requiring payment. They offered to deliver

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the other properties mentioned in the decree, but stated that the vessel "Sambuk" had been lost at sea. In the correspondence which subsequently took place, the plaintiffs offered to pay the value of the lost vessel "Sambuk," but they and the defendants could not agree upon the value. The plaintiffs estimated her value at Rs. 1,000, but the defendants' attorneys in a letter of the 20th December, 1890, said "our client wants the said bungalow under one of the conditions in the decree, as your clients, the plaintiffs, are bound specifically to deliver [498] the same, and as it is worth a very large sum in our clients' estimation."

The defendants having under these circumstances refused to pay the Rs. 65,000, the plaintiff applied to the Judge in chambers (Telang, J.) for execution of the decree, but on the 16th July, 1891, his application was refused.

The plaintiff then obtained a *rule nisi*, calling on the first defendant "to show cause why the decree of the 27th March, 1890, should not be amended or rectified by stating therein the amount of money to be paid to the first defendant as an alternative if delivery of the vessel named 'Sambuk' could not be made to the said first defendant, and why such further order should not be made as justice and good conscience require in consequence of the loss of the said vessel 'Sambuk,' and by reason of all the circumstances of the case as disclosed in the said affidavit, and why (if necessary) the amount of money to be fixed as an alternative for the delivery of the said vessel should not be ascertained by this Honourable Court or by the arbitrator, Mr. Shaik Abdul Aziz bin Ali Ebrahim, heretofore appointed in this suit after taking such evidence as may be necessary." In his affidavit the plaintiff said: "The plaintiffs are unable to execute the said decree for the value thereof and interest without having the said decree amended by this Honourable Court in the following respect, namely, in regard to the delivery of the said vessel 'Sambuk' the delivery of which has become impossible by the act of God. Under the circumstances aforesaid this Honourable Court will be pleased to direct that the said decree should be amended by stating therein the amount of money, *i.e.*, the value of the said vessel which is to be paid to the defendant in lieu of delivering the said vessel."

That rule, however, was discharged, the Court (Parsons, J.) holding that the objection was really to the award: that the award had been filed without objection, and a decree passed in accordance with the award, and that the Court had now no power to alter the award or the decree (see I. L. R. 17 Bom., p. 657).

The plaintiff appealed from this decision, but the appeal Court (Sargent, C. J., and Farran, J.) dismissed the appeal with costs.

[499] On the 10th day of April, 1894, the plaintiff took out the present summons calling on the defendant

"to show cause why this Honourable Court should not make an order under s. 244 of the Civil Procedure Code, directing that the plaintiffs do pay to the first defendant, in lieu of the delivery of the vessel 'Sambuk,' such sum of money as this Honourable Court may fix as the value of or compensation for the loss of the vessel 'Sambuk' in the decree mentioned, and why an order should not be made that on payment of such sum and delivery of the other properties mentioned in the decree herein which the plaintiffs are to deliver under the decree to the first defendant on payment by the latter to them of Rs. 65,000, the first defendant shall pay to the plaintiffs Rs. 65,000 and interest thereon from the 15th day of November, 1890, mentioned in the said decree;

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"and in the event of this Court holding that the first defendant is not bound to pay the said sum of Rs. 65,000, then why an order should not be made that the property mentioned in the decree which the plaintiffs were to hand over to the first defendant on payment of Rs. 65,000 should not be retained, used and appropriated absolutely by the plaintiffs for their own use and benefit, freed and discharged of all claims on the part of the first defendant,

"and why the first defendant should not be directed to withdraw the claims made by him to the said debt of Rs. 22,000 or thereabouts mentioned in the said affidavit of Ahmed bin Essa Khaliffa,

"and why such further or other order as to the Court may see fit and the justice of the case may require should not be made in the premises and in relation to the properties mentioned in the decree which were to be delivered over by the plaintiffs to the first defendant on receiving from him Rs. 65,000 and why, in the alternative, this suit should not be restored on the board for trial."

In the affidavit on which he obtained the summons, the plaintiff stated that until the questions raised in the summons were decided, it was impossible to deal with properties which under the decree he was to assign and deliver over to the defendant. Amongst these was a debt of Rs. 22,000 due by a third person (Haji Mahomed bin Kazum), which remained unrecovered, and the defendant had written a letter which prevented its payment. In his affidavit the plaintiff on this point said: "The defendant, although he would not pay the Rs. 65,000, or any part thereof, still claims to prevent the plaintiff's recovering the said debt, and apparently seeks to recover the same himself. The plaintiffs are apprehensive that, unless the said sum of Rs. 22,000 is recovered forthwith, it will be entirely lost." He further stated that the second ship "Nasri," which under the decree was also to be delivered by him to the defendant, would soon become valueless if left undelivered.

[500] The last two paragraphs of the affidavit were as follows:—

23. "The plaintiffs submit that, in the events that have happened, the first defendant is bound to pay them Rs. 65,000 and receive the property aforesaid and the value of the 'Sambuk', or if he is not bound to do so he is not entitled to retain possession of the 'Nasri' or to prevent the plaintiffs recovering the debt aforesaid, but that the plaintiffs are entitled to possession of the 'Nasri' and to recover payment of the debt aforesaid, and the other property which they were to deliver to the first defendant in getting payment of Rs. 65,000 from him, and that the first defendant has no claim on the said debt and vessel and the said property, and that the same may be declared to belong to the plaintiffs (in the event of it being held they are not entitled to the said Rs. 65,000).

24. "Under the foregoing circumstances I pray that this Honourable Court will be pleased to decide under s. 244 of the Civil Procedure Code (XIV of 1882) the foregoing questions which have arisen between the plaintiffs and the first defendant since the passing of the said decree, and to make such order in relation thereto as to this Honourable Court may seem fit and the justice of the case may require."

The summons now came on for argument in Chambers.

Inverarity for the plaintiffs in support of the summons:—The parties are now at a dead lock. The decree cannot be executed because a clause has been omitted from it which by s. 208 of the Civil Procedure Code (XIV of 1882) ought to be in it, *viz.*, the clause which provides for the payment

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of money where delivery of moveable property cannot be given. The value of the lost ship is trifling and the plaintiff is willing to allow the defendants to deduct the amount out of the money to be paid by them, but the defendants will have the ship or nothing. The plaintiff consequently cannot get execution of the decree as it stands, and the Court has refused to alter it. The defendant thus keeps the properties which we sued to partition and our right in which is admitted and declared in the decree. We, therefore, have taken out this summons to prevent the defendant getting the benefit which the award and decree only intended him to get in case we got other benefits. He wants to get his rights under the decree, but prevents us getting ours. In this summons we seek to get an order under which we can pay the value of the lost vessel and recover the amount due to us by the defendant, or, in the alternative, to have the suit restored to the list for hearing. We say these are questions arising in execution within the meaning of s. 244 of the Civil Procedure Code (XIV of 1882) [501] and that we are not obliged to bring a new suit. The plaint prayed for partition of property to which we asserted a claim. The award and decree recognise our rights in the property, for they awarded us Rs. 1,05,000 in full satisfaction and discharge of our claim. If and when this money is paid to us we are to give up these rights. But the decree does not order us to give up these rights. It gives us an option. We are only to give them up if and when we are paid a certain sum. The decree says that "upon the plaintiffs delivering over certain property" and "upon the plaintiffs executing valid and effectual assignment of their rights in the said properties" the defendant is to pay us certain monies. This decree, therefore, gives the plaintiffs an option either to retain their rights or to hand them over and to receive the money from the defendant. But the plaintiffs cannot now hand over the ship, and the defendant refuses to take what the plaintiffs can give. So the plaintiffs must elect to stand by the other alternative and retain the property. But if they do so, it is plain that the award and decree have not dealt with all the questions raised by the plaint in the suit, and we, therefore, ask that the suit may be restored to the list for hearing. The award and decree only dealt with our rights in the event of our handing over the property, but not in the event of our not handing them over.

[STARLING, J.—Can the suit be restored after a decree is passed?]

Yes, for the decree was merely on an award, and the award is not complete. It does not dispose of all the questions raised in the suit. The suit was never heard. The reference to arbitration was made before the suit came on for hearing. If the defendant will not accept our proposals so as to enable the decree to be executed, we are entitled to have the suit heard.

[STARLING, J.—Has there not been a final decree in the suit? The circumstances that have created the difficulty are circumstances which have occurred subsequently to the decree and make execution impossible. Is not another suit necessary?]

No. The decree was not a final decree. Even supposing these events had not happened at all, there is nothing in the decree to [502] prevent us electing. We might have elected not to hand over the property, and our rights would then have been left undetermined. We ask now that your Lordship should say that under the decree the defendant is not entitled to these properties and that we are entitled to them. So it is a question relating to the execution of the decree under s. 244 of the Code. The fact that the defendant shows cause against this summons shows that he claims

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the properties. Our rights under the decree are a question in execution. We contend that the decree gives us these properties in the alternative, *i.e.*, if we elect to retain them instead of handing them over and receiving their equivalent from the defendant. The decree in effect says: "If the plaintiff chooses he may hand over the property, and receive Rs. 1,05,000 from the defendant." We want a declaration of our rights under the decree.

Lang (Advocate-General), for the defendant, showed cause:—This is not a question relating to execution of a decree. The plaintiffs are only making another attempt to alter the decree by making it declare their rights. They have already made three attempts and failed.

JUDGMENT.

23*rd June*, 1894, STARLING, J.—This is a suit for a declaration of the rights of the plaintiffs in certain property, moveable and immoveable, and for its partition between the plaintiffs and defendants. The suit was referred to arbitration and the arbitrator awarded Rs. 1,05,000 to be paid by the first defendant to the plaintiffs—Rs. 40,000 at once and Rs. 65,000 on the plaintiffs handing over to the first defendant certain moveable and immoveable property and executing certain deeds of conveyance and releases. No objection was filed to this award, and a decree was passed in accordance therewith. The second portion of the decree has not been carried out, because a vessel, part of the moveable property to be handed over by the plaintiffs, has been lost at sea, and they are consequently unable to fulfil the condition on which alone they can claim payment of the Rs. 65,000.

Subsequently the plaintiffs issued a notice calling upon the first defendant to show cause why in the execution of the decree the Court should not ascertain and fix some sum as the value of the [503] lost vessel to be allowed to the first defendant out of the Rs. 65,000, because the vessel could not be delivered to him. The matter was heard before Telang, J., who dismissed the notice on the ground that what he was asked to do would be tantamount to making a fresh decree. Then the plaintiffs applied to Parsons, J., who had passed the decree on the award, to amend the decree by inserting some sum to be allowed in executing the decree as the value of the lost vessel. This application was refused on the ground that the only decree which could be passed was one in accordance with the award, and the amendment asked for was not in accordance with the award (1); and this refusal was on appeal upheld by the appeal Court.

The plaintiffs have now taken out a summons for an order to be made in one of three alternative ways. The first relief is the same as was asked for from Telang, J., and I must refuse it for the same reason, and also for the reason that the matter having been disposed of by him is now *res judicata*. The second alternative is that, seeing that the plaintiffs cannot hand over all the property referred to in the decree, and that consequently the first defendant is not liable to pay the Rs. 65,000, the Court should declare that the said property now in the hands of the plaintiffs should be retained, used and appropriated absolutely by them. In the first place, it would be impossible on this summons to make such an order, supposing it to be otherwise unobjectionable; because it appears by the plaint that all the defendants have some interest in all

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the property, the subject-matter of the suit, and it would be wrong for me to pass an order that the plaintiffs were absolutely entitled to any portion of it without the presence of all the parties to the suit. In the second place, this is not an application in execution of a decree, nor is the matter I am asked to decide upon, a question between the parties to the the suit arising in the course of the execution of the decree; but the decree being incapable of execution, I am asked to decide what are the rights of the parties in consequence of its non-execution. I think that if I made an order as asked, and a suit was brought to set it aside, the case would be [504] very similar to that of *Chowdhry Wahed Ali* v. *Mussamut Jumaee* (1), wherein at p. 157 their Lordships say: "Their Lordships cannot find, after the incongruous proceedings above described, that there exists any decree authorising an execution against the respondent's estate, and consequently the question in the present suit is one not properly relating to the execution of a decree, but to a sale under orders which have not the support of any decree." There is no decree in this suit which would authorize the order I am asked to make; it would, in fact, amount to an alteration in the decree or the making of a new decree. In my opinion, the only way in which the plaintiffs can obtain what they seek is by filing a fresh suit setting out the decree herein, and the circumstances which have transpired since the passing of that decree, and asking for a declaration of their rights under all the circumstances of the case.

As to the third alternative, the matters in issue in this suit have been finally heard and determined and the rights of all parties have been settled by the decree; consequently there is nothing further to be tried. The Court cannot in this suit after passing a decree proceed to ascertain the rights of the parties under a state of facts quite different from those which appear in the pleadings herein and arising subsequent to the decree. Under these circumstances I must dismiss the summons with costs. Counsel certified for.

Summons dismissed.

Attorneys for plaintiffs:—Messrs. *Little, Smith and Nicholson.*
Attorneys for defendants:—Messrs. *Payne, Gilbert and Burder.*

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[505] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

KRISHNAJI BIN MALJI (*Original Plaintiff*), *Appellant v.* VITHU AND OTHERS (*Original Defendants*), *Respondents.** [3rd August, 1893.]

Hindu law—Joint ownership—Decree against joint owner—Execution sale—Right of purchaser—Co-sharers made parties after period of limitation—Limitation.

The interest of Vithu, as co-sharer in certain land, was sold in execution of a decree against him. It was purchased by one Sakharam, who sold it to the plaintiff. The plaintiff sued for possession, and the other co-sharers were made party defendants to the suit, which, however, was held, as against them, to be barred by limitation.

Held, that the plaintiff was entitled to be put into joint possession of the land with them although the suit as against them was barred.

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* Second Appeal No. 198 of 1892.

(1) 11 B.L.R. 149.