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on the same basis of facts, two distinct titles may be put forth—See *Chová Karáv. Isa bin Khalifa*[1] and *Mahomed Buksh Khán* v. *Husseini Bibi*[2]. Plaintiff's principal claim was for a share of the land, a definite northern share if the alleged partition was held proved, or an equal share if no such partition was admitted. In the present case the fact of the second partition is not denied by the defendant. His contention relates solely to the impartible character of the land in dispute by reason of its being service land. There was, therefore, no inconsistency in plaintiffs' claim.

The partition-deed on which plaintiffs relied, was very properly held to be inadmissible in evidence, as both the value of the entire property and of plaintiffs' share in it exceeded 100 rupees. The questions of plaintiffs' alleged title to the land independently of the partition of 1887, and the impartibility of the land as being service land (on which latter point the Court of first instance rejected plaintiffs' claim), were not at all considered by the lower Court of appeal. It virtually disposed of the case on a preliminary point which did not cover the whole of plaintiffs' claim. Under these circumstances we think that the ends of justice will be best served by a remand of the case back to the lower Court of appeal under section 566, with directions that it should record its findings with reasons on the question of possession and title, and the impartibiiity or otherwise of the land in dispute. It should return these findings in the course of three months.

Case remanded.

(1) I. L. R., 1 Bom., 209. (2) L. R., 15 I. A., 81.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1894. *April* 18.

TRIMBAK RA'MRA'O DESHPA'NDE (ORIGINAL PLAINTIFF), APPELLANT, *v.* GOVINDA (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), *Sec.* 244 (c)—*Claim to attached property—Order in execution proceedings—Separate suit—Execution of decree.*

In execution of a decree passed against the plaintiff certain property in his possession was attached. Thereupon he laid claim to the property, on the ground

* Second Appeal, No. 718 of 1892.

that it was his service vatan. This claim was rejected. The plaintiff then filed a regular suit for a declaration that the property was not liable to attachment and sale.

Held, that the suit was barred under section 244 of the Code of Civil Procedure (Act XIV of 1882). The Court which originally rejected the plaintiff's claim in the execution proceedings had jurisdiction to investigate the claim under clause (*c*) of section 244 of the Code.

SECOND appeal from the decision of A. Steward, District Judge of Khándesh, in Appeal No. 203 of 1891.

The property in dispute was attached in execution of a money decree obtained by one Govinda Vyankoba against Trimbak Rámráo Deshpánde.

Thereupon Trimbak applied to have the attachment raised, alleging that the property was service vatan property, and as such not liable to attachment and sale.

This application was rejected.

Trimbak thereupon filed a regular suit to have it declared that the property in dispute was not liable to attachment and sale in execution of any decree, on the ground that it was service vatan.

The Court of first instance dismissed this suit, holding that it was barred under section 244 of the Code of Civil Procedure, as the order passed on plaintiff's application to set aside the attachment was one relating to the execution of a decree and made between the parties to the suit in which the decree was passed.

This decision was confirmed, on appeal, by the District Judge.

The plaintiff thereupon preferred a second appeal to the High Court.

Mahádev C. Apte for appellant (plaintiff) :—The decree in execution of which the property was attached was passed against the present plaintiff personally, and not in his capacity as vatandár. When the property was attached, he claimed it as his service vatan. The order rejecting his claim fell within section 280 and not 244 of the Code of Civil Procedure. The present suit will, therefore, lie as expressly provided by section 283 of the Code—*Roop Lall Dáss* v. *Bekani Meah*[1]. Section 278 of the Code does not exclude the case of a judgment-debtor claiming the

[1] I. L. R., 15 Calc., 437.

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property attached, not on his own account, but as a trustee for and on behalf of a third party. In the present case the plaintiff, a vatandár, claimed the property in dispute, not as his own private property, but as property belonging to Government and held by him as remuneration for service. The case, therefore, does not fall under section 244.

Dáji Abáji Khare for respondent (defendant):—All questions between the parties to a suit in which a decree is passed, and relating to execution of the decree, fall within section 244 of the Code of Civil Procedure. The claim made by the plaintiff in the execution proceedings was one between the parties to the suit, and relating to execution. It was, therefore, cognizable under section 244, and could not be made the subject of a separate suit—*Punchánun Bundopadhya* v. *Rahia Bibi* . Section 278 contemplates the case of a claimant who is not a party to the suit; the law, therefore, provides in his case that if he fails in the summary proceedings, he may bring a separate suit to establish his right. The present is not a case of this kind—*Chowdhry Wahed Ali* v. *Jumaee*[2].

JARDINE, J.:—A decree having been passed against the plaintiff, an inám jághir village in his possession was attached; whereupon he claimed that, as this property being service vatan was not liable to attachment or sale, the attachment should be removed. This claim was rejected. The plaintiff thereupon sued for a declaration that the property was not liable to attachment and sale. This suit has been rejected by the two lower Courts on the ground that the order was made under section 244, and that no suit would lie.

Mr. Apte has urged the analogy of the mutawali of wakf, who was the judgment-debtor in *Roop Láll Dáss* v. *Bekani Meah*[3], in which at page 445 it was held, after a review of the cases, that where the judgment-debtor claims to hold the property which is sought to be attached as a trustee for third parties, the order passed on the claim must be held to be a decision under section 280, and not under section 244. The present claim is not based on such a ground; and following the decisions of the

(1) I. L. R., 17 Calc., 711. (2) 11 Beng. L. R., 149.
(3) I. L. R., 15 Calc., 437.

Privy Council in *Chowdhry Wahed Ali* v. *Mussamut Jumace*[1] and *Abedoonissa* v. *Ameeroonissa*[2], as interpreted in *Punchánun Bundopádhya* v. *Rabia Bibi*[3] and *Kuriyali* v. *Mayan*[4], we are of opinion that the Court which originally rejected the claim made in the execution proceedings had jurisdiction under the words of section 244, clause (*c*). We, therefore, confirm the decree with costs.

Decree confirmed.

(1) 11 Beng. L. R., 149.
(2) L. R., 4 I. A., 66 at p. 75.
(3) I. L. R., 17 Calc., 711.
(4) I. L. R., 7 Mad., 255.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

GAVDA'PPA' AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* GIRIMALLA'PPA' (ORIGINAL PLAINTIFF), RESPONDENT.*

1894. *April* 19.

Hindu law—Adoption—Adoption by a mother after the death of her son who has left neither child nor widow—Adoption by a grandmother without the consent of her daughter-in-law—Objection taken for the first time in appeal—Practice.

Under the Hindu law a mother is competent to adopt when her son dies leaving no widow or other heir nearer than herself.

A Hindu of the Shudra class died, leaving him surviving his mother and a paternal grandmother. After his death his grandmother adopted the defendant. Subsequently to this adoption the deceased's mother adopted the plaintiff. Thereupon both plaintiff and defendant claimed the deceased's estate.

Held, that the plaintiff was entitled to succeed. The deceased's mother having succeeded as heir to her son, her mother-in-law could not by any adoption divest her of her rights as such heir without her consent. The defendant's adoption was, therefore, invalid.

An objection based upon a point of law may be made in second appeal, provided it does not involve the taking of any additional evidence on matters of disputed facts.

SECOND appeal from the decision of Venkatráo R. Inámdár, Acting Assistant Judge of Sholápur-Bijápur, in Appeal No. 78 of 1891.

The property in dispute belonged to one Giriáppa Jennáppa.

Giriáppa died leaving behind him his mother Ráchavá and a paternal grandmother also called Ráchavá.

* Second Appeal, No. 768 of 1892