



BOOKS AND PUBLICATIONS OF THE LEGISLATIVE
DEPARTMENT OF THE GOVERNMENT OF
INDIA FOR SALE.

1917

*List of Books and Publications for Sale which are
less than two years old.*

LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the Office of the Superintendent of Government Printing, India, No. 8 Hastings Street, Calcutta.]

The prices of the General Acts, Local Codes, Index to Enactments have been considerably reduced.

The British Enactments in force in Native States were issued by the Foreign Department.

[IN THE PRESS.]

The Ajmer Code.

The Chronological Tables of the Indian Statutes.

List of General Rules and Orders.

[The amounts within parentheses where noted are for packing and postage.]

I.—THE INDIAN STATUTE-BOOK.

A.—RULES AND ORDERS.

General Rules and Orders under enactments in force in British India consisting of General Rules, Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor-General in Council with an Index, Edn. 1915, Vol. I, Rs. 3, Vol. II, Rs. 4-8-0, Vol. III, Rs. 4, and Vol. IV, Rs. 5.

B.—LOCAL CODES.

The Assam Code, 1915, Vol. I. Royal 8vo, cloth. Rs. 3.
Do. do. Vol. II. Royal 8vo, cloth. Rs. 4 as. 8.
The Madras Code, 1915, Vols. I and II. Royal 8vo, cloth. Rs. 6 each.
The Punjab and North-West Frontier Code, 4th Edn., 1916. Royal 8vo, cloth. Rs. 6 as. 10.

**I.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL
OF INDIA IN COUNCIL AS ORIGINALLY PASSED.**

Acts (Unrepealed) of the Governor-General of India in Council from 1915 up to date.
Regulations made under the Statute 33 Vict., Cap. 3, from 1915 up to date.
Ordinances of the Governor-General of India during the years 1915 and 1916.

[The above may be obtained separately The price is noted on each.]

III.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL, AS MODIFIED BY SUBSEQUENT LEGISLATION.

- Act III of 1864 (Foreigners), as modified up to 1st April 1915. As. 3 p. 6 (Anna 1.)
 Act VII of 1885 (Fanch Mahal Laws), as modified up to 1st June 1915.
 Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. As. 2 p. 9. (Anna 1.)
 Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. As. 5 p. 6. (Anna 1.)
 Act II of 1886 (Indian Income-Tax), as modified up to 1st April 1916 As. 8. (Anna 1 p. 6.)
 Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1916. As. 9. (As. 2.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

- Act I of 1915 (Emergency Legislation Continuance). In Urdu. Pies 3. (Anna 1.)
 Act I of 1915 (Emergency Legislative Continuance). In Nagri. Pies 3. (Anna 1.)
 Act III of 1915 (Foreigners Amendment). In Urdu. Pies 3. (Anna 1.)
 Act III of 1915 (Foreigners Amendment). In Nagri. Pies 3. (Anna 1.)
 Act IV of 1915 (Defence of India Criminal Law Amendment). In Urdu. Pies 6. (Anna 1.)
 Act IV of 1915 (Defence of India Criminal Law Amendment). In Nagri. Pies 3. (Anna 1.)
 Act V of 1915 (Indian Paper Currency Temporary Amendment). In Urdu. Pies 3. (Anna 1.)
 Act V of 1915 (Indian Paper Currency Temporary Amendment). In Nagri. Pies 3. (Anna 1.)
 Act VI of 1915 (Indian Patent and Designs Temporary Rules). In Urdu. Pies 3. (Anna 1.)
 Act VI of 1915 (Indian Patent and Designs Temporary Rules). In Nagri. Pies 3. (Anna 1.)
 Act VII of 1915 (Delhi Laws). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1915 (Assam Labour and Emigration Amendment). In Urdu. Pies 6. (Anna 1.)
 Act VIII of 1915 (Assam Labour and Emigration Amendment). In Nagri. Pies 6. (Anna 1.)
 Act XII of 1915 (Indian Soldiers Litigation). In Urdu. Pies 3. (Anna 1.)
 Act XII of 1915 (Indian Soldiers Litigation). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1915 (North-West Frontier Constabulary). In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1915 (North-West Frontier Constabulary). In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1915 (Enemy Trading). In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1915 (Enemy Trading). In Nagri. Pies 3. (Anna 1.)
 Act XV of 1915 (Indian Steam Vessels Amendment). In Urdu. Pies 3. (Anna 1.)
 Act XV of 1915 (Indian Steam Vessels Amendment). In Nagri. Pies 3. (Anna 1.)
 Regulation I of 1915 (Excise). In Urdu. Anna 1 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Regulation I of 1915 (Excise). In Nagri. Anna 1 p. 6. (Anna 1.)
 Ordinance III of 1915 (Defence of India). In Urdu. Pies 3. (Anna 1.)
 Ordinance III of 1915 (Defence of India). In Nagri. Pies 3. (Anna 1.)
 Act I of 1916 (Indian Trusts Amendment). In Urdu. Pies 3. (Anna 1.)
 Act I of 1916 (Indian Trusts Amendment). In Nagri. Pies 8. (Anna 1.)
 Act II of 1916 (Defence of India Amendment). In Urdu. Pies 3. (Anna 1.)
 Act II of 1916 (Defence of India Amendment). In Nagri. Pies 3. (Anna 1.)
 Act IV of 1916 (Indian Tariff Amendment). In Urdu. Anna 1. (Anna 1.)
 Act IV of 1916 (Indian Tariff Amendment). In Nagri. Anna 1. (Anna 1.)
 Act V of 1916 (Indian Income-Tax Amendment). In Urdu. Pies 3. (Anna 1.)
 Act V of 1916 (Indian Income-Tax Amendment). In Nagri. Pies 3. (Anna 1.)
 Act VII of 1916 (Indian Medical Degrees). In Urdu. Pies 3. (Anna 1.)
 Act VII of 1916 (Indian Medical Degrees). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1916 (Presidency Banks Amendment). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1916 (Presidency Banks Amendment). In Nagri. Pies 3. (Anna 1.)
 Act IX of 1916 (Indian Paper Currency Temporary Amendment). In Urdu. Pies 3. (Anna 1.)
 Act IX of 1916 (Indian Paper Currency Temporary Amendment). In Nagri. Pies 3. (Anna 1.)
 Act X of 1916 (Enemy Trading). In Urdu. Pies 6. (Anna 1.)
 Act X of 1916 (Enemy Trading). In Nagri. Pies 6. (Anna 1.)
 Act XI of 1916 (Imports and Exports). In Urdu. Pies 3. (Anna 1.)
 Act XI of 1916 (Imports and Exports). In Nagri. Pies 3. (Anna 1.)
 Act XII of 1916 (Indian Lunacy). In Urdu. Pies 3. (Anna 1.)
 Act XII of 1916 (Indian Lunacy). In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1916 (Bills of Exchange). In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1916 (Bills of Exchange). In Nagri. Pies 3. (Anna 1.)
 Act XV of 1916 (Hindu Disposition of Property). In Urdu. Pies 3. (Anna 1.)
 Act XV of 1916 (Hindu Disposition of Property). In Nagri. Pies 3. (Anna 1.)
 Ordinance II of 1916 (Dutiable Goods and Salt). In Urdu. Pies 3. (Anna 1.)
 Ordinance II of 1916 (Dutiable Goods and Salt). In Nagri. Pies 3. (Anna 1.)
 Ordinance VII of 1915 (Second Paper Currency). In Urdu. Pies 3. (Anna 1.)
 Ordinance VII of 1916 (Second Paper Currency). In Nagri. Pies 3. (Anna 1.)
 Regulation V of 1910 (British Baluchistan Forests). In Urdu. Anna 1 p. 9. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act III of 1864 (Foreigners), as modified up to 1st April 1915. In Urdu. Anna 1. (Anna 1.)
- Act III of 1864 (Foreigners), as modified up to 1st April 1915. In Nagri. Anna 1. (Anna 1.)
- Act II of 1882 (Indian Income-Tax), as modified up to 1st April 1916. In Urdu. As. 2 p. 6. (Anna 1.)
- Act II of 1882 (Indian Income-Tax), as modified up to 1st April 1916. In Nagri. As. 2 p. 3. (Anna 1.)
- Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1916. In Urdu. As. 2 p. 9. (Anna 1.)
- Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1915. In Nagri. As. 2 p. 6. (Anna 1.)
- Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. In Urdu. Pies 9. (Anna 1.)
- Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. In Nagri. Pies 9. (Anna 1.)
- Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. In Urdu. Anna 1 p. 6. (Anna 1.)
- Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. In Nagri. Anna 1 p. 6. (Anna 1.)

V.—MISCELLANEOUS PUBLICATIONS.

- Table showing effect of legislation in the Governor-General's Council during 1914. As. 13. (As. 2.)
- Table showing effect of legislation in the Governor-General's Council during 1915. As. 5 p. 6. (Anna 1.)
- Annual Indexes to the Acts of the Governor-General of India in Council for 1914 and 1915. The price is noted on them.
- Proceedings of the Council of the Governor-General of India for making Laws and Regulations from 1915 to date. Super-royal 4to. Annual subscription Rs. 5 (Re. 1): single issue As. 4, including postage.
- Addenda et Corrigenda, List No. I of 1915, to the List of General Rules and Orders. As. 3 p. 3. (Anna 1.)
- Addenda et Corrigenda, List No. II of 1915, to the List of General Rules and Orders. Pies 6. (Anna 1.)
- Legislation and Orders relating to the War, Fourth Edition. Royal 8vo, paper. As. 8. (As. 2.)
- The Government of India Act, 1915 (5 and 6 Geo 5, ch. 61). Rs. 1. (Anna 1.)
- The Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, ch. 37). As. 3 p. 9.

DIGESTS.

- A Digest of Indian Law Cases for 1914 containing High Court Reports and Privy Council Reports of Appeals from India. Royal 8vo, cloth. Rs. 4 as. 4. (As. 4.)
- A Digest of Indian Law Cases for 1915 containing High Court Reports and Privy Council Reports of Appeals from India. Royal 8vo, cloth. Rs. 4 or 6s. (As. 5.)

List of Books and Publications for Sale which are more than two years old.

LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the office of the Superintendent of Government Printing, India, No. 8, Hastings Street, Calcutta.]

The prices of the General Acts, Local Codes, and Index to Enactments have been considerably reduced.

[The amounts within parentheses where noted are for packing and postage.]

I.—THE INDIAN STATUTE-BOOK.

A.—CHRONOLOGICAL TABLES.

- Chronological Tables of the Indian Statutes compiled under the orders of the Government of India by F. G. Wigley, of the Inner Temple, Bar-at-Law, Edition 1909. Rs. 4. (As. 8.)
- Index to Indian Statutes, Chronological Tables and Index to Indian Statutes, Vol. II, Edition 1911. Rs. 5. (As. 12.)

B.—GENERAL ACTS.

- General Acts of the Governor-General of India in Council, Vol. I, from 1834 to 1867, Edition 1909. Rs. 6. (As. 10.)
- General Acts of the Governor-General in Council, Vol. II, from 1868 to 1878, Edition 1909. Rs. 7. (As. 10.)
- General Acts of the Governor-General in Council, Vol. III, from 1879 to 1886, Edition 1909. Rs. 6. (As. 9.)
- General Acts of the Governor-General in Council, Vol. IV, from 1887 to 1897, Edition 1909. Rs. 6. (As. 9.)
- General Acts of the Governor-General in Council, Vol. V, from 1898 to 1903, Edition 1909. Rs. 6. (As. 9.)
- General Acts of the Governor-General in Council, Vol. VI, from 1904 to 1908, Edition 1909. Rs. 7. (As. 12.)
- General Acts of the Governor-General in Council, Vol. VII, Fourth Edition, from 1909 to 1913. Rs. 5. (As. 10.)

C.—LOCAL CODES.

- The Ajmer Code, Third Edition, 1905, containing the Enactments in force in Ajmer-Merwara, with an Appendix consisting of a list of the Enactments which have been declared in force in, or extended to, Ajmer-Merwara by notification under the Scheduled Districts Act, 1874; with a Chronological Table and an Index. Rs. 2 as. 8. (As. 7.)
- The Baluchistan Code, Third Edition, 1914. Rs. 2 as. 4. (As. 3.)
- The Bombay Code, Vol. I, Third Edition, 1907. Rs. 4. (As. 8.)
- The Bombay Code, Vol. II, Third Edition, 1907. Rs. 6. (As. 8.)
- The Bombay Code, Vol. III, Third Edition, 1908. Rs. 5. (As. 8.)
- The Bombay Code, Vol. IV, Third Edition, 1909. Rs. 4. (As. 8.)
- Volumes I to IV reduced to Rs. 11 per set.
- The Burma Code, Fourth Edition, 1910. Rs. 7. (As. 10.)

I.—THE INDIAN STATUTE-BOOK—cont.

C.—LOCAL CODES—cont.

The Central Provinces Code, Third Edition, 1904, consisting of the Bengal Regulations and the Local Acts of the Governor-General in Council in force in the Central Provinces, with an Appendix containing a list of the Acts which have been applied to the Scheduled Districts of the Central Provinces by notification under the Scheduled Districts Act, 1874; and an Index. Rs. 4. (As. 6.)

The Coorg Code, Third Edition, 1908. Rs. 2. (As. 4.)

The United Provinces Code, Vol. I, Fourth Edition, 1906, consisting of the Bengal Regulations and the Local Acts of the Governor-General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table. Rs. 5. (As. 8.)

The United Provinces Code, Vol. II, Fourth Edition, 1906, consisting of the Acts of the Lieutenant-Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared in force in, or extended to, the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874, with an Index. Rs. 10 (Rs. 1) for both vols. or Rs. 5 (As. 8) for each volume.

The United Provinces Code, Vols. I and II, reduced to Rs. 7 per set.

D.—STATUTES.

A Collection of Statutes relating to India, Volume I, Edition 1913. Royal 8vo, cloth. Rs. 8. (As. 11.)

A Collection of Statutes relating to India, Volume II, Edition 1913. Super-royal 8vo, cloth. Rs. 6. (As. 10.)

II.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL, AS MODIFIED BY SUBSEQUENT LEGISLATION.

Act II of 1834 (Secretaries to Government), with footnotes. Anna 1. (Anna 1.)

Act IV of 1837 (Property in land), with footnotes. Anna 1 p. 3 (Anna 1.)

Act XXV of 1838 (Wills), with footnotes. As. 3 p. 9. (Anna 1.)

Act XXIX of 1839 (Dower), with footnotes. Anna 1 p. 9. (Anna 1.)

Act XXX of 1839 (Inheritance), with footnotes. As. 2 p. 3. (Anna 1.)

Act XXXII of 1839 (Interest), with footnotes. Anna 1 p. 3. (Anna 1.)

Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December 1893 (with footnotes brought down to 1st December 1901). As. 7. (Anna 1.)

Act XIX of 1841 [Succession (Property Protection)], with footnotes. As. 3. (Anna 1.)

Act XXIV of 1841 (Illusory Appointments and Infants' Property), with footnotes. As. 2. (Anna 1.)

Act V of 1843 (Indian Slavery), with footnotes. Anna 1 p. 6. (Anna 1.)

Act I of 1846 (Legal Practitioners), as modified up to 1st October 1907. As. 2. (Anna 1.)

Act XV of 1848 (Supreme Courts' Officers' Trading), with footnotes. Anna 1 p. 3. (Anna 1.)

Act V of 1850 (Indian Coasting Trade), with footnotes. Anna 1. (Anna 1.)

Act XII of 1850 (Public Accountants' Default), with footnotes. Anna 1 p. 6. (Anna 1.)

II.—REPRINTS OF ACTS AND REGULATIONS, Etc.—cont.

Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. Anna 1 p. 9. (Anna 1.)

Act XIX of 1850 (Apprentices), as modified up to 1st May 1905. As. 3 p. 6. (Anna 1.)

Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. Anna 1 p. 6. (Anna 1.)

Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903. As. 2 p. 6. (Anna 1.)

Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. As. 11. (Anna 1.)

Act VIII of 1851 (Indian Tolls), as modified up to 1st June 1897. As. 2 p. 6. (Anna 1.)

Act VIII of 1852 (Sheriffs' Fees), with footnotes. Anna 1 p. 6. (Anna 1.)

Act XXX of 1852 (Indian Naturalization), as modified up to 30th April 1908. As. 2. (Anna 1.)

Act II of 1853 (Landholders' Public Charges and Duties), with footnotes. Anna 1 p. 6. (Anna 1.)

Act XX of 1853 (Legal Practitioners), as modified up to 1st September 1907. Anna 1 p. 9. (Anna 1.)

Act XXIV of 1854 (Malabar War-Knives), with footnotes. Anna 1 p. 3. (Anna 1.)

Act XXXI of 1854 (Conveyance of Land), as modified up to 1st June 1910. As. 2 p. 3. (Anna 1.)

Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. Anna 1. (Anna 1.)

Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. As. 2. (Anna 1.)

Act XXIII of 1855 (Administration of Mortgaged Estates), as modified up to 1st October 1908. Anna 1 p. 3. (Anna 1.)

Act XXIV of 1855 (Penal Servitude), as modified up to 1st January 1909. As. 2. (Anna 1.)

Act XXVIII of 1855 (Usury Laws Repeal), as modified up to 1st December 1903. Anna 1 p. 6. (Anna 1.)

Act XV of 1856 (Hindu Widows' Remarriage), with footnotes. As. 2. (Anna 1.)

Act XVIII of 1856 (Calcutta Land Revenue), as modified up to 15th July 1908. Pies 6. (Anna 1.)

Act XX of 1856 (Bengal Chankidari), as modified up to 1st November 1903. As. 7. (Anna 1.)

Act II of 1857 (Calcutta University), as modified up to 1st June 1910. As. 2. (Anna 1.)

Act IV of 1857 [Tobacco (Bombay Town)], as modified up to 1st December 1906. As. 3 p. 9. (Anna 1.)

Act X of 1857 (Sonthal Parganas), as modified up to 1st August 1909. Anna 1. (Anna 1.)

Act XIII of 1857 (Opium), as modified up to 1st August 1908. As. 4 p. 3. (Anna 1.)

Act XXIX of 1857 (Land Customs, Bombay), as modified up to 1st June 1905. As. 4. (Anna 1.)

Act XXVII of 1857 (Madras University), as modified up to 1st July 1909. As. 2 p. 9. (Anna 1.)

Act III of 1858 (State Prisoners), as modified up to 1st August 1897. As. 2. (Anna 1.)

Act XXXI of 1858 (Alluvial), as modified up to 15th February 1908.

Act I of 1859 (Indian Merchant Shipping), as modified up to 30th June 1905. As. 13. (As. 2.)

II.—REPRINTS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. Anna 1 p. 9. (Anna 1.)
- Act XI of 1859 (Bengal Land Revenue Sales), as modified up to 1st August 1906. As. 4. (Anna 1.)
- Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. Anna 1 p. 6. (Anna 1.)
- Act XXIV of 1859 (Madras District Police), as modified up to 1st November 1907. As. 3 p. 6. (As. 2.)
- Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. Anna 1 p. 6. (Anna 1.)
- Act XXI of 1860 (Societies Registration), as modified up to 1st December 1904. As. 2 p. 9. (Anna 1.)
- Act XLV of 1860 (Indian Penal Code), as modified up to 1st June 1910, with an Index. Rs. 2 As. 8. (As. 5.)
- Act V of 1861 (Police), as modified up to 7th March 1903. As. 7 p. 6. (Anna 1 p. 6.)
- Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. As. 3 p. 6. (Anna 1.)
- Act XVI of 1863 (Excise Duty on Spirits), as modified up to 1st October 1908. As. 2. (Anna 1.)
- Act XXIII of 1863 (Claims to Waste-lands), as modified up to 1st December 1896. As. 4 p. 9. (Anna 1.)
- Act XXXI of 1863 (Gazette of India), with footnotes. Anna 1 p. 3. (Anna 1.)
- Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. Anna 1 p. 9. (Anna 1.)
- Act III of 1865 (Carriers), as modified up to 31st May 1903. As. 3. (Anna 1.)
- Act X of 1865 (Indian Succession), as modified up to 1st April 1909. Re. 1 As. 8. (As. 2.)
- Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. As. 4. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st January 1905. As. 4. (Anna 1.)
- Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August 1908. As. 2. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. As. 5. (Anna 1.)
- Act IV of 1869 (Indian Divorce), as modified up to 1st January 1911. As. 12. (As. 2.)
- Act XX of 1869 (Indian Volunteers), as modified up to 1st May 1896. As. 4 p. 9. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. Anna 1. (Anna 1.)
- Act VII of 1870 (Court Fees), as modified up to 1st February 1909. Re. 1 as. 2. (As. 2.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. As. 6. (Anna 1.)
- Act XXI of 1871 (Dehra Dun), as modified up to 1st October 1913. Anna 1 p. 3.
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. As. 2 p. 3. (Anna 1.)
- Act I of 1872 (Indian Evidence), as modified up to 1st July 1911. Re. 1. (As. 2.)
- Act III of 1872 (Special Marriages), as modified up to 1st November 1906. As. 4 p. 6. (Anna 1.)

II.—REPRINTS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act IV of 1872 (Punjab Laws), as modified up to 1st August 1909. As. 7. (Anna 1.)
- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. Re. 1 as. 4. (As. 2.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. As. 10. (As. 2.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. As. 3 p. 6. (Anna 1.)
- Act X of 1873 (Oaths), as modified up to 1st February 1903. As. 3 p. 9. (Anna 1.)
- Act IX of 1874 (European Vagrancy), as modified up to 1st September 1909. As. 6 p. 6. (Anna 1.)
- Act XIV of 1874 (Scheduled Districts), as modified up to 1st October 1895. As. 6. (Anna 1.)
- Act XV of 1874 (Laws Local Extent), as modified up to 1st October 1895. As. 7. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. As. 2. (Anna 1.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. As. 11. (As. 2.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. As. 11. (Anna 1 p. 6.)
- Act I of 1878 (Opium), as modified up to 1st July 1910. As. 5 p. 6. (Anna 1.)
- Act VI of 1878 (Indian Treasure Trove), as modified by Act XII of 1891, as reprinted on the 14th February 1908. As. 2 p. 9. (Anna 1.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. As. 10. (As. 2.)
- Act VIII of 1878 (Sea Customs), as modified up to 1st June 1908. Re. 1 as. 5 p. 3. (As. 4.)
- Act XI of 1878 (Indian Arms), as modified up to 1st March 1910. As. 5 p. 6. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. As. 6. (Anna 1 p. 6.)
- Act XVI of 1879 (Transport of Salt), as modified up to 1st October 1907. Anna 1 p. 6. (Anna 1.)
- Act XVII of 1879 (Dekkhan Agriculturists' Relief), as modified up to 1st June 1905. As. 10. (As. 2.)
- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st July 1911. As. 6 p. 6. (Anna 1.)
- Act VII of 1880 (Indian Merchant Shipping), as modified up to 15th October 1891. As. 10. (As. 2.)
- Act XII of 1880 (Kazis), with footnotes. Anna 1 p. 6. (Anna 1.)
- Act XIII of 1880 (Vaccination), as modified up to 1st September 1909. As. 4 p. 9. (Anna 1.)
- Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. As. 12. (As. 2.)
- Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st March 1909. Re. 1 as. 2. (As. 3.)
- Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September 1909. As. 10. (Anna 1.)
- Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. As. 10. (Anna 1.)
- Act IV of 1882 (Transfer of Property), as modified up to 1st December 1905. As. 15. (As. 2.)
- Act V of 1882 (Indian Easements), as amended by the Repealing and Amending Act, 1891 (XII of 1891). As. 8. (Anna 1.)

II.—REPRINTS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XII of 1892 (Indian Salt), as modified up to 1st August 1909. As. 7. (As. 2.)
- Act XV of 1882 (Presidency Small Cause Courts), as modified up to 1st June 1906. As. 10. (As. 2.)
- Act V of 1883 (Indian Merchant Shipping), as modified up to 1st September 1909. As. 6. (Anna 1.)
- Act VIII of 1883 (Little Cocos and Preparis Islands Laws), as modified up to 1st October 1902. Anna 1 p. 3. (Anna 1.)
- Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. As. 2 p. 6. (Anna 1.)
- Act IV of 1884 (Explosives), as modified up to 1st October 1911. As. 4 p. 9. (Anna 1.)
- Act VI of 1884 (Inland Steam Vessels), as modified up to 1st October 1910. As. 9. (As. 2.)
- Act VII of 1884 (Indian Steamships), as modified up to 1st July 1890. As. 6. (Anna 1.)
- Act IX of 1884 (Legal Practitioners), as modified up to 30th June 1909. Anna 1 p. 6. (Anna 1.)
- Act XII of 1884 (Agriculturists' Loans), as modified up to 1st February 1903. As. 2. (Anna 1.)
- Act XIII of 1885 (Indian Telegraph), as modified up to 1st June 1910. As. 5. (Anna 1.)
- Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st May 1911. As. 6. (Anna 1.)
- Act XI of 1886 (Indian Tramways), as modified up to 1st December 1903. As. 9. (As. 2.)
- Act XIII of 1886 (Indian Securities), as amended by Act XII of 1891. As. 2 p. 9. (Anna 1.)
- Act VII of 1887 (Suits Valuation), as modified up to 1st November 1904. Anna 1 p. 9. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1900. As. 6. (Anna 1.)
- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. As. 8. (Anna 1.)
- Act III of 1888 (Police), as modified up to 1st January 1909. Anna 1 p. 9. (Anna 1.)
- Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. Anna 1 p. 9. (Anna 1.)
- Act II of 1889 (Measures of Length), with footnotes. Anna 1 p. 3. (Anna 1.)
- Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st August 1908. As. 6. (Anna 1.)
- Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. As. 2 p. 9. (Anna 1.)
- Act VII of 1889 (Succession Certificate), as modified up to 1st June 1910. As. 5 p. 6. (Anna 1.)
- Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. As. 3. (Anna 1.)
- Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. As. 2 p. 6. (Anna 1.)
- Act IX of 1890 (Indian Railways), as modified up to 1st June 1909. Re. 1 as. 2. (As. 2.)
- Act X of 1890 (Press and Registration of Books), as modified up to 1st December 1903. As. 2 p. 3. (Anna 1.)
- Act XI of 1890 (Prevention of Cruelty to Animals), with footnotes. As. 2. (Anna 1.)

II.—REPRINTS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XIII of 1890 (Excise Malt Liquors), as modified up to 1st October 1908. Anna 1 p. 6. (Anna 1.)
- Act X of 1891 (Indian Criminal Law Amendment), as modified up to 1st August 1909. Anna 1. (Anna 1.)
- Act XII of 1891 (Amending Act), showing the Schedules as modified up to 31st May 1902. As. 12. (Anna 1 p. 6.)
- Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897. Anna 1 p. 3. (Anna 1.)
- Act I of 1894 (Land Acquisition), with footnotes. As. 7. (Anna 1.)
- Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898. As. 8. (Anna 1 p. 6.)
- Act XII of 1896 (Excise), as modified up to 1st March 1907. As. 8. (As. 2.)
- Act XX of 1896 (Sindh Incumbered Estates), as modified up to 1st June 1906. As. 4. (Anna 1.)
- Act IV of 1897 (Indian Fisheries), with footnotes. Anna 1 p. 9. (Anna 1.)
- Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. As. 2 p. 9. (Anna 1.)
- Act X of 1897 (General Clauses), as modified up to 1st February 1910. As. 5 p. 6. (Anna 1 p. 6.)
- Act III of 1898 (Lepers), as modified up to 1st September 1909. As. 4. (Anna 1.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. Rs. 3 as. 10. (As. 8.)
- Act II of 1899 (Indian Stamp), as modified up to 1st March 1907. Re. 1. (As. 2.)
- Act VIII of 1899 (Indian Petroleum), as modified up to 1st July 1911. As. 7 p. 6. (Anna 1 p. 6.)
- Act XVI of 1899 (Northern India Canal and Drainage), with footnotes. Anna 1. (Anna 1.)
- Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900. Anna 1. (Anna 1.)
- Act III of 1900 (Prisoners), as modified up to 1st July 1910. As. 6 p. 6. (Anna 1.)
- Act VI of 1901 (Assam Labour and Emigration), as modified up to 1st July 1910. Re. 1 as. 4. (As. 2.)
- Act II of 1902 [Cantonments (House-accommodation)], as modified up to 1st June 1910. As. 6 p. 6. (Anna 1.)
- Act I of 1904 (Poisons), with footnotes. As. 2 p. 9. (Anna 1.)
- Act II of 1904 (Central Provinces Courts), as modified up to 1st December 1910. As. 4 p. 3. (Anna 1.)
- Act I of 1910 (Indian Press), with footnotes. As. 3 p. 6. (Anna 1.)
- Regulation III of 1818 (Bengal State Prisoners), as modified up to 1st August 1909. As. 2 p. 9. (Anna 1.)
- Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st March 1909. As. 6 p. 6. (Anna 1.)
- Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July 1903. Anna 1 p. 9. (Anna 1.)
- Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February 1897. As. 5 p. 6. (Anna 1.)
- Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894. As. 13. (As. 2.)
- Regulation V of 1886 (Ajmer Municipalities), as modified up to 1st February 1911. As. 15. (As. 2.)
- Regulation VI of 1886 (Ajmer Rural Boards), as modified up to 1st February 1897. As. 5 p. 6. (Anna 1.)

II.—REPRINTS OF ACTS AND REGULATIONS, ETC.—*cont.*

Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October 1899. As. 4 p. 9. (Anna 1.)
Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April 1902. As. 6. (Anna 1.)

III.—ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor-General of India in Council from 1854 to 1914.
Regulations made under the Statute 33 Vict., Cap. 3, from No. II of 1875 to 1914. 8vo, stitched.
Ordinances of the Governor-General of India, during the year 1914.

[The above may be obtained separately. The price is noted on each.]

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December 1893, with footnotes brought down to 1st December 1901. In Urdu. As. 2 p. 6. (Anna 1.)
Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. In Urdu. Pies 6. (Anna 1.)
Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. In Nagri. Pies 6. (Anna 1.)
Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. In Urdu. Pies 3. (Anna 1.)
Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. In Nagri. Pies 3. (Anna 1.)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903. In Urdu. Pies 6. (Anna 1.)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903. In Nagri. Pies 6. (Anna 1.)
Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. In Urdu. Pies 9. (Anna 1.)
Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
Act XXX of 1852 (Naturalization), as modified up to 1st December 1902. In Urdu. Pies 6. (Anna 1.)
Act XXX of 1852 (Naturalization), as modified up to 1st December 1902. In Nagri. Pies 6. (Anna 1.)
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. In Urdu. Pies 3. (Anna 1.)
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. In Nagri. Pies 3. (Anna 1.)
Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. In Urdu. Pies 6. (Anna 1.)
Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. In Nagri. Pies 6. (Anna 1.)
Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
Act XV of 1856 (Hindu Widow's Re-marriage). In Urdu. Pies 6. (Anna 1.)
Act XV of 1856 (Hindu Widow's Re-marriage). In Nagri. Pies 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

Act XX of 1856 (Bengal Chaukidari), as modified up to 1st November 1903. In Urdu. As. 2 p. 6. (Anna 1.)
Act XX of 1856 (Bengal Chaukidari), as modified up to 1st November 1903. In Nagri. As. 2 p. 6. (Anna 1.)
Act XIII of 1857 (Opium), as modified up to 1st August 1908. In Urdu. Pies 9. (Anna 1.)
Act XIII of 1857 (Opium), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. In Urdu. Pies 3. (Anna 1.)
Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. In Nagri. Pies 3. (Anna 1.)
Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. In Urdu. Pies 3. (Anna 1.)
Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. In Nagri. Pies 3. (Anna 1.)
Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903. In Urdu. Re. 1 As. 5. (As. 5.)
Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903. In Nagri. Re. 1 As. 5. (As. 5.)
Act V of 1861 (Police), as modified up to 7th March 1903. In Urdu. As. 2 p. 9. (Anna 1.)
Act V of 1861 (Police), as modified up to 7th March 1903. In Nagri. As. 2 p. 9. (Anna 1.)
Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. In Urdu. Anna 1 p. 3. (Anna 1.)
Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. In Nagri. Anna 1 p. 3. (Anna 1.)
Act XVI of 1863 (Excise), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
Act XVI of 1863 (Excise), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
Act XXXI of 1863 (Official Gazettes), with footnotes. In Urdu. Pies 3. (Anna 1.)
Act XXXI of 1863 (Official Gazettes), with footnotes. In Nagri. Pies 3. (Anna 1.)
Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. In Urdu. Pies 3. (Anna 1.)
Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. In Nagri. Pies 3. (Anna 1.)
Act III of 1865 (Carriers), as modified up to 31st May 1903. In Urdu. Pies 9. (Anna 1.)
Act III of 1865 (Carriers), as modified up to 31st May 1903. In Nagri. Pies 9. (Anna 1.)
Act X of 1865 (Indian Succession), as modified up to 1st April 1909. In Urdu. As. 11 p. 3. (As. 2.)
Act X of 1865 (Indian Succession), as modified up to 1st April 1909. In Nagri. As. 11 p. 3. (As. 2.)
Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. In Urdu. Pies 9. (Anna 1.)
Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. In Nagri. Pies 9. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act III of 1867 (Public Gambling), as modified up to 1st December 1896. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st January 1905. In Urdu. Anna 1. (Anna 1.)
- Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
- Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August 1908. In Nagri. Pies 6. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1870 (Court-fees), as modified up to 1st February 1909. In Urdu. As. 5 p. 9. (Anna 1.)
- Act VII of 1870 (Court-fees), as modified up to 1st February 1909. In Nagri. As. 5 p. 6. (Anna 1.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. In Nagri. Anna 1 p. 9. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. In Urdu. Pies 9. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. In Nagri. Pies 9. (Anna 1.)
- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Urdu. As. 8. (As. 2.)
- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Nagri. As. 8. (As. 2.)
- Act IV of 1872 (Punjab Laws), as modified up to 1st November 1904. In Urdu. As. 2 p. 6. (Anna 1 p. 6.)
- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. In Urdu. As. 9 p. 9. (As. 3.)
- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. In Nagri. As. 9 p. 9. (As. 3.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. In Urdu. As. 3. (Pies 9.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. In Nagri. As. 4. (As. 2.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. In Urdu. Pies 9. (Anna 1.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. In Nagri. Pies 9. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899. In Urdu. As. 3 p. 3. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899. In Nagri. As. 3 p. 3. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1903. In Urdu. Anna 1. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1903. In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1873 (Agra Village and Road Police). In Urdu. Anna 1. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act IX of 1874 (European Vagrancy). In Urdu. *As. 2. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. In Urdu. Pies 3. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. In Nagri. Pies 3. (Anna 1.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. In Urdu. As. 3 p. 9. (Anna 1 p. 6.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. In Nagri. As. 3 p. 6. (Anna 1 p. 6.)
- Act XVIII of 1876 (Oudh Laws). In Urdu. As. 2. (Anna 1.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. In Urdu. As. 4 p. 6. (Anna 1 p. 6.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. In Nagri. As. 4 p. 6. (Anna 1 p. 6.)
- Act I of 1878 (Opium), as modified up to 1st October 1907. In Urdu. Anna 1 p. 6. (Anna 1.)
- Act I of 1878 (Opium), as modified up to 1st October 1907. In Nagri. Anna 1 p. 6. (Anna 1.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. In Urdu. As. 4. (Anna 1 p. 6.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. In Nagri. As. 4. (Anna 1 p. 6.)
- Act XI of 1878 (Indian Arms), as modified up to 1st May 1904. In Urdu. As. 2. (Anna 1.)
- Act XI of 1878 (Indian Arms), as modified up to 1st May 1904. In Nagri. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. In Urdu. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. In Nagri. As. 2. (Anna 1.)
- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896. In Urdu. As. 2 p. 6. (Anna 1.)
- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896. In Nagri. As. 2 p. 6. (Anna 1.)
- Act XII of 1880 (Kazis), with footnotes. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1880 (Vaccination). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XIII of 1880 (Vaccination). In Nagri. Anna 1 p. 3. (Anna 1.)
- Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. In Urdu. As. 4 p. 6. (Anna 1 p. 6.)
- Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. In Nagri. As. 4 p. 6. (Anna 1 p. 6.)
- Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898. In Urdu. As. 9. (Anna 1 p. 6.)
- Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898. In Nagri. As. 9. (Anna 1 p. 6.)
- Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September 1909. In Urdu. As. 4. (Anna 1.)
- Act XXVI of 1881. (Negotiable Instruments), as modified up to 1st September 1909. In Nagri. As. 4. (Anna 1.)
- Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. In Urdu. As. 3 p. 6. (Anna 1.)
- Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. In Nagri. As. 3 p. 6. (Anna 1.)
- Act IV of 1882 (Transfer of Property), as modified up to 1st March 1900. In Urdu. As. 6 p. 9. (As. 2.)
- Act IV of 1882 (Transfer of Property), as modified up to 1st March 1900. In Nagri. As. 6 p. 9. (As. 2.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. In Urdu. Anna 1. (Anna 1.)
- Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. In Nagri. Anna 1. (Anna 1.)
- Act IV of 1884 (Indian Explosives), as modified up to 1st September 1908. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act IV of 1884 (Indian Explosives), as modified up to 1st September 1908. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July 1891. In Urdu. As. 3 p. 6. (Anna 1 p. 6.)
- Act VI of 1884 (Inland Steam-vessels), as modified up to 1st July 1891. In Nagri. As. 3 p. 6. (Anna 1 p. 6.)
- Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September 1906. In Urdu. Pies 6. (Anna 1.)
- Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September 1906. In Nagri. Pies 6. (Anna 1.)
- Act XVIII of 1884 (Punjab Courts), as modified up to 1st December 1899. In Urdu. As. 2 p. 6. (Anna 1.)
- Act II of 1885 [Negotiable Instruments (Amendment)]. In Urdu. Pies 9. (Anna 1.)
- Act III of 1885 [Transfer of Property (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act X of 1885 [Oudh Estates (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1885 (Indian Telegraph), as modified up to 1st June 1910. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XXI of 1885 [Madras Civil Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act IV of 1886 [Indian Contract (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1886 (Births, Deaths and Marriages Registration). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act X of 1886 [Indian Criminal Law (Amendment)]. In Urdu. Pies 9. (Anna 1.)
- Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900. In Urdu. As. 3 p. 3. (Anna 1.)
- Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900. In Nagri. As. 3 p. 3. (Anna 1.)
- Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891. In Urdu. Pies 9. (Anna 1.)
- Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891. In Nagri. Pies 9. (Anna 1.)
- Act VII of 1887 (Suits' Valuation). In Urdu. Pies 9. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896. In Urdu. As. 2 p. 3. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896. In Nagri. As. 2 p. 6. (Anna 1.)
- Act X of 1887 (Native Passenger Ships). In Urdu. Anna 1 p. 6. (Anna 1.)
- Act XII of 1887 (Bengal, Agra and Assam Civil Courts). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XII of 1887 (Bengal, Agra and Assam Civil Courts). In Nagri. Anna 1 p. 3. (Anna 1.)
- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. In Urdu. As. 3 p. 6. (Anna 1.)
- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. In Nagri. As. 3 p. 9. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XV of 1887 (Burma Military Police). In Urdu. Pies 9. (Anna 1.)
- Act XV of 1887 (Burma Military Police). In Nagri. Pies 9. (Anna 1.)
- Act XVIII of 1887 (Allahabad University). In Urdu. Anna 1. (Anna 1.)
- Act III of 1888 (Police), as modified up to 1st January 1909. In Urdu. Pies 3. (Anna 1.)
- Act III of 1888 (Police), as modified up to 1st January 1909. In Nagri. Pies 6. (Anna 1.)
- Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March 1893. In Urdu. Pies 3. (Anna 1.)
- Act IV of 1888 (Indian Reserve Forces), as passed up to 1st March 1893. In Nagri. Pies 3. (Anna 1.)
- Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. In Urdu. Pies 6. (Anna 1.)
- Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. In Nagri. Pies 6. (Anna 1.)
- Act II of 1889 (Measures of Length). In Urdu. Pies 3. (Anna 1.)
- Act II of 1889 (Measures of Length). In Nagri. Pies 3. (Anna 1.)
- Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st February 1904. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st February 1904. In Nagri. As. 2. (Anna 1.)
- Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. In Urdu. Pies 6. (Anna 1.)
- Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. In Nagri. Pies 6. (Anna 1.)
- Act VII of 1889 (Succession Certificate), as modified up to 1st December 1903. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. In Urdu. Pies 9. (Anna 1.)
- Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1889 (Central Provinces Land Revenue). In Urdu. Anna 1 p. 6. (Anna 1.)
- Act XVI of 1889 (Central Provinces Land Revenue). In Nagri. Anna 1 p. 6. (Anna 1.)
- Act XX of 1889 [Indian Lunatic Asylums (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1890 (Revenue Recovery). In Urdu. Pies 3. (Anna 1.)
- Act II of 1890 (Probate and Administration). In Urdu. Pies 3. (Anna 1.)
- Act V of 1890 (Forest). In Urdu. Pies 6. (Anna 1.)
- Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
- Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
- Act VIII of 1890 (Guardians and Wards). In Urdu. As. 2 p. 3. (Anna 1 p. 9.)
- Act IX of 1890 (Indian Railways), as modified up to 1st June 1905. In Urdu. As. 8. (As. 2.)
- Act IX of 1890 (Indian Railways), as modified up to 1st May 1896. In Nagri. As. 8. (As. 2.)
- Act X of 1890 [Press and Registration of Books (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XI of 1890 (Prevention of Cruelty to Animals). In Urdu. Pies 6. (Anna 1.)
- Act XX of 1890 (United Provinces). In Urdu. Anna 1. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act X of 1891 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1891 (Oudh Courts). In Urdu. Pies 6. (Anna 1.)
- Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900. In Urdu. Pies 3. (Anna 1.)
- Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900. In Nagri. Pies 6. (Anna 1.)
- Act II of 1892 (Marriages Validation). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1892 [Bengal Court of Wards (Amendment)]. In Urdu. Pies 6. (Anna 1.)
- Act IV of 1893 (Partition). In Urdu. Pies 3. (Anna 1.)
- Act I of 1894 (Land Acquisition). In Urdu. As. 2 p. 3. (Anna 1 p. 6.)
- Act I of 1894 (Land Acquisition). In Nagri. Anna 1 p. 6. (Anna 1 p. 6.)
- Act III of 1894 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act IX of 1894 (Prisons). In Urdu. As. 2 p. 3. (Anna 1.)
- Act IX of 1894 (Prisons). In Nagri. As. 2 p. 3. (Anna 1.)
- Act VII of 1895 [Punjab Laws Act (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VII of 1895 [Punjab Laws Act (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1895 (Pilgrim Ships). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act II of 1896 (Cotton-duties). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act II of 1896 (Cotton-duties). In Nagri. Anna 1. (Anna 1.)
- Act VI of 1896 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VIII of 1896 (Inland Bonded Warehouses). In Urdu. Pies 3. (Anna 1.)
- Act VIII of 1896 (Inland Bonded Warehouses). In Nagri. Pies 3. (Anna 1.)
- Act XII of 1896 (Excise), as modified up to 1st March 1907. In Urdu. As. 2 p. 9. (As. 2.)
- Act XII of 1896 (Excise), as modified up to 1st March 1907. In Nagri. As. 3 p. 3. (As. 2.)
- Act I of 1897 [Public Servants (Inquiries) Amendment]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1897 [Public Servants (Inquiries) Amendment]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1897 (Epidemic Diseases). In Urdu. Pies 3. (Anna 1.)
- Act III of 1897 (Epidemic Diseases). In Nagri. Pies 3. (Anna 1.)
- Act IV of 1897 (Fisheries). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1897 (Fisheries). In Nagri. Pies 3. (Anna 1.)
- Act VI of 1897 [Negotiable Instruments (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1897 [Negotiable Instruments (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VIII of 1897 (Reformatory Schools). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act VIII of 1897 (Reformatory Schools). In Nagri. Pies 6. (Anna 1.)
- Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. In Urdu. Pies 9. (Anna 1.)
- Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. In Nagri. Pies 9. (Anna 1.)
- Act X of 1897 (General Clauses). In Urdu. Anna 1. (Anna 1.)
- Act X of 1897 (General Clauses). In Nagri. Anna 1. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act I of 1898 [Stage-carriages Act (1861) Amendment]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1898 [Stage-carriages Act (1861) Amendment]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1898 (Lepers), as modified up to 1st September 1909. In Urdu. Pies 6. (Anna 1.)
- Act III of 1898 (Lepers), as modified up to 1st September 1909. In Nagri. Pies 6. (Anna 1.)
- Act IV of 1898 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. In Urdu. Re. 1 as. 4. (As. 8.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. In Nagri. Re. 1 as. 6. (As. 8.)
- Act VI of 1898 (Indian Post Office). In Urdu. As. 3 p. 3. (Anna 1.)
- Act VI of 1898 (Indian Post Office). In Nagri. As. 3 p. 3. (Anna 1.)
- Act IX of 1898 (Live-stock Importation). In Urdu. Pies 3. (Anna 1.)
- Act IX of 1898 (Live-stock Importation). In Nagri. Pies 3. (Anna 1.)
- Act X of 1898 (Indian Insolvency Rules). In Urdu. Pies 3. (Anna 1.)
- Act I of 1899 [Indian Marine Act (1887) Amendment]. In Urdu. Pies 6. (Anna 1.)
- Act I of 1899 [Indian Marine Act (1887) Amendment]. In Nagri. Pies 6. (Anna 1.)
- Act II of 1899 (Stamps), as modified up to 1st March 1907. In Urdu. As. 7 p. 6. (Anna 1 p. 6.)
- Act II of 1899 (Stamps), as modified up to 1st March 1907. In Nagri. As. 7 p. 6. (Anna 1 p. 6.)
- Act IV of 1899 (Government Buildings). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1899 (Government Buildings). In Nagri. Pies 3. (Anna 1.)
- Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment]. In Urdu. Pies 3. (Anna 1.)
- Act VII of 1899 [Indian Steam-vessels Act (1884) Amendment]. In Nagri. Pies 3. (Anna 1.)
- Act VIII of 1899 (Indian Petroleum), as modified up to 1st January 1909. In Urdu. Anna 1 p. 6. (Anna 1.)
- Act VIII of 1899 (Indian Petroleum), as modified up to 1st January 1909. In Nagri. Anna 1 p. 6. (Anna 1.)
- Act IX of 1899 (Indian Arbitration). In Urdu. Pies 9. (Anna 1.)
- Act IX of 1899 (Indian Arbitration). In Nagri. Pies 9. (Anna 1.)
- Act XI of 1899 [Court-fees (Amendment)]. In Urdu. Pies 6. (Anna 1.)
- Act XI of 1899 [Court-fees (Amendment)]. In Nagri. Pies 6. (Anna 1.)
- Act XII of 1899 (Currency Notes Forgery). In Urdu. Pies 3. (Anna 1.)
- Act XII of 1899 (Currency Notes Forgery). In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1899 [Tariff (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1899 [Tariff (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XVIII of 1899 [Land Improvement Loans (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XVIII of 1899 [Land Improvement Loans (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XX of 1899 (Presidency Banks). In Urdu. Pies 3. (Anna 1.)
- Act XX of 1899 (Presidency Banks). In Nagri. Pies 3. (Anna 1.)
- Act XXI of 1899 [Central Provinces Tenancy (Amendment)]. In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XXI of 1899 [Central Provinces Tenancy (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XXIV of 1899 (Central Provinces Court of Wards). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XXIV of 1899 (Central Provinces Court of Wards). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act III of 1900 (Prisoners), as modified up to 1st March 1905. In Urdu. As. 2 p. 3. (Anna 1.)
 Act III of 1900 (Prisoners), as modified up to 1st March 1905. In Nagri. As. 2 p. 3. (Anna 1.)
 Act IX of 1900 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1900 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1901 [Indian Tolls (Army)]. In Urdu. Pies 6. (Anna 1.)
 Act II of 1901 [Indian Tolls (Army)]. In Nagri. Pies 9. (Anna 1.)
 Act V of 1901 [Indian Forest (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act V of 1901 [Indian Forest (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VI of 1901 (Assam Labour and Emigration). In Urdu. As. 5. (As. 2.)
 Act VI of 1901 (Assam Labour and Emigration). In Nagri. As. 5. (As. 2.)
 Act VII of 1901 (Native Christian Administration of Estates). In Urdu. Pies 3. (Anna 1.)
 Act VII of 1901 (Native Christian Administration of Estates). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1901 (Indian Mines). In Urdu. Anna 1. (Anna 1.)
 Act VIII of 1901 (Indian Mines). In Nagri. Anna 1. (Anna 1.)
 Act X of 1901 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act X of 1901 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1902 [Cantonments (House-accommodation)]. In Urdu. Anna 1. (Anna 1.)
 Act II of 1902 [Cantonments (House-accommodation)]. In Nagri. Anna 1. (Anna 1.)
 Act IV of 1902 (Indian Tramways). In Urdu. Pies 3. (Anna 1.)
 Act IV of 1902 (Indian Tramways). In Nagri. Pies 3. (Anna 1.)
 Act VII of 1902 [United Provinces (Designation)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1902 [Indian Tariff (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1902 [Indian Tariff (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1903 [Indian Post Office (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act II of 1903 [Indian Post Office (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1903 (Indian Works of Defence). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VII of 1903 (Indian Works of Defence). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1903 (Probate and Administration). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1903 (Probate and Administration). In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act IX of 1903 (Indian Tea Cess). In Urdu. Pies 3. (Anna 1.)
 Act IX of 1903 (Indian Tea Cess). In Nagri. Pies 3. (Anna 1.)
 Act X of 1903 (Victoria Memorial). In Urdu. Pies 3. (Anna 1.)
 Act X of 1903 (Victoria Memorial). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1903 [Lepers (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1903 [Lepers (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1903 (Indian Foreign Marriages). In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1903 (Indian Foreign Marriages). In Nagri. Pies 3. (Anna 1.)
 Act I of 1904 (Poisons). In Urdu. Pies 6. (Anna 1.)
 Act I of 1904 (Poisons). In Nagri. Pies 6. (Anna 1.)
 Act IV of 1904 (North-West Border Military Police). In Urdu. Pies 9. (Anna 1.)
 Act VI of 1904 [Transfer of Property (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1904 [Transfer of Property (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1904 (Ancient Monuments Preservation). In Urdu. Pies 9. (Anna 1.)
 Act VII of 1904 (Ancient Monuments Preservation). In Nagri. Pies 9. (Anna 1.)
 Act VIII of 1904 (Indian Universities). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1904 (Indian Universities). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act XI of 1904 (to revive and continue section 8-B of the Indian Tariff Act, 1894). In Urdu. Pies 3. (Anna 1.)
 Act XI of 1904 (to revive and continue section 8-B of the Indian Tariff Act, 1894). In Nagri. Pies 3. (Anna 1.)
 Act XV of 1904 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XV of 1904 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act IV of 1905 (Indian Railway Board). In Urdu. Pies 3. (Anna 1.)
 Act VI of 1905 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1905 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act III of 1906 (Indian Coinage). In Urdu. Pies 9. (Anna 1.)
 Act III of 1906 (Indian Coinage). In Nagri. Pies 9. (Anna 1.)
 Act V of 1906 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act V of 1906 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act III of 1907 (Provincial Insolvency). In Urdu. Anna 1 p. 6. (Anna 1.)
 Act III of 1907 (Provincial Insolvency). In Nagri. Anna 1 p. 6. (Anna 1.)
 Act IV of 1907 [Repealing and Amending (Rates and Cesses)]. In Urdu. Pies 3. (Anna 1.)
 Act IV of 1907 [Repealing and Amending (Rates and Cesses)]. In Nagri. Pies 3. (Anna 1.)
 Act I of 1908 [Legal Practitioners (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1908 [Legal Practitioners (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act III of 1908 [Indian Trusts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act V of 1908 (Code of Civil Procedure). In Urdu. Re. 1 as. 2. (As. 6.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act V of 1908 (Code of Civil Procedure). In Nagri. Re. 1 as. 2. (As. 6.)
 Act VI of 1908 (Explosive Substances). In Urdu. Pies 3. (Anna 1.)
 Act VI of 1908 (Explosive Substances). In Nagri. Pies 3. (Anna 1.)
 Act VII of 1908 (Incitements to Offences). In Urdu. Pies 3. (Anna 1.)
 Act VII of 1908 (Incitements to Offences). In Nagri. Pies 3. (Anna 1.)
 Act IX of 1908 (Indian Limitation). In Urdu. As. 2. (Anna 1.)
 Act IX of 1908 (Indian Limitation). In Nagri. As. 2. (Anna 1.)
 Act X of 1908 (Indian Salt Duties). In Urdu. Pies 3. (Anna 1.)
 Act X of 1908 (Indian Salt Duties). In Nagri. Pies 3. (Anna 1.)
 Act XI of 1908 (Assam Labour and Emigration). In Urdu. Pies 3. (Anna 1.)
 Act XI of 1908 (Assam Labour and Emigration). In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1908 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1908 [Indian Criminal Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XVI of 1908 (Indian Registration). In Urdu. As. 2. (As. 2.)
 Act XVI of 1908 (Indian Registration). In Nagri. As. 2. (As. 2.)
 Act XVII of 1908 (Indian Emigration). In Urdu. As. 2 p. 3. (As. 2.)
 Act XVII of 1908 (Indian Emigration). In Nagri. As. 2 p. 3. (As. 2.)
 Act I of 1909 [Indian Steamships Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1909 [Indian Steamships Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act IV of 1909 (Whipping). In Urdu. Pies 3. (Anna 1.)
 Act IV of 1909 (Whipping). In Nagri. Pies 3. (Anna 1.)
 Act V of 1909 [Amending (Army) Act]. In Urdu. Pies 3. (Anna 1.)
 Act V of 1909 [Amending (Army) Act]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1909 (Anand Marriage). In Urdu. Pies 3. (Anna 1.)
 Act VII of 1909 (Anand Marriage). In Nagri. Pies 3. (Anna 1.)
 Act I of 1910 (Indian Press). In Urdu. Pies 6. (Anna 1.)
 Act I of 1910 (Indian Press). In Nagri. Pies 6. (Anna 1.)
 Act II of 1910 (Indian Paper Currency). In Urdu. Pies 6. (Anna 1.)
 Act II of 1910 (Indian Paper Currency). In Nagri. Pies 6. (Anna 1.)
 Act III of 1910 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act III of 1910 [Indian Penal Code (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act V of 1910 (Dourine). In Urdu. Pies 3. (Anna 1.)
 Act V of 1910 (Dourine). In Nagri. Pies 3. (Anna 1.)
 Act VI of 1910 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1910 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1910 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VII of 1910 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1910 [Indian Tariff (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1910 [Indian Tariff (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act IX of 1910 (Indian Electricity). In Urdu. Anna 1 p. 9. (Anna 1.)
 Act IX of 1910 (Indian Electricity). In Nagri. Anna 1 p. 9. (Anna 1.)
 Act XII of 1910 [Glanders and Farcy (Amendment)]. In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XII of 1910 [Glanders and Farcy (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1910 [Prisons (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1910 [Prisons (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1910 [Indian Emigration (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1910 [Indian Emigration (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1910 (Cantonments). In Urdu. Pies 9. (Anna 1.)
 Act XV of 1910 (Cantonments). In Nagri. Pies 9. (Anna 1.)
 Act XVI of 1910 (Indian Census). In Urdu. Pies 3. (Anna 1.)
 Act XVI of 1910 (Indian Census). In Nagri. Pies 3. (Anna 1.)
 Act II of 1911 (Patents and Designs). In Urdu. Anna 1 p. 9. (Anna 1.)
 Act II of 1911 (Patents and Designs). In Nagri. Anna 1 p. 9. (Anna 1.)
 Act III of 1911 (Criminal Tribes). In Urdu. Pies 9. (Anna 1.)
 Act III of 1911 (Criminal Tribes). In Nagri. Pies 9. (Anna 1.)
 Act V of 1911 [Tramways (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act V of 1911 [Tramways (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VI of 1911 [Tariff (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1911 [Tariff (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1911 [Indian Paper Currency (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VII of 1911 [Indian Paper Currency (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1911 (Indian Army). In Urdu. As. 8 p. 6. (Anna 1.)
 Act VIII of 1911 (Indian Army). In Nagri. As. 2 p. 6. (Anna 1.)
 Act X of 1911 (Prevention of Seditious Meetings). In Urdu. Pies 3. (Anna 1.)
 Act X of 1911 (Prevention of Seditious Meetings). In Nagri. Pies 3. (Anna 1.)
 Act XI of 1911 [University (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XII of 1911 (Factories). In Urdu. Anna 1 p. 6. (Anna 1.)
 Act XII of 1911 (Factories). In Nagri. Anna 1 p. 6. (Anna 1.)
 Act XIII of 1911 [Christian Marriage (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1911 [Christian Marriage (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1911 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1911 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1911 [Forest (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XV of 1911 [Forest (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XVI of 1911 [Bengal, Agra and Assam Civil Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XVII of 1911 (Airships). In Urdu. Pies 3. (Anna 1.)
 Act XVII of 1911 (Airships). In Nagri. Pies 3. (Anna 1.)
 Act I of 1912 (Indian Stamp Amendment). In Urdu. Pies 3. (Anna 1.)
 Act I of 1912 (Indian Stamp Amendment). In Nagri. Pies 3. (Anna 1.)
 Act II of 1912 (Co-operative Credit Societies). In Urdu. Anna 1. (Anna 1.)
 Act II of 1912 (Co-operative Credit Societies). In Nagri. Anna 1. (Anna 1.)
 Act III of 1912 (Indian Post Office Amendment). In Urdu. Pies 3. (Anna 1.)
 Act III of 1912 (Indian Post Office Amendment). In Nagri. Pies 3. (Anna 1.)
 Act IV of 1912 (Lunacy). In Urdu. Anna 1 p. 9. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act IV of 1912 (Lunacy). In Nagri. Anna 1 p. 9. (Anna 1.)
 Act V of 1912 (Provident Insurance Societies). In Urdu. Pies 6. (Anna 1.)
 Act V of 1912 (Provident Insurance Societies). In Nagri. Pies 6. (Anna 1.)
 Act VI of 1912 (Indian Life Assurance Companies). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VI of 1912 (Indian Life Assurance Companies). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1912 (Wild Birds and Animals Protection). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1912 (Wild Birds and Animals Protection). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1912 (Delhi Laws). In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1912 (Delhi Laws). In Nagri. Pies 3. (Anna 1.)
 Act I of 1913 [Extradition (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1913 [Extradition (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act V of 1913 (White Phosphorus Matches Prohibition). In Urdu. Pies 3. (Anna 1.)
 Act V of 1913 (White Phosphorus Matches Prohibition). In Nagri. Pies 3. (Anna 1.)
 Act VI of 1913 (Musalman Wakf Validating). In Urdu. Pies 3. (Anna 1.)
 Act VI of 1913 (Musalman Wakf Validating). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1913 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1913 [Indian Criminal Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act I of 1914 [Civil Procedure Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1914 [Civil Procedure Code (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1914 (Destructive Insects and Pests). In Urdu. Pies 3. (Anna 1.)
 Act V of 1914 [Negotiable Instruments (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1914 (Provincial Small Cause Courts Amendment). In Urdu. Pies 3. (Anna 1.)
 Act VI of 1914 (Provincial Small Cause Courts Amendment). In Nagri. Pies 3. (Anna 1.)
 Act VII of 1914 (Indian Telegraph Amendment). In Urdu. Pies 6. (Anna 1.)
 Act VII of 1914 (Indian Telegraph Amendment). In Nagri. Pies 6. (Anna 1.)
 Act VIII of 1914 (Indian Motor Vehicles). In Urdu. Pies 6. (Anna 1.)
 Act VIII of 1914 (Indian Motor Vehicles). In Nagri. Pies 6. (Anna 1.)
 Act IX of 1914 (Local Authorities Loan Act). In Urdu. Pies 6. (Anna 1.)
 Act IX of 1914 (Local Authorities Loan Act). In Nagri. Pies 6. (Anna 1.)
 Act XIII of 1914 (Indian Life Assurance). In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1914 (Indian Life Assurance). In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1914 [Post Office and Telegraphs (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1914 [Post Office and Telegraphs (Amendment)]. In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XV of 1914. (Indian Army Amendment). In Urdu. Pies 3. (Anna 1.)
 Act XV of 1914 (Indian Army Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XVI of 1914 [Indian Aircraft (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XVI of 1914 [Indian Aircraft (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Regulation V of 1890 (British Baluchistan Forests). In Urdu. As. 2. (Anna 1 p. 6.)
 Regulation VIII of 1896 (British Baluchistan Criminal Justice). In Urdu. Pies 9. (Anna 1.)
 Regulation IX of 1896 (British Baluchistan Civil Justice). In Urdu. As. 2 p. 3. (Anna 1.)
 Regulation III of 1901 (Frontier Crimes). In Urdu. As. 2 p. 6. (Anna 1.)
 Regulation IV of 1901 (Frontier Murderous Outrages). In Urdu. Pies 6. (Anna 1.)
 Regulation VII of 1901 (North-West Frontier Province). In Urdu. As. 4 p. 3. (Anna 1.)
 Regulation III of 1914. In Urdu. Pies 3. (Anna 1.)
 Regulation III of 1914. In Nagri. Pies 3. (Anna 1.)
 Ordinance I of 1914 [Indian Naval and Military News (Emergency)]. In Urdu. Pies 3. (Anna 1.)
 Ordinance I of 1914 [Indian Naval and Military News (Emergency)]. In Nagri. Pies 3. (Anna 1.)
 Ordinance III of 1914 (Foreigners). In Urdu. Pies 3. (Anna 1.)
 Ordinance III of 1914 (Foreigners). In Nagri. Pies 3. (Anna 1.)
 Ordinance V of 1914 (Ingress into India). In Urdu. Pies 3. (Anna 1.)
 Ordinance V of 1914 (Ingress into India). In Nagri. Pies 3. (Anna 1.)
 Ordinance VI of 1914 (Commercial Intercourse with Enemies). In Urdu. Pies 3. (Anna 1.)
 Ordinance VI of 1914 (Commercial Intercourse with Enemies). In Nagri. Pies 3. (Anna 1.)
 Ordinance VII of 1914 [Foreigners (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Ordinance VII of 1914 [Foreigners (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Ordinance VIII of 1914 [Foreigners (Further Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Ordinance VIII of 1914 [Foreigners (Further Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Ordinance IX of 1914 (Articles of Commerce). In Urdu. Pies 3. (Anna 1.)
 Ordinance IX of 1914 (Articles of Commerce). In Nagri. Pies 3. (Anna 1.)

V.—MISCELLANEOUS PUBLICATIONS.

- Table showing effect of legislation in the Governor-General's Council during 1898 to 1900. Re. 1. (Anna 1 p. 6.)
 Table showing effect of legislation in the Governor-General's Council during 1901. As. 6. (As. 2.)
 Table showing effect of legislation in the Governor-General's Council during 1902. As. 2 p. 6. (Anna 1.)
 Table showing effect of legislation in the Governor-General's Council during 1903. As. 14. (As. 2.)

V.—MISCELLANEOUS PUBLICATIONS—*cont.*

- Table showing effect of legislation in the Governor-General's Council during 1904. As. 4. (As. 2.)
- Table showing effect of legislation in the Governor-General's Council during 1905. Pies 3. (Anna 1.)
- Table showing effect of legislation in the Governor-General's Council during 1906. As. 3 p. 6. (Anna 1.)
- Table showing effect of legislation in the Governor-General's Council during 1907. As. 2 p. 6. (Anna 1.)
- Table showing effect of legislation in the Governor-General's Council during 1908. As. 4. (Anna 1.)
- Table showing effect of legislation in the Governor-General's Council during 1909. As. 3 p. 3. (Anna 1.)
- Table showing effect of legislation in the Governor-General's Council during 1910. As. 5 p. 6. (Anna 1.)
- Table showing effect of legislation in the Governor-General's Council during 1911. As. 3 p. 3. (Anna 1.)
- Table showing effect of legislation in the Governor-General's Council during 1912. As. 2 p. 6. (Anna 1.)
- Table showing effect of legislation in the Governor-General's Council during 1913. As. 2 p. 3. (Anna 1.)
- Annual Indexes to the Acts of the Governor-General of India in Council from 1854 to 1913. The price is noted on each.
- Proceedings of the Council of the Governor-General of India for making Laws and Regulations, from July 1882 to 1914. Super-royal, 4to. Annual subscription Rs. 5 (Re. 1); single issue As. 4, including postage.
- List of General Rules and Orders under Statutes and General Acts in force in British India. Corrected up to 31st December 1908. Re. 1 as. 4. (As. 3.)
- Addenda et Corrigenda, List No. 1 of 1909, to the List of General Rules and Orders. Pies 3. (Anna 1.)
- Addenda et Corrigenda, List No. 2 of 1909, to the List of General Rules and Orders. As. 2 p. 6. (Anna 1.)
- Addenda et Corrigenda, List No. I of 1910, to the List of General Rules and Orders. As. 2 p. 3. (Anna 1.)
- Addenda et Corrigenda, List No. II of 1910, to the List of General Rules and Orders. As. 3. (Anna 1.)
- Addenda et Corrigenda, List No. I of 1911, to the List of General Rules and Orders. As. 2 p. 6. (Anna 1.)
- Addenda et Corrigenda, List No. II of 1911, to the List of General Rules and Orders. As. 3 p. 9. (Anna 1.)
- Addenda et Corrigenda, List No. I of 1912, to the List of General Rules and Orders. As. 4 p. 6. (Anna 1.)
- Addenda et Corrigenda, List No. II of 1912, to the List of General Rules and Orders. Pies 6. (Anna 1.)
- Addenda et Corrigenda, List No. I of 1913, to the List of General Rules and Orders. Anna 1. (Anna 1.)
- Addenda et Corrigenda, List No. II of 1913, to the List of General Rules and Orders. As. 3 p. 3. (Anna 1.)
- Addenda et Corrigenda, List No. I of 1914, to the List of General Rules and Orders. As. 3 p. 3. (Anna 1.)
- Addenda et Corrigenda, List No. II of 1914, to the List of General Rules and Orders. As. 3 p. 9. (Anna 1.)
- The Baluchistan Agency Forest Law, 1890. In Urdu. As. 2. (Anna 1 p. 6.)
- The Quetta Municipal Law, 1896. In Urdu. As. 3 p. 3. (Anna 1 p. 6.)
- The Baluchistan Agency Criminal Justice Law, 1896. In Urdu. Pies 9. (Anna 1.)

V.—MISCELLANEOUS PUBLICATIONS—*cont.*

- The Baluchistan Agency Civil Justice Law, 1896. In Urdu. As. 2 p. 6. (Anna 1.)
- Declaration of London, 1909. Royal 8vo, paper cover. As. 2 p. 6 or 3d. (Anna 1.)
- The Official Secrets Act, 1911 (1 and 2 Geo. 5, ch. 28.) As. 3 p. 3. (Anna 1.)
- The Prize Court Rules, 1914 (as amended by the order in Council, dated the 30th September 1914.) Royal 8vo, paper cover. As. 6 or 7d. (Anna 1.)

DIGESTS.

- Wigley's Digest of Indian Law Cases, 1901–1903. Reduced to Rs. 2 as. 8. (Annas 10.)
- Grey's Digest of Indian Law Cases, 1904. Reduced to As. 10. (As. 6.)
- Grey's Digest of Indian Law Cases, 1905. Reduced to As. 10. (As. 6.)
- Grey's Digest of Indian Law Cases, 1906. Reduced to As. 10. (As. 6.)
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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 145 AND O. XXXII, R. 6—Security enabling next friend to receive monies due to minor under decree—Attachment of surety's property for sums not accounted for, legality of] Security being furnished, the next friend of a minor and the surety were permitted to draw from the Court monies due to a minor under a decree. On default in accounting, the amount due to the estate of the minor was directed to be realized by attachment of the property of the surety. Held, that the order for attachment was made without jurisdiction as neither section 145 nor any other provision of the Code of Civil Procedure empowers the Court to attach the property of the surety.
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through his predecessor within section 2, clause (8) of the Limitation Act. <i>Gnanasambanda Pandara Sannathi v. Velu Pandaram</i> (1900) I.L.R., 23 Mad., 271 at p. 281 (P.C.), applied.	
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THE
INDIAN LAW REPORTS

MADRAS SERIES.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Seshagiri Ayyar.

P. M. A. MUTHIAH CHETTY AND THREE OTHERS
(PLAINTIFFS NOS. 2 TO 5), APPELLANTS,

1917.
January,
26 and 29.

v.

P. R. ALAGAPPA CHETTY AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Principal and Agent—Ordinary money account—Lending of money to persons to whom agent is not authorized to lend—Suit for account—Limitation Act (IX of 1908), arts. 89 and 90—Termination of agency.

A suit by a principal against an agent for the recovery of money lent to persons to whom the agent was not authorized to lend, is a suit for an ordinary money account and is governed by article 89 and not article 90 of the Limitation Act.

The question when an agency terminates, is a question of fact.
Great Western Insurance Co. v. Cunliffe (1874) 9 Ch. Ap., 525, distinguished.
Venkatachalam v. Narayanan (1916) I.L.R., 39 Mad., 376, referred to.

APPEAL against the decree of R. GOPAL RAO, the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 9 of 1914.

The material facts appear from the judgment.

A. Krishnaswami Ayyar for the appellants.

Hon. Mr. S. Srinivasa Ayyangar (*Advocate-General*), K. Bhashyam Ayyangar and N. M. Malim Sahib for the respondents.

WALLIS, C.J.—In the first of these cases—Appeal No. 192 of 1915, the Subordinate Judge has dismissed a suit brought by principals against an agent and his son to recover a specified sum of money, particulars of which are set out at length in the plaint, and those particulars show that what they are really

* Appeals Nos. 192 and 193 of 1915.

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seeking to do is to make the first defendant account for the moneys which they entrusted to the first defendant.

The main ground of complaint taken by the plaintiffs in their plaint is that the first defendant lent moneys of the principals to persons to whom he was not authorized to lend them, and Mr. Krishnaswami for the appellants has taken the point that this case is governed by article 90 of the Limitation Act which provides for

"other suits by principals against agents for neglect or misconduct"

and not by article 89 which deals with suits

"by a principal against his agent for moveable property received by the latter and not accounted for."

Now the use of the word 'other' in article 90 shows that that article does not include suits which properly come within article 89, and we think that this is really a suit for a mere money account which comes within article 89. Mr. Krishnaswami has relied upon *Great Western Insurance Co. v. Cunliffe*(1).

In that case it was sought, in taking an account by a principal against his agent, to hold the agent responsible for the loss which had occurred to the principal by the agent's failure to insure certain goods, that is to say, for failing to carry out the instructions of the principal by spending moneys of the principal in a particular manner and Lord Justice JAMES held that that did not come within an ordinary money account. In an ordinary money account the accounting party is asked to account for the moneys which have come to his hands and to pay over the balance, and where the account is on the footing of wilful default he may be held liable, not only for the moneys which have come to his hands but also for moneys which ought to have come to his hands; and if he is shown, in taking such an account to have applied moneys in a way in which he was not authorized to apply them, the result is that he is not allowed credit for that sum in taking the account. That is the ordinary practice in taking accounts and it seems to us that there is no reason for holding that the matters pleaded in this case should not come into an ordinary money account. As I have said *Great Western Insurance Co. v. Cunliffe*(1) itself and also the illustration put there

(1) (1874) 9 Ch. Ap., 525.

of an attempt to make a solicitor liable for his negligence in the conduct of an action when taking an account in respect of his client's moneys—those are cases of a different nature from the present.

Therefore, in our opinion, in this case, article 89 was rightly applied.

Then the question arises as to whether this case was properly disposed of with regard to that article. Now the Judge has simply held the suit to be barred on the authority of a decision of my learned brother and myself in *Venkatachalam v. Narayanan*(2). All that we decided in that case was that termination of agency is a question of fact for purposes of article 89 of the Limitation Act and the agency must be considered as having terminated when the authority to the agent is revoked or the agent renounces the agency, or the business of the agency is completed which is practically another case of revocation or determination of authority. Now that must be a question of fact in each case to be decided upon the evidence.

We do not think the case is sufficiently clear upon the pleadings to enable us to dispose of the case without taking evidence, and we have therefore decided to call for a finding upon fresh evidence as to whether the suit is barred under article 89. We think it necessary, however, to say that we consider this question depends upon the question when the authority of the agent to represent the principal ceased and that it does not depend upon the question as to the agent's obligation to take back a salary bill and pass his accounts with the principal. Fresh evidence may be taken. The finding will be submitted in two months from this date and seven days will be allowed for filing objections.

[His Lordship then dealt with the connected appeal, and as it involved only questions of fact, it has been omitted from the report.]

SESHAGIRI AYYAR, J.—I agree.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Seshagiri Ayyar.

1917,
January,
24 and 25
and
February, 2.

KIZHAKKE MELADETHIL VIDVAN KOMBI ACHAN
SEKHARI VARMA VALIA RAJA
AVERGAL OF PALGHAT (DECEASED) AND
ANOTHER (PLAINTIFF AND HIS LEGAL
REPRESENTATIVE), APPELLANTS,

v.

KANNANPRA NAIR VEETIL KARNAVAN RAMAN UNNI
ALIAS THARUVAYUR PADA NAIR AND THIRTY-ONE OTHERS
(DEFENDANTS NOS. 1—19, 21, 23, 25, 27, 29—33,
37—40), RESPONDENTS.*

Limitation Act (IX of 1908), art. 124—Stani in Malabar constituted trustee of a temple and its properties—Absolute transfer by the stani of the trusteeship and temple properties to defendant's predecessor—Effect of adverse possession for over statutory period on succeeding stani—Section 2 (d) of Limitation Act, definition of 'plaintiff' in.

According to the customary law of Malabar a *stanom* is descendible from one *stani* to another in a peculiar line of succession.

A suit by a *stani* to recover a hereditary office of trustee of a temple and its properties, attached to the *stanom* is governed by article 124 of the Limitation Act and adverse possession for over the statutory period of the office of trustee and the properties of the trust as against a prior *stani* is a bar to a suit by the successor to recover the same.

Though the successor gets his title not by any act of his predecessor but by succession according to the law of the land, he derives his right to sue only from or through his predecessor within section 2, clause (8) of the Limitation Act.

Gnanasambanda Pandara Sannadhi v. Velu Pandaram (1906) I.L.R., 23 Mad., 271 at p. 281 (P.C.), applied.

APPEAL against the decree of V. K. DESIKA ACHARIYAR, the Subordinate Judge of South Malabar at Palghat, in Original Suit No. 44 of 1911.

The Raja of Palghat brought this suit for redemption of a mortgage made in favour of the first defendant's predecessor by a previous Raja on 12th October 1851, alleging that the properties were endowed for the maintenance of a temple in Rishinarathapuram village in Malabar and that the Government

* Appeal No. 300 of 1914.

constituted the Raja and his successors trustees therefor by a deed (Exhibit A) called *muktyarnama* executed on 17th September 1842, which was as follows:—

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“From the Honourable the Government of East India Company.

“Power-of-attorney executed to Sekarivarma Valia Raja of Palghat. I wrote that the following devasthanams should in future be in your possession and that you should manage them. The devasthanams are . . . and (20) Rishinaradhamangalam temple which belonged to Karat Nampuri and another, whose family has become extinct, in Kannanur Pattola Amsam . . .

“Lands have been set apart according to the inventory sent along with this, which will fetch 5,040 paras and 4½ edangalis of paddy inclusive of assessment and *michavaram*. These lands you must take charge of and from their rent you must meet the expenses of the abovementioned temples. As the assessment of the above-mentioned lands is included in the rent set apart, no more assessment need be paid for them.

“You should manage the affairs of the abovementioned 20 devasthanams in the same way as you manage the affairs of your own temples, get the rent, etc., collected by the kariatthans you appoint from the present tenants of the abovementioned lands or from the tenants you appoint in future and conduct the expenses *santhi* (rites) and other ceremonies of the devasthanams . . .

“As nobody has as yet managed the affairs, etc., of the abovementioned 20 devasthanams as *Urallars*, you must yourself manage all the affairs in the same way as the *Urallars* of other temples manage all their affairs. Still if there be any such claimant as *Urainna*, *Samudhayam* and *Karaima*, you must conduct the affairs properly and without detriment to the claims and shares of those persons.

“You can yourself order to be produced and examine the accounts for managing the affairs of the abovementioned 20 devasthanams collecting the rent, etc., and making expenses. You need not submit to the Government any such account.”

The pleas of the main contesting defendant, the first defendant, were, *inter alia*, that the management of the temple and its properties were absolutely assigned in favour of his predecessor by means of Exhibit I, dated 30th April 1843 set out below, that his family was in adverse possession ever since and that the plaintiff's right was barred by prescription and limitation. Exhibit I was as follows:—

“Writ (thit) issued by Sekari Varman to Tharuva Pada Nayar. Out of the temple lands and temples which had been transferred to

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me by the Government (torn) under a power-of-attorney, I transferred to you on the 18th Medam 1018 (29th April 1843) the Rishinarathamangalam Temple and for the *santhi* (ceremonies) and other expenses thereof (torn) *paramba* and a tank. I also transferred to you (torn) properties, out of the *purappad* of 1675 paras of which after deducting the interest on the *kanom* of 12,349 fanams and 409 paras of paddy, you must meet the *santhi* and other expenses of the temple. You must get renewals executed for the above-mentioned properties (torn), collect rents, meet the usual expenses of the temple and manage the temple (torn) in the same way (as I was asked to do) when the temple was handed over to me. (torn) 18th, In the presence of the witnesses, Manam Krishna Pattar and Chilkunna Venkateswara Pattar.

"Written in the handwriting of Panichamekakandy.

(Signed) Rajah Avergal."

The lower Court, while dismissing the suit, held that the original grant (Exhibit A) was only in favour of the then Raja for his life, that no grant was made thereby in favour of his successors, that Exhibit I was genuine but invalid as it transferred a trusteeship and that the first defendant's family had acquired by prescription the right to the management of the temple and all its properties.

The plaintiff preferred this appeal.

T. R. Ramachandra Ayyar with *A. Nilakanta Ayyar* and *P. V. Parameswara Ayyar* for the appellant.—Each *stani* holds the office of trustee in his own independent right and does not claim through his predecessor and any act done by his predecessor does not prejudice him. The definition of "plaintiff" in the Limitation Act does not apply to him. The *stanom* is a *raj* and each *stani* is only a life-holder. The peculiar position of a *stani* is such that he cannot make an alienation of the properties of the *stanom*. The position of a *stani* is fully considered in *Patinharkaru Vellabhan Chattan Rajah v. Rama Varma*(1). *Venkataswara Iyan v. Sekari Varma*(2) is distinguishable. As twelve years have not elapsed since the plaintiff became *stani* he is not barred.

If one *stan* is barred, his successor is not thereby barred.

(1) (1915) 28 M.L.J., 669 at pp. 673 to 675.

(2) (1881) I.L.R., 3 Mad., 384 at p. 386 (P.C.).

[WALLIS, C.J., referred to *Somasundaram Chettiar v. Vaithilinga Mudaliar*(1) and *Chiruvolu Punnamma v. Chiruvolu Perrazu*(2).]

I rely on *Veerayya v. Gangamma*(3) and *Doraisamy Reddy v. Muthulinga Reddy*(4). A *stani*'s position is not analogous either to that of a widow or of a reversioner. *Prasanno Kumar v. Mookerjee v. Srikantha Rout*(5).

[SESHAGIRI AYYAR, J., referred to *Pydigantam Jagannadha Row v. Rama Doss Patnaik*(6).]

That relates only to the trusteeship and not to properties. Though the creation by a private person of a series of life-estates is repugnant to Hindu Law, such a rule does not bind the Government who can grant a series of life-estates and the grantees take according to the nature of the grant; see *Gulabdas Jugjivandas v. The Collector of Surat*(7) and *Mariam Begum v. Mirza*(8). *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(9) is distinguishable.

C. V. Anantakrishna Ayyar with *K. Kuttikrishna Menon* for the respondents.

The alienation of the office having been made by the transfer deeds of 1843 and 1851, the right of the Raja was barred after the lapse of six years, under the Limitation Act of 1859, section 1, clause (16); there was no article in that Act corresponding to the present article 124, and the Limitation Acts of 1871 and 1877 enacted that any right to sue already barred is not thereby revived: *Khunni Lal v. Gobind Krishna Narain*(10).

[WALLIS, C.J.—It is only under section 29 of the Limitation Act of 1871 that the right to the office was extinguished. But there was nothing corresponding to this in the Act of 1859.]

I am only a defendant. It is sufficient if I show that plaintiff is barred. I need not show that the right vested in me. Each *stani* represents the *corpus* or estate; see *Venkataswara Iyan v. Sekari Varma*(11), a decision relating to this very Palghat

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(1) (1917) I.L.R., 40 Mad., 843.

(2) (1906) I.L.R., 29 Mad., 390 at p. 394 (F.B.).

(3) (1913) I.L.R., 36 Mad., 570. (4) (1910) 32 I.C., 50; s.c., 19 M.L.T., 1.

(5) (1913) I.L.R., 40 Cal., 173 at p. 180.

(6) (1905) I.L.R., 28 Mad., 97 at p. 200.

(7) (1879) I.L.R. 3 Bom. 186 at p. 192 (P.C.).

(8) (1890) I.L.R., 17 Cal., 234 (P.C.).

(9) (1900) I.L.R., 23 Mad., 271 (P.C.).

(10) (1911) I.L.R., 33 All., 353 (P.C.).

(11) (1881) I.L.R., 3 Mad., 334 at p. 335 (P.C.).

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stanom. The present appeal was filed by one *stani* and after he died the other side is now prosecuting the appeal by bringing in another *stani* as his legal representative. How can the other side do this or have a *locus standi*, to continue the appeal if the argument of the other side that one does not claim through another be correct? The view I contend for, viz., that one *stani* claims through another and is bound by the acts of his predecessor was accepted in *Sankaran v. Krishna*(1). That one trustee represents his successors has been held in *Veerabadhra Varaprasada Row v. Vellanki Venkataadri*(2). Even a female trustee has been held to represent the trust: *Pydiguntam Jagannadha Row v. Rama Doss Patnaik*(3). There is no beneficial interest in any *stani* in the properties of the trust which he is asked to manage. The right to office will be barred by twelve years' adverse possession: *Narsaya Upada v. Venkataramana Bhatta*(4). In *Damodar Das v. Laikhan Das*(5) the right was only as to office and not to properties as here: see also *Lilabati Misra v. Bishun Chobey*(6), *Ram Kanai Ghosh v. Raja Sri Sri Hari Narayan Singh Deo Bahadur*(7), *Baluswamy Iyer v. Venkitaswamy Naicken*(8) and *Bulwant Rao v. Purnan Mal*(9). Under the Limitation Act of 1859, it was held that limitation which operated against a widow operated against the reversioners also: *Amirtolal v. Rajaneekant Mitter*(10).

[SESHAGIRI AYYAR, J., referred to *Luchhan Kunwar v. Manorath Ram* (11) and *Runchordas v. Parvatibai*(12).]

I rely on *Ambalavana Pandhara Sannadhi v. Sree Minakshy Devastanam*(13), *Prasanna Kumar Dutt v. Gnanendra Kumar Dutt*(14) and *Jalandhar Thakur v. Jharula Das*(15). Change of personnel does not extinguish the effect of limitation: *President and Governors of Magdalen Hospital v. Knotts*(16). The result of accepting the opposite contention will be there will be no limitation at all.

- (1) (1823) 1 L.R., 13 Mad., 456 at p. 479. (2) (1900) 10 M.L.J., 114.
(3) (1805) 1 L.R., 28 Mad., 197 at p. 201. (4) (1912) 23 M.L.J., 260 at p. 263.
(5) (1910) 1 L.R., 37 Calc., 885 (P.C.). (6) (1907) 6 C.L.J., 621 at p. 636.
(7) (1905) 2 C.L.J., 516 at p. 554. (8) (1917) 32 M.L.J., 24.
(9) (1884) 1 L.R., 6 All., 1 (P.C.).
(10) (1875) 15 Beng. L.R., 10 at p. 19 (P.C.).
(11) (1895) 1 L.R., 22 Calc., 445 (P.C.).
(12) (1899) 1 L.R., 23 Bom. 725 (P.C.). (13) (1915) 23 M.L.J., 217.
(14) (1916) 1 L.R., 43 Calc., 779. (15) (1915) 1 L.R., 42 Calc., 214 (P.C.).
(16) (1879) 1 L.R., 4 A.C., 324.

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T. R. Ramachandra Ayyar in reply.—The position of a *stani* is not at all analogous to that of a widow or a reversioner; hence most of the cases cited are not applicable. The root of title is the grant and not the predecessor. Compare *President and Governors of Magdalen Hospital v. Knotts*(1). Whatever may be the effect of adverse possession on my right to the *stanom* or the properties attached to the *stanom*, my right to the trusteeship which is different from either of these two is only under the grant. On the view taken in *Gulabdas Jugjivandas v. The Collector of Surat*(2) there can be no limitation at all. I rely also on *Mariam Begum v. Mirza*(3). *Pydiguntam Jagannadha Row v. Rama Doss Patnaik*(4) is wrong being opposed to *Runchordas v. Parvatibai*(5). *Ram Kanai Ghosh v. Raja Sri Sri Hari Narayan Singh Deo Bahadur*(6) has been dissented from in *Singaram Chettiar v. Kalyanasundaram Pillai*(7). The other cases quoted were distinguished.

WALLIS, C.J.—In 1842 the Government of Madras by WALLIS, C.J. exhibit A put the Raja of Palghat in possession and management of the suit *deraswom* which is stated to have belonged to two persons whose family had become extinct. This is the grant relied on by the plaintiff and its validity has not been called in question.

The Palghat Raj is a Malabar *stanom*, the succession to which is in the senior male member for the time being of a large number of families who are presumably descended from a common ancestress. The grant of this and the other *deraswoms* included in Exhibit A was made in pursuance of the policy adopted by the East India Company about this time of divesting itself of the direct management of religious institutions, and was intended, in our opinion, to confer the office of trustee of these various endowments on the Raja and his successors in the *stanom* as a hereditary office descendible in the same manner as the *stanom*. This is not now contested for the respondents, and the only question before us is whether the suit to recover possession of the kanom properties is barred by limitation under article 124 of the Limitation Act, as held by the

- (1) (1879) 1 L.R., 4 A.C., 324. (2) (1879) 1 L.R., 3 Bom., 186 (P.C.).
(3) (1890) 1 L.R., 17 Calc., 234 (P.C.). (4) (1905) 1 L.R., 28 Mad., 197 at p. 201.
(5) (1899) 1 L.R., 23 Bom., 725 (P.C.). (6) (1905) 2 C.L.J., 546 at p. 554.
(7) (1914) M.W.N., 735 at p. 738.

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Subordinate Judge. After the very full arguments we have heard, I am of opinion that this is the article applicable and that the suit is barred under it if it was not already barred under the Regulation and the previous Limitation Acts. According to the finding of the Subordinate Judge which has not seriously been disputed before us, the defendants' family have been in possession since 1843 when the then Raja purported to assign the *devaswom* to them under exhibit I. Article 124 fixes the period of limitation at twelve years from the date

"when the defendant takes possession of the office adversely to the plaintiff,"

and Mr. Ramachandra Ayyar's main argument was that the previous holders of the *stanom* were not persons "from or through whom the plaintiff derived his right to sue" and so do not come within the definition of 'plaintiff' in section 2 of the Limitation Act. According to him each successive holder of the *stanom* who brings a suit falling under article 124 or 144, can only be barred under these articles if there is possession adverse to himself for the requisite periods, as possession adverse to his predecessors cannot be taken into account not being possession adverse to the plaintiff within the meaning of the Act. I am wholly unable to accept this contention. A *stanom*, according to the customary law of Malabar, is descendible from one *stanom*-holder to another in a peculiar line of succession, and it appears to me each successive holder is in the same position as an ordinary heir succeeding on intestacy. In either case it is the law of the land and not any act of the previous holder or owner that confers title on the successor. The fact that the law of the land confers limited powers of disposition in one case and unlimited powers in the other case can make no difference. In both cases it seems to me that for the purposes of the definition of 'plaintiff' in the Limitation Act, which is intended to include predecessors in title of whom the successor is the representative, the heir must be considered to derive his title from and through the purchaser and the intermediate holders or owners who have taken by inheritance. It would defeat the whole scheme of the Limitation Act to hold that adverse possession against the predecessors of an owner taking by inheritance was of no avail against such owner unless it could be shown that the owner derived title from him other-

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wise than by inheritance, and I think, as I have already said, that the succession to mutts, *stanom*, etc., stands on the same footing. As regards cases of ordinary succession I am not aware that this has ever been questioned, but if authority be wanted, it is to be found in the decision of the Privy Council on this very article 124 in *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(1). There is also a strong current of authority in this Court on the present question. SUBRAHMANYA AYYAR, J., in his reference to the Full Bench in *Chiruvolu Punnamma v. Chiravolu Perrazu*(2) refers to the decisions in which succeeding trustees, *Mahants* and Malabar *stanis* have been treated as claiming through or under their predecessors, and these decisions are approved in the opinion of the Full Bench at page 409 subject no doubt to the observation which was unnecessary for the decision, that they did not in strictness so claim from or through the predecessors. *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(1) deals with the case of trustees. *Sankaran v. Krishna*(3) proceeds upon the same view in the case of *stanis*, as though article 124 was not considered to apply—why is not apparent—it was held that the suit might be governed by article 144 which equally raises the present question: see also *Pydigantam Jagannadha Row v. Rama Doss Patnaik*(4), *Ambalavana Pandara Sannadhi v. Sree Minakshi Devasthanam*(5). Mr. Ramachandra Ayyar relied on a dictum of the Privy Council in *Runchordas v. Parvatibai*(6) that the plaintiff who sued as next reversioner after the death of the widows of the last male owner did not derive his title from or through the widows and the extinguishment of their right could not extinguish his. In my opinion this means at most that under the existing and recent Limitation Acts which give the reversioner a fresh starting point from the death of the widow under article 141, a reversioner cannot be treated as claiming from or through the widow. Prior to the introduction of article 141, the next reversioner was held to claim from or through the widow; *Amirtolal Bose v. Rajonstant Mitter*(7) and *Sambasiva v.*

(1) (1900) I.L.R., 23 Mad., 271 at p. 281 (P.C.).

(2) (1906) I.L.R., 29 Mad., 390 at p. 396 (F.B.).

(3) (1893) I.L.R., 16 Mad., 456.

(4) (1905) I.L.R., 23 Mad., 197.

(5) (1915) 28 M.L.J., 217.

(6) (1899) I.L.R., 23 Bom., 725 (P.C.). (7) (1871) 15 Beng. L.R., 10 (P.C.).

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Ragava(1). However this may be, this dictum which was not in any way the ground of their Lordships' judgment, must in my opinion be strictly confined to the case of widows and is no authority for the position that other persons such as ordinary heirs, stanom-holders, mahants on whom property devolves by operation of law do not derive their title to sue from or through their immediate predecessors within the meaning of section 2 of the Indian Limitation Act. In the event, the appeal is dismissed with costs of the first respondent.

SESHAGIRI AYYAR, J.—I agree. The short point for consideration is whether the plaintiff, the Raja of Palghat or the defendants' tarwad is entitled to the hereditary trusteeship of the plaint *devaswom*. Till 1843, the Government managed it under Regulation VII of 1817. In that year, they transferred the management to the then Palghat Raja (*vide* Exhibit A) presumably under section 13 of the Regulation. The Subordinate Judge considers that the transfer was to the then Raja, as an individual, and that the succeeding Rajas were not entitled to the management. He is clearly wrong in this view. Mr. Anantakrishna Ayyar, the learned vakil for the first respondent, did not endeavour to support him on this point. The first Raja executed Exhibit I to the ancestors of the defendants. What it exactly conveyed has been the subject of controversy. Acting on Exhibit I the defendants' ancestor asked the Collector of Malabar to recognize him as the *Uralan* of the *devaswom*. The Collector refused to deal with him in that capacity; Exhibit D. Then followed some correspondence with the Rajas. Exhibits XII, C and F show that the Collector treated the successors of the first Raja as the proper trustees. Exhibit F is an extract from the Inam Register showing that the then Raja was the trustee. By Exhibits IX and X, the third Raja constituted the defendants' ancestor, the manager of the *devaswom*. This was in 1851. There is no evidence whether, from the date of Exhibit A, the defendants' ancestor had possession of the temple properties. The above documents make it abundantly clear that the Government transferred the right of management to the holder of the *Raj* as such. The practice followed in this case has been the recognized mode of

(1) (1890) I.L.R., 13 Mad., 512.

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dealing with *devastanam* by the Government in the years 1842 and 1843. The cases of the mahants of Tirupati and of the *Jeers* of the Ahobilam mutt show that the Government in divesting themselves of their responsibility assigned their rights to persons holding particular positions who were expected to transmit those rights to their successors in office.

Further, Exhibit A leaves very little room for doubt that the right was intended to be vested in the Raja for the time being. The Raja was asked to

"manage the affairs of the *devastanam* in the same way as he managed the affairs of his own temples."

This shows that the management was to be by the Raja for the time being. I have no hesitation, therefore, in holding that Exhibit A was a grant to the Rajas of Palghat, and that the plaintiff is entitled to manage the affairs, if he has not lost the right by prescription or has not been barred by limitation.

Mr. Ramachandra Ayyar, for the appellant, contended that the Government created a succession of life estates by Exhibit A. The learned vakil's argument is that the document was intended to operate as a fresh grant of trusteeship in the case of each succeeding Raja. *Gulabdas Juggivandas v. The Collector of Surat*(1) and *Mariam Begum v. Mirza*(2) show that the creation of successive life estates is within the competence of the Government, although the *Tagore* case(3) holds that private individuals should not create a line of succession unknown to the law applicable to them. But there is nothing in the language of Exhibit A to warrant the construction that a fresh grant in the case of each of the Rajas was in the contemplation of the Government. It seems to me that the Government were content to leave the devolution of the right to be regulated in the same way as succession to the *Raj* or to the management of the family *devaswoms*.

The claim of the defendants is based both on prescription and on limitation. The grant to their ancestor (Exhibit I) seems to convey the absolute right of management. Exhibits IX and X also are to the same effect. But it is clear that such an alienation is invalid. This is settled law: *vide Rajah Vurmah Valia v.*

(1) (1879) I.L.R., 3 Bom., 186 (P.C.). (2) (1890) I.L.R., 17 Cal., 234 (P.C.).
(3) (1872) L.R. I.A. Sup., Vol. 47.

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Ravi Varma Kunhi Kutty(1). It is conceded, however, that the defendants and their ancestors have been managing the *devaswom* for over sixty years.

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The main argument of Mr. Ramachandra Ayyar was that cause of action accrued to the plaintiff when he became the Raja and that as the suit was within twelve years of his succession, his right was not barred. On the question of prescription, his answer was that adverse enjoyment against the previous Rajas could only deprive them of their rights, but was ineffective to affect the rights of his client who claimed in his own right and not as heir to the late Raja.

A very learned argument was addressed to us on the legal position and rights of Malabar *stanis*. It has been stated by the highest authority that their position is analogous to that of Hindu widows: *Venkateswara Iyan v. Shekari Varma*(2). I took the same view in *Patinharkara Vallabhan Chettan Rajah v. Rama Varma*(3). It does not follow from these decisions that the *stani* is bound by the same limitations as a widow is. It is true that like the widow he holds his property for life, but beyond this, the analogy does not go. There is no one who corresponds to the reversioner. The next in succession is his own heir. The fact that in *stanoms*, the strict rule of Marumakkattayam succession is not followed is no reason for saying that the successor is not the heir of the last *stani*. Most of the important *stanoms* have secondary *stanoms*. On the death of the first *stani*, the person at the head of the next *stanom* succeeds.

The important pre-requisite in all these cases is that the first and the other *stanoms* should all be held by the members of the same family. I do not think that this customary rule of succession offers any ground for the suggestion that each succeeding *stani* is not the heir of his predecessor in office. In the East Coast mutts, the successor is nominated. In the case of the mahants, priority of discipleship regulates the succession. It is not correct to argue that in observing these customary rules of devolution of right, the successor does not become the heir of the previous holder of the office. The position

(1) (1876) I.L.R., 1 Mad., 235 (P.C.). (2) (1881) I.L.R., 3 Mad., 384 (P.C.)
(3) (1915) 23 M.L.J., 669.

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of a *stani* approximates more to that of an owner of an impartible estate under the Act than to that of a widow.

There can be no question that the article of limitation applicable to the suit is 124. It was contended by Mr. Ramachandra Ayyar that even if the article applied, the suit was not barred by limitation. His argument was that the office could not be said to have been taken adversely to the plaintiff, until the plaintiff succeeded to the Raj. There is great force in this contention. The effect to be given to it depends upon the meaning to be attached to the word 'plaintiff' in article 124. The definition in section 2, clause (8) of the Limitation Act, is not exhaustive. The use of the word 'includes' shows that. Apart from this reservation, I am unable to hold that the present plaintiff did not derive his title from his predecessors. The holders of the Palghat Raj may be aptly described in respect of the *devaswoms* as forming a chain of trustees. That is the only *locus standi* they have to claim to manage the trust. In that view, it is clear that the plaintiff and his predecessors continuously represented the trust property. This was enunciated by the Judicial Committee in *Prosunno Kumari Debya v. Golub Chand Baboo*(1). At page 256, it was stated:

"It appears to be right and reasonable that judgments obtained against a former shebait in respect of debts so incurred should be binding upon succeeding shebait, who, in fact, form a continuing representation of the idol's property."

In *Gnana Sambanda Pandara Sannadhi v. Velu Pandaram*(2), the Privy Council did not accept the theory that each trustee became entitled to the management *per formam doni*. Reviewing all the previous decisions, BANERJEE AND GORDON, JJ., say in *Nilmony Singh v. Jagabandhu Roy*(3):

"But that does not show that each succeeding manager gets a fresh start as far as the question of limitation is concerned, upon the ground of his not deriving title from any previous manager. The succeeding shebait, as was observed in the case just referred to, formed a continuing representation of the idol's property. If we were to hold otherwise, it would lead to a most anomalous result, for then it would follow that, although after any alienation of the idol's property, the successive shebait may not take any steps to recover

(1) (1875) 23 W.R., 253 (P.C.). (2) (1900) I.L.R., 23 Mad., 271 (P.C.)
(3) (1898) I.L.R., 23 Cal., 536 at p. 545.

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the idol's property, the eleventh shebait, it may be after a hundred years or more, would still be in time to institute a suit for recovery of possession. Such a result the legislature could not have contemplated."

These observations are exactly in point. *Veerabadhra Varaprasada Row v. Vellanki Venkatadri*(1), *Sankaran v. Krishna*(2), *Pydigantam Jagannatha Row v. Rama Doss Patnaik*(3) and *Chiruvolu Punnamma v. Chiruvolu Perrazu*(4) lay down the same principle.

As against this chain of authorities, the learned vakil relied upon some decisions of the Judicial Committee and on *Prasanna Kumar Mookerjee v. Srikantha Rout*(5), and on *Patinharkara Vellabhan Chattan Rajah v. Rama Varma*(6). The decision in *Bahadur Singh v. Mohar Singh*(7) that one reversioner does not claim through another has no bearing on the present case. Until the widow dies, it cannot be predicated of any one of them that he would be the heir. Consequently, they may not be said to claim title through each other. Moreover, the position of a *stani* is not analogous to that of a reversioner. Nor does *Runchordas v. Parvatibai*(8) help the appellant. It was held in that case that a reversioner does not derive title through the widow in possession. The position of successive trustees is not the same as that of a widow and a reversioner. In *Prasanna Kumar Mookerjee v. Srikantha Rout*(5) the properties in the possession of the previous ghatwal were apparently resumed and regranted to the new ghatwal; see however *Radhabai and Ramachandra Konher v. Anantarav Bhagavant Deshpande*(9). Consequently, there can be no question of claiming through or from the previous owner. *Patinharkara Vellabhan Chattan Rajah v. Rama Varma*(6), to which I was a party, related to a different state of affairs altogether. That was a case in which the right to the *stanom* itself was in dispute and not to any property or office which appertained to the *stanom*. It was argued in that case that a person who might at some future

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time succeed to one of the *stanoms* should have sued for a declaration that a person in one of the higher *stanoms* was a trespasser. I held that such was not obligatory on the plaintiff, as he may never live to succeed to the *stanom* and that his cause of action arose only when succession opened to him. I followed *Veerayya v. Gangamma*(1) and other cases. It is open to argument whether those decisions are any longer law, having regard to the character with which the Judicial Committee are now clothing a reversioner. However that may be, it is enough to say my judgment in *Patinharkara Vellabhan Chattan Rajah v. Rama Varma*(2) related to a different question altogether. On the other hand the decision in *Damodar Das v. Lakhan Das*(3) seems to re-affirm the view taken by the Judicial Committee in *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(4).

I am, therefore, of opinion that limitation commenced to run against the plaintiff when the management was assumed by the defendants as against the previous Rajas who were trustees of the *devaswom*, and that consequently the suit is barred by limitation.

For the same reason, I think the defendants acquired a title by prescription to the office.

In the view I have taken it is not necessary to consider the question raised by Mr. Anantakrishna Ayyar that the right to sue having been barred under the Limitation Act of 1859 was not revived by the Act of 1871 or 1877.

The decision of the Subordinate Judge is right and this appeal must be dismissed with costs.

N.R.

(1) (1900) 10 M.L.J., 114.

(2) (1893) I.L.R., 16 Mad., 456.

(3) (1905) I.L.R., 28 Mad., 197.

(4) (1906) I.L.R., 29 Mad., 390 at p. 409 (F.B.).

(5) (1913) I.L.R., 40 Calc., 173.

(6) (1915) 28 M.L.J., 669.

(7) (1902) I.L.R., 24 All., 94.

(8) (1894) I.L.R., 23 Bom., 725.

(9) (1885) I.L.R., 9 Bom., 198.

(1) (1913) I.L.R., 36 Mad., 570.

(2) (1915) 28 M.L.J., 669.

(3) (1910) I.L.R., 37 Calc., 885 (P.C.).

(4) (1900) I.L.R., 23 Mad., 271 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Napier.

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February,
2, 5 and 6.

BATHULA VENKANNA (FIRST DEFENDANT), APPELLANT,

v.

NAMUDURI VENKATAKRISHNAYYA AND ANOTHER
(PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Limitation Act (IX of 1908), art. 113—Contract between two parties that on payment of a specified sum by one to the other, the latter would transfer a decree in his favour to a third party—Suit by such third party for specific performance of the contract—Limitation—Starting point.

A agreed with B that on the latter paying him a specified sum of money he would transfer a decree in his favour to C. In a suit by C against A for the specific performance of the contract by the execution of a deed of transfer,

Held, that the suit was governed by the second part of article 113 and time began to run from the date on which C had notice that performance was refused and not from the date of payment to A by B of the sum agreed in the contract.

Applicability of the doctrine of *certum est quod certum reddi potest* to third parties, considered.

SECOND APPEAL against the decree of A. RAGHUNATHA RAO, the Subordinate Judge of Cocanada, in Appeal No. 82 of 1914, preferred against the decree of E. J. S. WHITE, the District Munsif of Cocanada, in Original Suit No. 714 of 1912.

Facts appear from the judgment.

G. Venkataramayya for V. Ramesam for the appellant.—The lower Court relies on section 10 of the Limitation Act. Section 10 requires two conditions:—an express trust and a specific purpose. Obviously in this case, the agreement (Exhibit F) does not create any express trust for a specific purpose.

The object of the suit contemplated by section 10 must be for the purpose of following in the *cestuique trust's* hands the suit property. Exhibit F creates no such right. The lower Court finds that under article 113 of the Limitation Act the suit is barred. *Ahmed Mahomed Pattel v. Adfein Dooply*(1) is a direct ruling on the plain language of the section.

* Second Appeal No. 842 of 1915.

(1) (1877) I.L.R., 2 Cal., 323.

M. Patanjali Sastri for P. Narayanamurti for the first respondent.—Section 10 of the Limitation Act does not govern the case. The contract does not contain the date of performance and therefore the second part of article 113 applies. I rely on *Juggomohun Ghose v. Manickchund*(1), *Merchant Shipping Co. v. Armitage*(2) and *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*(3).

The other respondent did not appear.

G. Venkataramayya in reply.—The rulings relied on by the other side relate to the interpretation of the Interest Act. No reasons are given by the learned Judges in *Merchant Shipping Co. v. Armitage*(2). Further, at about the same time, the opposite view was taken in *Duncombe v. Brighton Club and Norfolk Hotel Co.*(4). The conflicting rulings on the interpretation of the Interest Act are therefore no safe guide. The first part of article 113 applies on the construction of Exhibit F. The date of transfer by the first defendant in favour of the plaintiff is fixed to be the date of payment by the first defendant to the second defendant. The second part of the article applies only where there is no indication in the contract as regards the date of performance. Moreover, in *Virasami Mudali v. Ramasami Mudali*(5) it has been held that even under the second clause of article 113, a specific demand from the plaintiff should be an express condition in the contract to make the date of refusal the starting point; otherwise a mere personal right is created enforceable immediately after the date of payment by the second to the first defendant. In this view the suit is barred even under second part of article 113.

JUDGMENT.—This appeal arises out of a suit instituted by the plaintiff to compel the first defendant to execute a duly registered transfer in respect of a decree in a suit (Original Suit No. 364 of 1904). The first defendant was the holder of this decree and he had by an agreement (Exhibit F) made with one Jayanti Venkayya agreed that on Jayanti Venkayya paying to him the amount of that decree, he would transfer the decree to

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(1) (1859) 7 M.I.A., 263.

(3) (1893) A.C., 429.

(2) (1873) 9 Q.B., 99.

(4) (1873) 10 Q.B., 371.

(5) (1880) I.L.R., 3 Mad., 87.

VENKANNA the plaintiff. The particular clauses of that agreement which
 v. are important are to the following effect:—
 VENKATA-
 KRISHNAYYA. “1. The amount was to be paid within six months. The
 AYLING AND transfer in favour of the present plaintiff was to be made as soon
 NAPIER, JJ. as the amount in respect of this *razinama* was paid.”

It is to enforce this latter clause that this suit is brought. No point has been taken that it was not open to the plaintiff, not a party to the contract, to bring a suit for specific performance; so we must deal with it as if that right did vest in him. The lower Appellate Court has held that the suit is primarily barred under article 113 of the Limitation Act, but that the circumstances under which the first defendant received the money from the second defendant constituted him a trustee for the plaintiff within the meaning of section 10 of the Limitation Act, and it therefore held that the suit was not barred. Before us this contention was not relied on by the respondent and we think rightly, for it would be quite impossible to bring this case within the language of that section. But it has been urged by the respondent that the contract does not contain the date fixed for the performance and that therefore the second clause “when the plaintiff has notice that performance is refused” is the starting point for limitation and that therefore the suit is not barred. For the appellant it is contended that the date is fixed for the performance and the suit is out of time. Admittedly of course no specific date was fixed, and the question that remains is whether it is possible in these circumstances to apply the doctrine *certum est quod certum reddi potest*, so as to bring the case within the article. A very careful argument has been addressed to us by both sides. We have been strongly pressed with the decisions of the Privy Council in *Juggomohun Ghose v. Manickchand*(1) and of the Court of Queen’s Bench in *Merchant Shipping Co. v. Armitage*(2) and *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*(3). These decisions turned on the construction of the Interest Act which is as follows:

‘that upon all debts or sums certain, payable at a certain time the jury on the trial of any issue may allow interest.’

(1) (1859) 7 M.I.A., 263.

(2) (1873) 9 Q.B., 99.

(3) (1892) A.O., 429.

There is no doubt that the Privy Council in dealing with this clause have given a very restricted meaning to it, and their Lordships give their reasons for so deciding at great length. They point out that the sum may never be due and that even if due it is uncertain in amount at the time of the contract and it necessarily follows of course that the amount which will be payable for interest will be equally uncertain. They also point out that this provision is an alteration of the common law and is in its nature penal and for these reasons they construe the Act strictly.

Merchant Shipping Co. v. Armitage(1) was argued before the Exchequer Chamber and the decision that there was no principal sum payable at a time certain on which interest could run was given by the court after the decision on the main question in respect of which the case is really reported. No reasons are given by the learned Judges for that decision. It appears that about the same time the opposite view was taken by the Court of Queen’s Bench in *Duncombe v. Brighton Club and Norfolk Hotel Co.*(2). Their Lordships did not consider the policy of the Act but confined themselves to applying the doctrine of “*certum est, etc.*,” in its entirety. They quote and follow the language of Lord KENYON in an old case which language is reproduced as being a correct exposition of the doctrine in Broom’s Legal Maxims; vide page 479. That language certainly is in the widest terms, for it applies the maxim whether the time can be ascertained by any process of computation at the time the contract is made or whether it cannot. I will quote a few words:

“That certainty need not be ascertained at the time, for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. As, if a lease be granted for 21 years, after three lives in being, though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty, and *Id certum est quod certum reddi potest.*”

We have therefore a clear conflict on the language of the Interest Act.

Now we have not to decide this question on the construction of that Act, and we must bear in mind the essential difference

(1) (1873) 9 Q.B., 99.

(2) (1873) 10 Q.B., 371.

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between the Interest Act and the Limitation Act. As pointed out in the Privy Council case the Interest Act is penal and imposes a higher liability than was known to Common Law. It should therefore be construed strictly. On the other hand, the Limitation Act is one which operates as a bar to a claim that is legally enforceable, and it should therefore be construed as much as possible in favour of the person whose right is sought to be barred. There are indications that the courts of this country have been inclined to give a liberal application to this language in article 113. *Muhi-ud-din Ahmad Khan v. Majlis Rai*(1) is one case. The decision of Mr. Justice BODDAM in *Pindiprolu Sooraparaju v. Pindiprolu Veerabadrudu*(2) is another. We do not think it necessary, however, to express a final opinion on this point because in this case there is here an element which seems to us to render the doctrine inapplicable. It may be that it is right to apply the doctrine fully between the actual parties to the contract who would get the benefit and be subject to the liabilities under the contract and to whom therefore the date of payment of the money would become certain some time or other to their knowledge. But in cases where a person is entitled to bring a suit on the contract who may not and need not and very likely may not be aware of the date becoming fixed, we cannot think that the doctrine will apply. Taking this case, for instance, the second defendant was bound to pay the amount within six months to the first defendant, and on the date of that payment the first defendant was bound to transfer the property to the plaintiff. He might have paid it within two days, and the plaintiff need not have known anything about it. He might have paid it, as in fact he did, three days after the due date and the plaintiff might not have known anything about it. He might not have paid it till years after the due date and the first defendant might have accepted payment and the plaintiff might not have known anything about it. It seems to us therefore that in cases where a right to enforce specific performance rests in a third party to whom the ascertainment of the date need not necessarily be known, the doctrine *certum est quod certum reddi potest*, can have no application. We therefore on this narrow ground alone hold that the suit is not

(1) (1884) I.L.R., 8 All., 231.

(2) (1907) I.L.R., 30 Mad., 436.

barred by reason of the first part of the article 113 and that as he is within time under the second part of the article^o the claim is not barred. It is admitted that there is no defence on the merits. The appeal will therefore be dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Napier.

RAMANAMMA alias VIDCHI PATNAYAKAM AND ANOTHER
(DEFENDANTS NOS. 4 AND 5), APPELLANTS,

v.

BATHALA KAMARAJU AND THREE OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

Limitation Act (IX of 1908), art. 13—Attachment of property before judgment—Order raising the attachment—Decree in the suit—Subsequent suit for a declaration that the property is liable to be attached for the decree—Existence of the order, whether bar to such suit.

An order releasing certain properties from attachment before judgment, is no bar to a subsequent suit for a declaration that they are liable to attachment in execution of the decree in the prior suit, and such suit is not governed by article 13 of the Limitation Act.

Bisheshwar Das v. Ambika Prasad (1915) I.L.R., 37 All., 575, not followed.

SECOND APPEAL against the decree of T. RAJARAM RAO the Temporary Subordinate Judge of Rajahmundry in Appeal No. 109 of 1915 preferred against the decree of N. NARASIMHAM, the Additional District Munsif of Rajahmundry, in Original Suit No. 125 of 1914.

The respondents Nos. 1 and 2 carried on a joint trade in hides. The first respondent filed a suit against the latter for winding up the business and for payment to him of whatever might be found due. During the pendency of the suit, he filed a petition for attachment before judgment. The Court made the order. The appellants, the wives of the second respondent, preferred a claim petition alleging that the second respondent had sold his properties to them and praying that the attachment might be raised. The Court made an order in their favour on 6th December 1910. The suit was eventually decreed

* Second Appeal No. 916 of 1916.

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in favour of the first respondent. On 12th April 1912 he filed this suit for a declaration that the property belonged to the second respondent and was liable to attachment in execution of his decree in the first suit. The appellants contended, *inter alia* that the suit was barred by limitation. The Court of first instance held that the suit was governed by article 120 of the Limitation Act and gave a decree in favour of the first respondent. This decree was confirmed on appeal. The appellants (defendants Nos. 4 and 5) preferred this second appeal, contending that the suit was barred under article 13 of the Limitation Act.

P. Chenchiah and S. Narasimha Rao for the appellants.

T. Prakasam for the first respondent.

The others were not represented.

AYLING, J.

AYLING, J.—Appellants' contention before us is that the suit is barred under article 13 of the Indian Limitation Act. This article is clearly inapplicable in terms, since the plaint contains no prayer to alter or set aside any decision or order of a Civil Court. Appellants' counsel, however, argues that the District Munsif's order dated 6th December 1910 allowing his clients' claim under Order XXXVIII, rule 8 (attachment before judgment), is governed by Order XXI, rule 63, and unless set aside, will become final; in which case it will preclude any proceedings against the same property in execution of the decree subsequently obtained. Hence, whatever the prayer in the plaint, the suit must be treated as a suit to set it aside, otherwise it will not be maintainable at all.

As authority for his proposition that Order XXI, rule 63, governs orders passed in investigation under Order XXXVIII, rule 8, Mr. Chenchiah relies on the ruling in *Bisheshar Das v. Ambika Prasad*(1). This is no doubt direct authority in his favour, but with all respect I am unable to follow it. Order XXXVIII, rule 8, simply provides for the manner of investigation into claims to property sought to be attached before judgment, and I can see no ground for holding that, as stated by the learned Chief Justice in the case above quoted, its effect is to incorporate all the provisions of Order XXI and amongst them rule 63. The manner of an investigation and the finality of the order

(1) (1915) I.L.R., 37 All., 575.

passed on the same investigation are two totally different things. In the absence of a specific provision I should be most loath to hold that an order passed under Order XXXVIII, rule 8, was final in the sense of determining the ownership of the property in dispute even for the purpose of the suit in connection with which it was passed. It would be both unfair and inexpedient to drive a plaintiff into a fresh litigation to establish a defendant's title to property, with a view to attachment, before it is certain that he will secure a decree under which to attach.

In my opinion the suit as framed will lie, and the existence of the order releasing the attachment before judgment is no bar to it. It is not time-barred.

I would therefore dismiss the appeal with costs.

NAPIER, J.—I agree. It is urged before us that article 13 is a bar to this suit even though it is not in form a suit to set aside an order, the argument being that as an order has been passed releasing the property before judgment, that order must be set aside by suit before any relief can be obtained. The contention is that rule 63 of Order XXI is made applicable to investigation of claims under Order XXXVIII by rule 8. *Bisheshar Das v. Ambika Prasad*(1) is relied on. The dictum in that case does support this contention, but it was not necessary for the decision and I think that the learned Judges, who give no reasons for their view, have not realized the result of their view, which is shortly this: that a plaintiff whose attachment has been raised would very likely have to bring a suit for a declaration before he even got his decree in the first suit, and this decree might be useless to him if he never got that decree at all or unnecessary if he could levy execution more easily on other property of the defendant. I cannot imagine a more futile proceeding than such a suit with its first and second appeals going on contemporaneously with the main suit and its appeals. I am quite clear that rule 8 only applies the procedure of investigation in Order XXI. A Court dealing with an application under Order XXXVIII has only power to order the property to be placed at the disposal of the Court and conditionally attached and it can only do this when it is satisfied that the defendant is endeavouring to dispose of the property. Of course

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it must be satisfied that it is the property of the defendant and so a third party is allowed by rule 8 to make a claim, but the order passed under Order XXXVIII does not purport to decide conflicting claims but only the right to attach in the circumstances of the case. It is clear that article 11 of the Limitation Act does not apply because the words "attached in execution of a decree" prevent that. If rule 63 was intended to apply to prior attachments one would expect to find article 11 worded in such a manner as to include these orders. The suit is one to establish the right which he claims and is not one to set aside an order. If a suit in that form is proper where an order has been made under rule 63, as is clearly indicated by the rule itself, I do not see why it is not the proper form of suit in this case and as the article does not bar it, I see no reason to assume that the order must be set aside, or go to article 13 to find a bar.

The Second Appeal is dismissed with costs.

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APPELLATE CIVIL.

*Before Mr. Justice Coutts Trotter and Mr. Justice
Seshagiri Ayyar.*

DEVARAPALLI RAMALINGA REDDI AND SEVEN OTHERS
(DEFENDANTS NOS. 1 TO 7 AND 12), APPELLANTS,

v.

RIGIRIRAJU KOTAYYA AND TEN OTHERS (PLAINTIFFS
AND DEFENDANTS NOS. 8 TO 11, 13 AND 14), RESPONDENTS.*

Evidence Act (I of 1872), sec. 35—Register of births and deaths kept by village officials—Extract from the register, whether receivable in evidence and whether evidence of the date of death of a person.

A register of births and deaths kept by village officials under the orders of the Board of Revenue is a public document within the meaning of section 35 of the Evidence Act and an entry in such register recording the death of a person is evidence of the actual date of his death.

Ratcliff v. Ratcliff and Anderson (1859) 1 Swabey and Tristram, 467 and *In the Estate of Goodrich, Payne v. Bennett* (1904) Pr. D., 138, referred to.

* Appeal No. 71 of 1916.

APPEAL against the decree of S. RANGANADHA MUDALIYAR, the temporary Subordinate Judge of Guntur, in Original Suit No. 42 of 1914.

The facts material to this report are set out in the judgment.

T. V. Venkatarama Ayyar and *R. Rajagopala Ayyar* for the appellants.

T. Prakasam for the respondents.

JUDGMENT.—This is an appeal from a decree in a suit brought by a reversioner to recover possession of the properties belonging to one Pedda Venkatarayudu, the last male owner. His daughter Venkamma was in possession until she died. The first question argued before us related to the date of the death of this woman. The plaintiffs' allegation was that she died on the 9th January, 1902. The twelfth defendant stated that Venkamma died in 1899 and that the suit was barred by limitation. The Subordinate Judge came to the conclusion that the plaintiff's suit was in time. The main argument against this conclusion was that Exhibit A, the public extract of the register of the death of Venkamma, was not receivable in evidence, and that the judgment of the Subordinate Judge which is mainly based on that document should be reversed.

The learned vakil for the appellants broadly contended that this document is not receivable in evidence under section 35 of the Indian Evidence Act. He argued that there is no legislative enactment making it compulsory upon village officers to maintain a register of this kind and that an extract from such a register is not covered by section 35. There are two answers to this contention. In the first place, the Madras Act III of 1899 provides for village officers beyond municipal towns keeping a register of births and deaths. Under section 5, the Collector may appoint any person either by name or by virtue of his office to be Registrar of Births and Deaths in each village. There are provisions in the Act for such registers being sent up to the Taluk cutcherry.

Under section 17, the extracts given in the Taluk office are required to be certified as provided in section 76 of the Indian Evidence Act. Such extracts may be produced in proof of the entries of which they purport to be copies. It is, therefore, clear that the record of death would be an entry made in a public

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register as required by the Evidence Act. It is true that under section 2, the Local Government has to extend the operation of this Act to the districts. On such a notification, section 4 would enable the Collector to proclaim that registration shall be compulsory. As the point has been taken for the first time in appeal and as the appellant denied the existence of any legislative enactment on the subject, the respondent has not been able to ascertain whether the Act has been extended to the district of Guntur and whether the registration has been made compulsory in that district. But even apart from this question, we see no reason for holding that the register would not be covered by the language of section 35 of the Evidence Act. The entry spoken of in the first part of the section must either (a) be made by a public servant in the discharge of his official duty, or (b) by any other person in the performance of a duty specially enjoined by the law of the country. The second part alone relates to legislative enactments; the first part is general in its terms. A reference to the Standing Order No. 101 of the Board of Revenue shows that the system of registering births and deaths was inaugurated in 1865; by the Board's Proceedings, dated 5th February, 1874, the duty of keeping such registers was cast upon the village officials. It is clear, therefore, that a village karnam or a reddi keeping a register of deaths will be acting as a public servant in the discharge of his official duty. It is not necessary that a public servant should be compellable by legislative enactment to discharge such a duty. In *Ratcliff v. Ratcliff and Anderson*(1) it was pointed out that a register of births and deaths kept under the orders of the East India Company was a public document of the description mentioned in section 35 of Evidence Act. Lord CAMPBELL in that judgment speaks of the register having been kept in obedience to directions given by the East India Company in its sovereign capacity. No legislation of the Company is referred to as having authorized the keeping of such a register. We are, therefore, of opinion that even apart from Act III of 1899 the registers which are being kept under the directions of the Board of Revenue since the year 1865 do come under section 35 of the Evidence Act. It need hardly be stated that the Board of Revenue are the agents

(1) (1859) 1 Swabey and Tristram, 467.

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of the Executive Government of the Presidency: see *The Secretary of State for India in Council v. Kasturi Reddi*(1).

One other argument of the learned vakil for the appellant was that the extract is not evidence of the actual date of the death mentioned in it. Reliance was placed upon certain observations contained in *In re Wintle*(2). It is clear that these observations have not been accepted as good law in England: see *In the Estate of Goodrich, Payne v. Bennett*(3). We are, therefore, of opinion that Exhibit A was rightly admitted in evidence, and that it is evidence of the actual date of the death.

Upon the facts, we have no hesitation in concurring with the conclusion of the Subordinate Judge that the plaintiff has proved that Venkamma died within twelve years of the date of suit. The evidence let in on behalf of the defendants is utterly worthless, having regard to the fact that the twelfth defendant who professes to have known the date of the death all along did not state it in the written statement filed by him.

Another contention was that Chinna Venkatarayudu and Pedda Venkatarayudu were not divided; but the documentary evidence on the question is very clear. Exhibits L, N and Z of the year 1860 show that by that time the two brothers had become divided in status. Then it was suggested that the family compromise evidenced by Exhibit D is binding upon the present plaintiffs. The contest in that case was between the widow of a co-parcener who claimed maintenance from the family and the twelfth defendant's father. The twelfth defendant's father claimed that he was entitled to the whole of the property; he entered into a compromise. The present plaintiffs were not parties to the compromise and by no stretch of imagination can they be said to have been represented either by Bangaramma or by the twelfth defendant's father. We hold that the compromise is not a family arrangement binding upon the plaintiffs. We must, therefore, for these reasons confirm the decree of the Subordinate Judge and dismiss the appeal with costs. We dismiss the memorandum of objections also with costs.

S.V.

(1) (1903) I.L.R., 26 Mad., 268.

(2) (1870) L.R., 9 Eq., 373.

(3) (1904) Pr. D., 138.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Bakewell.

S. K. MOHIDEEN KHADIRSHAW MARAIKAR (FIRST RESPONDENT), APPELLANT,

v.

THE OFFICIAL RECEIVER, TINNEVELLY, AND ANOTHER (PETITIONER AND SECOND RESPONDENT), RESPONDENTS.*

Provincial Insolvency Act (III of 1907), ss. 24, 26, 36 and 52—Rules—Official Receiver—Delegation of powers—Framing of schedule by Receiver—Enquiry, nature of—Order of Receiver, if judicial or final—Entry of name of a creditor in schedule—Subsequent application by Receiver to Court to expunge name—Power of Court, to entertain application.

An Official Receiver under the Provincial Insolvency Act in framing a schedule of creditors does not decide judicially or finally upon contested claims.

Where, therefore, an Official Receiver passed an order upon the claim of a creditor of an insolvent to rank as a secured creditor under a mortgage which was disputed by another creditor, the action of the Receiver amounted only to an entry of the name of the creditor in the schedule framed under section 24 of the Act, and did not preclude the Court from entertaining an application by the Receiver under sections 26 and 36 of the Act to expunge the name of the creditor from the schedule.

APPEAL against the Order of A. EDGINGTON, the District Judge of Tinnevely, in Original Petition No. 395 of 1915.

The appellant claimed to be a mortgagee under a mortgage bond executed by the second respondent on the 17th December 1912. The latter filed an application in the District Court of Tinnevely under the Provincial Insolvency Act (III of 1907) to be declared an insolvent. The application was made on the 22nd October 1913, and, in the schedule submitted with the petition, the insolvent included the appellant as a secured creditor for Rs. 2,000. The claim of the appellant was disputed by another creditor of the insolvent on the ground that the mortgage was a sham transaction unsupported by consideration and was executed in fraud of the creditors of the insolvent. The Official Receiver made an enquiry and, after taking evidence adduced before him by both sides, passed an order, dated 4th November 1914, upholding the claim of the appellant to rank as

* Appeal against Order No. 58 of 1916.

a secured creditor of the insolvent. The name of appellant was accordingly included in the schedule of creditors framed under section 24 of the Act. The first respondent (who was the successor in office of the former Official Receiver who had made the previous order) moved the District Court, by a petition, dated 23rd April 1915, stating that the deed of mortgage executed to the appellant by the insolvent was a fraudulent and sham transaction unsupported by consideration, and praying that the name of the appellant and his debt should be expunged from the schedule of creditors. The District Judge held an inquiry and decided that the appellant's mortgage bond was a fraudulent transaction and declared that the document was void against the Receiver. The creditor preferred this appeal to the High Court, contending that the order of the Official Receiver was final and conclusive and that the mortgage bond in his favour was a bona fide transaction supported by consideration.

C. V. Anantakrishna Ayyar and K. R. Rangaswami Ayyangar for the appellant.

M. D. Devadas for the respondents.

JUDGMENT.—The first question in this case relates to an order passed by an Official Receiver upon the claim of a creditor of an insolvent to rank as a secured creditor under an hypothecation bond which was disputed by another creditor. The Official Receiver received oral and documentary evidence and held that the bond was supported by consideration and was not fraudulent. His successor in office seeks to impeach the transaction notwithstanding this decision.

By virtue of section 52 of the Provincial Insolvency Act, 1907, and rules of this Court made thereunder, an Official Receiver has power (b) to frame schedules and to admit or reject proofs of creditors, and (f) to hear and determine any unopposed or ex parte application. Section 24 (1) directs the Court to frame a schedule of creditors and the debts proved by them, and section 25 prescribes the ordinary procedure for proof of debts. Under these provisions all persons alleging themselves to be creditors are required to produce evidence of the amount and particulars of their debts, which may be upon affidavit containing certain particulars, and the Court by order determines the persons who have proved themselves to be creditors and the amount of their debts, and then frames the schedule.

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Section 24 (3) then provides for an application by a creditor after the schedule has been framed that his name may be entered therein and section 26 provides that the Court may expunge an entry in the schedule or reduce the amount of a debt upon the application of a receiver or, in certain cases, of a creditor or the debtor; and both provisions contemplate a judicial inquiry. Having regard to these express provisions for a judicial inquiry upon the rectification of the schedule when framed, and to the absence of any such provision in relation to the framing of the schedule in the first instance, we think that the latter operation is intended, at least in general, to be an *ex parte* determination by the Court upon the evidence furnished by the alleged creditors. If this construction be correct and the sections and rules already mentioned be read together, it is clear that the power delegated to the Official Receiver is to frame the schedule after an *ex parte* examination of the evidence tendered by the alleged creditors and that he does not decide judicially or finally upon contested claims.

For these reasons we are of opinion that the action of the Official Receiver amounted only to an entry of the appellant in the schedule of creditors under section 24, and does not preclude the Court from entertaining an application under sections 26 and 36.

[Their Lordships then dealt with the evidence and, holding that the appellant's mortgage bond was a *bonâ fide* transaction supported by consideration, allowed the appeal with costs.]

K.B.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

CHIKKAM AMMIRAJU AND FIVE OTHERS (DEFENDANTS),
APPELLANTS,

v.

CHIKKAM SESHAMMA AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

1917,
February,
14, 15 and 23.

Contract Act (IX of 1872), ss. 15 and 16--Threat by a stranger to a contract, to commit suicide, held out to his wife and son and inducing them to enter into contract on that account--Validity of contract--Coercion and undue influence--Suicide whether 'an act forbidden by Indian Penal Code'--'Prejudice' in section 15, meaning of.

By a threat of suicide, a Hindu induced his wife and son to execute a release deed in favour of his brother in respect of certain properties which they claimed as their own.

Held by WALLIS, C.J., and SESHAGIRI AYYAR, J. (OLDFIELD, J., dissenting) that the threat of suicide amounted to coercion within section 15 of the Indian Contract Act, and that the release deed was therefore voidable.

Per WALLIS, C.J., and SESHAGIRI AYYAR, J.—Suicide is an 'act forbidden by the Indian Penal Code' and suicide by a Hindu if actually committed, will be an act not only to his own prejudice but also 'to the prejudice' of his wife and son within section 15.

Per OLDFIELD, J.—Suicide is not 'an act forbidden by the Indian Penal Code,' directly or inferentially; and hence the threat did not amount to coercion and the release was not voidable on that account. As the person who held out the threat was not a party to the release deed, it was not voidable on account of 'undue influence' within section 16 of the Indian Contract Act.

APPEAL under clause 15 of the Letters Patent against the Judgment of SADASIVA AYYAR, J., who differed from MOORE, J., in *Ammiraju v. Seshamma*(1).

The first plaintiff who was the mother of the second plaintiff and the second plaintiff, alleging that the property in the possession of the defendants belonged to the deceased father of the

* Letters Patent Appeal No. 121 of 1916.

(1) Second Appeal No. 1857 of 1914, preferred against the decree of J. J. COTTON, the District Judge of Godavari at Rajahmundry, in Appeal No. 6 of 1913, against the decree of A. SAMBAMURTI AYYAR, the Temporary Subordinate Judge of Rajahmundry.

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first plaintiff and that his widow (the mother of the first plaintiff) had alienated the same to the defendants without any justifying cause, sued to set aside the same and got a decree that the alienation was not binding on the reversion. Thereafter the defendants brought pressure to bear upon their brother who was the husband of the first plaintiff and father of the second plaintiff. In consequence, the brother threatened to commit suicide in case the two plaintiffs (his wife and son) did not execute a deed of release, relinquishing their rights in the properties in favour of the defendants. On account of this threat the two plaintiffs executed the release deed which they sought to set aside by means of this suit. The defendants contended *inter alia* that no such threat was held out. Both the lower Courts finding that the threat was used, held that it amounted to coercion within section 15 of the Indian Contract Act and gave a decree in favour of the plaintiffs. The defendants filed a second appeal in the High Court.

SADASIVA AYYAR, J., agreeing with the lower Courts dismissed the appeal. MOORE, J., held that the threat held out did not in law amount to coercion or undue influence and allowed the appeal. The result was that the second appeal was dismissed under section 98, Civil Procedure Code. The defendants then filed this Appeal under article 15 of the Letters Patent from the judgment of SADASIVA AYYAR, J.

ON THIS APPEAL,

M. Patanjali Sastri for *P. Narayanamurti*, for the appellants.—Suicide is not an offence punishable under Indian Penal Code; so, section 15 of the Indian Contract Act does not apply. 'Prejudice' in section 15 means some detriment to property and not any sentimental grievance as in this case; see *The Queen v. The Metropolitan Board of Works*(1).

G. Venkataramayya for the respondent.—Section 15 speaks of 'an act forbidden by the Indian Penal Code' and not of an offence punishable under the Indian Penal Code. Suicide is an act forbidden as the attempt or abetment thereof is an offence punishable under the Indian Penal Code. Prejudice need not be in respect of property alone; section 15 provides for an exception where freedom of consent is absent and any circumstance which influences the mind of a party to a contract and destroys the

freedom of volition would constitute coercion. The loss of the husband to the wife or of a father to the son is sufficient prejudice in law.

WALLIS, C.J.—It has been found by both courts that the deed in question was obtained by coercion, the coercion consisting in a threat by the fifth witness for the plaintiffs to his wife and son that he would commit suicide if they did not execute the document.

It is easy to set up such a defence and the evidence in support of it should therefore be very closely scrutinized before it is held to be made out. Here it has been found as a fact and we are not at liberty to interfere with the finding on second appeal.

The case now comes before us on a Letters Patent Appeal owing to a difference of opinion between SADASIVA AYYAR and MOORE, JJ., as to whether the fact as found amounted to coercion within the meaning of section 15 of the Indian Contract Act.

The point mainly argued before us was that suicide was not an "act forbidden by the Indian Penal Code" within the meaning of the section. With this I cannot agree. At common law suicide was a form of homicide. "Homicide properly so called," says Hawkins (*Pleas of the Crown*, Book 1, Chapter 9) "is either against a man's own life or that of another." Wilful suicide was felony, and on a finding that the suicide was *felo de se*, his chattels were forfeited to the crown like those of other convicted felons. In section 299 of the Indian Penal Code the offence of culpable homicide is defined in terms which are sufficiently wide to cover deliberate suicide which is dealt with by Mr. Nelson in his Indian Penal Code as a species of Unlawful Homicide, though, of course, section 302 and the following sections which prescribe the punishment for the various kinds of homicide are only applicable to living offenders. These sections are immediately followed by sections 305 and 306 which make abetment of suicide punishable with death in some circumstances and with lesser penalties in others. Then, after dealing in sections 307 and 308 with attempts to commit murder and to commit culpable homicide, the Code proceeds in section 309 to provide for attempts to commit suicide. I find it impossible to hold that an act which it is made punishable to abet or attempt

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(1) (1863) 3 B. & S., 710.

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is not forbidden by the Indian Penal Code, especially as the absence of any section punishing the act itself is due to the fact that the suicide is in the nature of things beyond the jurisdiction of the court, and it is no longer thought desirable to inflict a vicarious punishment on those who come after him by forfeiting his goods to the crown.

As to the second point, the act threatened must be 'to the prejudice of any person whatever,' and would cover threats to a wife to murder her husband or to a son to murder his father. Here the threat was by the husband and father to kill himself, which must be taken to be an act to his own prejudice which seems to me sufficient to satisfy the section. I may add that I think the threatened act would also be directly to the prejudice of the wife, as it must be taken to be to the prejudice of any wife to deprive her of her husband, especially of a Hindu wife who thereby incurs all the disabilities of a Hindu widow. For the same reason I think the act must be taken to be to the prejudice of the son. I would therefore dismiss the appeal with costs.

Under section 36 of the Letters Patent the appeal is dismissed with costs.

OLDFIELD, J.—I have the misfortune to differ from the learned CHIEF JUSTICE and therefore deal with the case at length.

The question is whether a threat to commit suicide is a threat to commit 'an act forbidden by the Indian Penal Code' within the meaning of section 15, Indian Contract Act; and it is conceded that it is not forbidden either directly or in the sense that a penalty is provided for it. It therefore can be regarded as forbidden only by implication. It is accordingly in place to consider whether section 15 can be construed by implication or should be read strictly.

Section 15 has given rise to few decisions and to none, in which the policy of the portion we are concerned with has been defined. No definition of that policy has been suggested before us; and advisedly. For it would be hard to argue that any general policy is in question, when the coercive character of an act depends on the applicability to it of a statute, which, though wide, does not enumerate acts criminal in India exhaustively, which (as the illustration shows) need not have been enacted at all or need not have been in force at the date or place in question

and which might make conduct punishable, although it would be so under no law binding on those concerned or of which they could even be presumed to have known. The test thus provided may commend itself as definite, but can be regarded only as arbitrary and not as intended to promote any general policy, by reference to which liberal construction can be supported. Taking this view, I am bound to scrutinize respondents' arguments closely.

The first is that a threat to commit suicide is indistinguishable from one to attempt to do so and that such an attempt is forbidden by section 309, Indian Penal Code, which penalizes it. The answer is that threats of these two descriptions are distinguishable unless the word 'attempt' is used throughout the argument in its ordinary sense as equivalent to 'endeavour' and not, as it must be in the second place, where it occurs, in the legal sense, in which it is used in sections 305 and 511. Further if the word is used in its legal sense throughout, a threat to attempt to commit suicide is not only different from one to commit suicide, but is, like other threats to commit an attempt, a contradiction in terms. For an attempt in the legal sense can be recognized as such only after the criminal's intention has been frustrated, not when it is expressed; that is, when the threat is made.

The remaining contention relied on is that the Code implicitly forbids suicide, because in sections 306 and 309 it explicitly forbids abetment of it and attempt to commit it. But this will advance the argument, only if it corresponds with some general principle; and it does not as regards abetment. For, apart from the cases of abetment of children and lunatics, it is not suggested that acts done without guilty knowledge or intention (and therefore innocently), but which nevertheless can be abetted, under section 108, Explanation 3, are forbidden. The principle, if there is one, is therefore sustainable only subject to these exceptions. But, even so, reference to it is useless. For it is not shown that it can be tested by application to any instance, except the case of suicide, with which we are concerned; and there is no more security for its validity, when such test is impossible, than for the validity of respondents' argument as applied to that case alone.

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Respondents must therefore succeed, if at all, on the single and direct contention that in the case of suicide a prohibition can be inferred from the prohibition of attempts to commit it: and with all respect, having decided in favour of a strict construction of section 15, Indian Contract Act, I cannot accept it. No doubt the only species of prohibition, employed in the Code, the specification of a penalty, would be useless in this case. But it does not follow that the failure to employ the other, direct prohibition, or to make provision for the case of suicide in the Contract Act was due to inadvertence and that the omission should be supplied by inference. For it is possible that provision was omitted deliberately, because cases for its application would be rare and their truth difficult to establish, the party alleged to be coerced having usually easier means of preventing the accomplishment of the threat than by entering into the agreement, sought to be avoided.

Holding that respondents cannot succeed on section 15, I turn to section 16 on which they also rely. In this connexion the threat of suicide is irrelevant, since Swami, who made it, was not a party to the contract; and there is no finding of fact, which would support any exercise of undue influence by the parties to the contract, appellants. This plea therefore fails.

As the majority of the court would dismiss the appeal with reference to section 15, respondents' other contentions have not been heard. On the view I take, it would be necessary to consider them before the appeal could be disposed of.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—I agree with the judgment of the learned CHIEF JUSTICE.

I do not think that the evidence in this case is sufficient to warrant a finding on the question of undue influence. On the question of coercion, although I had some doubts in the beginning, I have come to the conclusion that the facts do bring the case within section 15 of the Indian Contract Act. Mr. Patanjali Sastri argued that threatening to commit suicide is not forbidden by the Indian Penal Code. A man who commits suicide goes unpunished, because the law cannot reach him, and not because the offence is not forbidden. The Code makes a person who abets the committing of suicide punishable. It also reaches a man who attempts to commit suicide. Although therefore there is no provision in the Indian Penal Code which forbids in

terms the commission of suicide, there can be no doubt that the intention of the legislature is to forbid such an act. I agree with Mr. Venkatarama Ayya that the term 'any act forbidden by the Indian Penal Code' is wider than the term 'punishable by the Indian Penal Code.' Simply because a man escapes punishment, it does not follow that the act is not forbidden by the Indian Penal Code. For example, a lunatic or a minor may not be punished. This does not show that their criminal acts are not forbidden by the Indian Penal Code. On the same analogy, a man who commits suicide escapes punishment because by committing the act, he is out of the reach of the law. Where the abetment of it and the attempt to do it are both made punishable by the Indian Penal Code, I am prepared to hold that the act itself is one forbidden by the Indian Penal Code.

The second contention of the learned vakil was that the threat to commit suicide could not have prejudiced the plaintiff. I agree with him that mere sentimental prejudice is not what the law contemplates. As pointed out in *The Queen v. The Metropolitan Board of Works*(1), some legal injury must flow in order that the man may be said to have been prejudiced; see also *Clark v. London General Omnibus Company, Limited*(2). Accepting this test, I am unable to hold that the wife to whom the threat was addressed by a husband that he would commit suicide in case she did not execute a document is not prejudicially affected by such a threat. In my opinion the possibility of the husband dying leaving the wife and the child uncared for is sufficient in the eye of the law to furnish the ground of prejudice. On this ground, I agree with Mr. Justice SADASIVA AYYAR in thinking that Exhibit A was brought about by the use of coercion and that it should be set aside.

The appeal should be dismissed with costs.

N.R.

(1) (1863) 3 B. & S., 710.

(2) (1906) 2 K.B., 648.

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APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

NADANALIGI KURUGODAPPA (COUNTER-PETITIONER),
PETITIONER,

v.

ANGADI SOOGAMMA AND ANOTHER (PETITIONER AND
RESPONDENT), RESPONDENTS.*

1917,
February, 28,
and March,
1 and 6.

Civil Procedure Code (Act V of 1908), sec. 145 and O. XXXII, r. 6—Security enabling next friend to receive monies due to minor under decree—Attachment of surety's property for sums not accounted for, legality of.

Security being furnished, the next friend of a minor and the surety were permitted to draw from the Court monies due to a minor under a decree. On default in accounting, the amount due to the estate of the minor was directed to be realized by attachment of the property of the surety.

Held, that the order for attachment was made without jurisdiction as neither section 145 nor any other provision of the Code of Civil Procedure empowers the Court to attach the property of the surety.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the order of B. C. SMITH, the acting District Judge of Bellary, in Original Petition No. 113 of 1914, in Interlocutory Application No. 124 of 1915.

The facts of the case are set out in the judgment of SPENCER, J.

T. R. Venkatarama Sastriyar for the petitioner.

V. Ramesam and P. M. Srinivasa Ayyangar for the respondents.

SPENCER, J.

SPENCER, J.—Briefly stated, the order of the District Judge, which we are asked to revise, has arisen out of the following facts:—One Angadi Soogamma, acting as next friend of her minor son Nanjundappa who had been adopted into another family, brought a suit (Original Suit No. 24 of 1910) for the recovery of considerable properties belonging to the minor, and obtained, on compromise, a decree for the possession of moveable properties worth about Rs. 90,000. Under Order XXXII, rule 6

of the Code of Civil Procedure, she was required to furnish security for the cash and jewels handed over to her. The petitioner before us, Kurugodappa by name, stood surety for her to the extent of Rs. 50,000 and executed a bond in April, 1911. In February 1914, Soogamma presented an original petition to the District Judge alleging, *inter alia*, that Kurugodappa out of Rs. 44,945 in cash, jewels and bonds belonging to the minor's estate delivered to him by the Court, had retained Rs. 12,340 in his own hands, that he claimed and got Rs. 2,000 as consideration for standing surety calculated at the rate of one quarter of the minor's income, and that he had borrowed two sums of Rs. 500 and Rs. 2,600 from the minor's estate and had failed to repay them in full. She therefore asked the Court to cancel his security bond, to direct him to pay into Court all the monies received by him, and to make such other directions as might be deemed sufficient to protect the minor's property from waste. It may here be noted that the first request, if granted, would have defeated the very object of requiring the security, namely, that the minor's estate should be guaranteed against waste and mismanagement: *cf. Subroya Chetty v. Ragammall*(1).

The District Judge upon this petition held an enquiry and came to the conclusion that a sum of Rs. 10,600 handed over to Soogamma and Kurugodappa by the minor's vakil had not been accounted for satisfactorily, that both were responsible for making it good to the estate of the minor, and finally he ordered the attachment of Kurugodappa's property to the value of Rs. 10,600.

An objection is now taken that the District Judge had no jurisdiction to attach the petitioner's property, and on this ground I think we must set aside the order.

Where a guardian appointed under the Guardian and Wards Act fails to account for the property of his ward received by him, section 35 of that Act empowers the Court, on being satisfied that the guardian has not kept his engagement, to assign the bond to a proper person for suing upon it, and recovering what may be due. The Court itself does not sue upon such bonds, and in *Ganpat v. Anna*(2), it was shown how undesirable it would be that the Court should do so.

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* Civil Revision petition No. 218 of 1915.

(1) (1905) I.L.R., 28 Mad., 161.

(2) (1905) I.L.R., 30 Bom., 164.

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Apart from (a) attachments made in execution under orders XXI and XXXVIII, at the instance of the decree-holders in esse or in posse after and before judgment, (b) attachments under Order XXXIX, rule 2, at the instance of plaintiffs against persons disobeying injunctions of the Court, and attachments made by the Court itself, (c) under Order XVI, rule 10 of the property of witnesses who disobey a summons of Court, and (d) under Order XL, rule 4, and section 94 (d) of the property of receivers who neglect to perform the duties of their office, I am not aware of any power conferred by the Code of Civil Procedure to attach the property of individuals.

In this case the District Judge's order does not disclose the provisions of law under which the order of attachment purports to have been passed. He says that he is only concerned with the loss to the minor's estate, and that the liabilities as between Soogamma and Kurugodappa must be settled in a regular suit. He observes that it may be necessary to appoint a receiver in Soogamma's place but he does not appoint one.

From the allusion to a receiver it may be that the District Judge had in mind the provision of section 94 (d) which is declared to have the object of preventing the ends of justice from being defeated and speaks of a receiver being appointed in certain cases and of the performance of his duties being enforced by attachment and sale of property, but it is evident that what is meant here is the attachment and sale of the receiver's own property and not the property of any person in the position of a defendant or surety.

The petition upon which the District Judge proceeded was presented under Order XXXII, rule 6, and an attempt has been made in this Court to justify the order of attachment as being within the words of that rule.

The rule deals with the receipt of property under a decree by a next friend or *ad litem* guardian of a minor, not being a guardian under the Guardian and Wards Act, or being such and yet being under some known incapacity, and it provides that the Court

"shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application."

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It is sought to include an order for the attachment of the surety's property as falling under 'such directions as will, etc.' I am clearly of opinion that the legislature could not have intended to include such a large power as that of attaching the property of a person, not a party to any suit or decree within the cognizance of the Court under the category of mere 'directions.'

Again the authority of section 145 of the Code of Civil Procedure has been invoked. This permits a Court to execute a decree or order against a person who has become liable as a surety for the performance of a decree, for the payment of any money, or for the fulfilment of any condition imposed on him under an order of the Court in any suit or in any proceeding consequent thereon, to the extent to which he has rendered himself personally liable as if he were a party.

The section refers to the enforcing of the liability of sureties in the manner provided for the execution of decrees. It will not cover the case of a surety who has given a bond irrespective of any decree of Court: see *Narayanamma v. Ramayya Chetty*(1). That decision was with reference to the corresponding section of the Code of 1882, and the language of the present Code is no doubt wider, as it extends to orders in any suit or any proceeding consequent thereon. But we are not concerned here with the execution of any decree or order of Court, as may be seen from the fact that the present proceedings were started by the next friend of the plaintiff, not in execution of the decree in Original Suit No. 24 of 1910, but through what is termed an original petition with a view to protect the minor's interests arising after, and independently of, the result of the suit. In these proceedings Soogamma is not seeking to enforce any previous order or decree against her surety. Her remedy therefore lies in a regular suit in which the questions of fact upon which their respective liabilities depend can be adequately tried and determined.

The order directing attachment of Kurugodappa's property is set aside as made without jurisdiction. The respondents will bear their own and the petitioner's costs in this Court.

SADASIVA AYYAR, J.—I entirely agree. I think that section 145 of the Civil Procedure Code which allows execution against

(1) (1889) I.L.R., 22 Mad., 268.

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a surety, can apply only where the Court passed an order or decree which is intended to be an order or decree enforceable through execution by one or some of the parties to a suit or other proceedings against another party or other parties thereto. Here the order under Order XXXII, rule 6, clause (2), requiring the next friend of the minor to furnish security was clearly not an order in favour of any of the parties to the suit to be enforced against another party or other parties thereto but an order passed for the protection of a minor's interests against that minor party's own next friend. This was clearly not intended to be an order executable in the suit by the minor against his next friend and therefore it could not be executed against the surety of the next friend under section 145 of the Code of Civil Procedure.

S.V.

APPELLATE CIVIL—(FULL BENCH).

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Kumaraswami Sastriyar.

V. SUBRAMANIA AYYAR (PLAINTIFF), APPELLANT,

v.

RATHNAVELU CHETTY AND TWELVE OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Inheritance—Illegitimate son—Right of putative father to succeed as heir.

Held by the Full Bench:—

Where an illegitimate son, who if he had survived his putative father, would have inherited his estate either alone or along with others, dies leaving no issue, widow or mother, his putative father is entitled to succeed as his heir.

Jogendra Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing (1891) I.L.R., 18 Cal., 151 (P.C.) and *Sadu v. Baiza and Genu* (1880) I.L.R., 4 Bom., 87, applied.

APPEAL against the decree of C. R. TIRUVENGADA ACHARIYAR, the City Civil Judge of Madras, in Original Suit No. 356 of 1914.

The facts of the case and the arguments before the Division Bench are stated in the Order of Reference to the Full Bench.

* City Civil Court Appeal No. 1 of 1916.

W. Chakrapani Nayudu for T. Ethiraja Mudaliyar for the SUBRAMANIA
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T. Narasimha Ayyangar for the first respondent.

A. K. Madhava Rao for the respondents Nos. 1 and 2.

The other respondents did not appear.

This Appeal came on for hearing in the first instance before SADASIVA AYYAR AND NAPIER, JJ., who made the following ORDER OF REFERENCE TO A FULL BENCH:—

SADASIVA AYYAR, J.—The plaintiff is the appellant. He is the purchaser of the plaint property from the defendants Nos. 3 and 4 and from the deceased father of the defendants Nos. 3 and 4 (by name, Parthasarathi Mudali). Parthasarathi Mudali was the brother of the deceased Krishnasawmi Mudali who died in 1882. Krishnasawmi Mudali had two sons, a legitimate son Jagannatham who survived his father and died in 1886 and an illegitimate son Narayanasawmi who had predeceased him in 1875. The suit was brought for redemption of a mortgage on the plaint house created by the illegitimate son Narayanasawmi in 1873.

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Though the plaint contained allegations that Parthasarathi Mudali and Krishnasawmi Mudali were undivided brothers and that Narayanasawmi was (like Jagannatham) a legitimate son of Krishnasawmi Mudali, the learned City Civil Judge found against these contentions and his conclusions were not attacked before us.

There was again an alternative allegation (or rather suggestion) in the eighth paragraph of the plaint that the plaint property belonged to Krishnasawmi alone even during the lifetime of his illegitimate son, Narayanasawmi Mudali, and another suggestion in paragraph 9 of the plaint that it belonged to Krishnasawmi Mudali's illegitimate son, Narayanasawmi Mudali alone. On a liberal construction of the plaint, we might hold that the plaintiff based the title of his vendors (Parthasarathi Mudali and his sons) on these alternative statements of facts also.

Narayanasawmi Mudali, the illegitimate son, mortgaged the plaint house to Sabapathi Chetty, the father of the defendants Nos. 1 and 2, in 1873 and the plaintiff (as I said before) sues

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to redeem the mortgage as the purchaser of the equity of redemption from Parthasarathi Mudali and his sons. The question for decision is whether Parthasarathi Mudali and his sons became the owners of the equity of redemption on the death of Jagannatham (Krishnasawmi's legitimate son) in 1886.

Narayanasawmi Mudali having mortgaged the property as his own in 1873 during the lifetime of his putative father, Krishnasawmi Mudali, and it not being alleged in the plaint that Narayanasawmi acted as the *benamidar* of his said putative father, Krishnasawmi Mudali, in effecting the mortgage, we intimated during the course of the argument (agreeing on this point with the learned City Civil Judge) that the plaintiff ought to trace his title to the equity of redemption on the basis that Naraynasawmi Mudali was the sole owner of the property on the date of the mortgage of 1873.

The appellant's learned vakil then argued on that basis to the following effect: when Narayanasawmi Mudali died in 1875, his putative father, Krishnasawmi Mudali, became his heir under the Hindu Law. On Krishnasawmi's death in 1882, Krishnasawmi's legitimate son, Jagannatham, inherited the equity of redemption. On Jagannatham's death in 1886, his paternal uncle, Parthasarathi Mudali (one of the plaintiff's vendors), inherited the equity of redemption.

The contesting respondents (the mortgagee-defendants Nos. 1 and 2) contended before us that Krishnasawmi Mudali, the putative father, was not under the Hindu Law the heir of his illegitimate son, Narayanasawmi Mudali. They base the said contention on two lines of reasoning: (1) The mother of Narayanasawmi who lived with Krishnasawmi as his permanent concubine was not an 'unmarried woman' within the meaning of the Hindu Law texts bearing on the question of the rights of illegitimate son, as she was a widow when she came under the keeping of Krishnasawmi Mudali. Therefore Narayanasawmi Mudali could not be the heir to Krishnasawmi Mudali, as not having the status of such an illegitimate son as is recognized as an heir by the Hindu Law. If then Narayanasawmi Mudali had no right to inherit to Krishnasawmi Mudali (in case Narayanasawmi Mudali, the son, survived Krishnasawmi Mudali, the father), it followed *a fortiori* that Krishnasawmi,

the father, who survived Narayanasawmi, the son, could not inherit to his said illegitimate son. (2) Even if Narayanasawmi Mudali could have inherited to Krishnasawmi Mudali, it does not follow that Krishnasawmi Mudali could under Hindu Law reciprocally inherit the property of his illegitimate son Narayanasawmi Mudali.

The first branch of his argument, namely, that Narayanasawmi Mudali, was not such an illegitimate son that he could inherit to Krishnasawmi Mudali if he had survived, found favour with the learned City Civil Judge on the strength of the ruling in *Annayyan v. Chinnan*(1). There the learned Judges, notwithstanding that remarriage of widow is sanctioned by Statute Law, held that if remarriage is unlawful by custom, concubinage with such a widow is prohibited connection. They also held that 'unmarried' does not mean 'not married to the putative father' but not married to anybody before. I respectfully dissent from that decision. Reliance was also placed on *Sundaram v. Meenakshi Achi* (2). But this decision which related to the son of a dancing girl who had not severed her connection with a temple was explained away in the recent Full Bench case reported in *Soundararajan v. Arunachalam Chetty*(3) as having turned on the finding of fact, arrived at in the former case, namely, that dancing girl was not proved to be a permanently kept concubine as she had not severed her connection with the temple. It was decided in the said Full Bench case that if the connection of the concubine was not of an adulterous or incestuous nature, the illegitimate son by her is entitled to inherit the father's properties. The expression in the Texts translated loosely as 'unmarried woman' merely means 'a woman not married to the father of the person whose rights of inheritance were under consideration.' I therefore cannot uphold the learned City Civil Judge's decision on the ground on which he based it. There then remains for decision the next question of Hindu Law: "whether when the illegitimate son, if he had survived his putative father, would have inherited to the latter, the putative father could reciprocally inherit his said son's property, if the son left no widow or issue." In *Myna*

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(1) (1910) I.L.R., 33 Mad., 363.

(2) (1912) 16 I.C., 787.

(3) (1916) I.L.R., 39 Mad., 136 (F.B.).

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Booye v. Ootaram(1), the facts were as follow:—A European Christian, Hughes by name, lived in an adulterous connection with a Brahman married woman and had two illegitimate sons, Taukooram and Ramaprasad. Each got one-fifth share in a village under the will of their putative father Hughes. Taukooram died first. The question was whether Ramaprasad could inherit Taukooram's estate. (Ramaprasad instituted the suit which went up to the Privy Council, but he died during the course of the litigation. His widow Myna Booye as his heir and others were the appellants before the Privy Council.) The Tinnevely Zilla Court submitted the following question to the Pandit of the Sudder Dewanny Court for his opinion:

"You are requested to state whether, upon the death of one of two illegitimate sons of a Hindu woman, the estate of the deceased by law devolves upon the surviving brother."

The Pandit returned the following answer:—

"If the illegitimate sons referred to in the question were undivided, the estate of one of them would, after his death, devolve upon the surviving brother. If divided, 'it would go to him' only on failure of the deceased's widow, daughter, or her son, or of the deceased's mother."

Their Lordships of the Privy Council pointed out at page 423 of the report that as the plaintiff Ramaprasad and the deceased Taukooram were sons of their father by an adulterous connection with a Hindu woman, they could not have inherited to their father. Next they point out:

"It was not referred to the Law Officers to consider whether the inability of the sons to succeed to the father affected their heritable capacity as *collaterals inter se*."

So their Lordships were not prepared to say whether the opinion of the Pandits was right or wrong as they were not properly instructed on the facts. Then they go on to say:

"It is, however, impossible to treat these sons as the sons of a Sudra father; if the plaintiff and Taukooram be viewed as the sons of a Sudra mother, still the property never was hers, and their heritable capacity even to property of hers has not been established. If any general usage in this part of India has ripened into a custom having the force of law, that the illegitimate children of a woman pursuing an unchaste course of life, *whether married or unmarried*, inherit her property, this custom is not in proof."

(1) (1861) 8 M.L.A., 400.

"If amongst Sudras proper, a course of decisions, or other evidence of the prevalency of a general custom, support a heritable capacity of illegitimate Hindus beyond that which the writers' text-books establish, these decisions have not been made known, nor has that custom been established. But a title such as the present, so wholly irreconcilable with the expositions of any text-writer, and, unsupported by any authority, cannot be established upon the evidence which this case affords. To assume without evidence, on assertion simply, a capacity in the appellant and his uterine brother to inherit to their mother, and assuming that capacity of lineal inheritance to their mother, thence to derive collateral heirship, *inter se*, to property which never was their mother's, would be at variance with legal principles."

Then their Lordships finally say that they have come to the conclusion that:

"The only safe course to be taken is to remit the question whether with reference to local custom and usage such illegitimate brothers, though born of an adulterous connection, may collaterally inherit to one another . . . the question being remitted to India for further investigation and consideration."

When the case came back before the Madras High Court, it was decided by PHILLIPS and HOLLOWAY, JJ., in a judgment to be found in *Mayna Bai v. Uttaram*(1). I shall quote a few passages from this judgment.

"The authorities seem to show clearly that the Hindu Law, although, for obvious reasons, not recognizing as the husband's son one got by a man of unequal class, nevertheless gives no ground whatever for supposing that the circumstance of birth from illicit connection severs the union between the mother and her son, so as not to admit of heritable blood between them. This being so, there seems no ground, either of authority or analogy, for contending that, if Tankooram had died without issue, his mother would not have succeeded to him. This would equally have been the case, if she was a Sudra or of a class still lower, as we think that, in the view of Hindu Law, she was. That the illegitimate offspring of women of the lowest Hindu classes daily succeed to the property, both of their mother and of one another, without question or dispute, we can, upon our own experience, affirm. It would be illogical if it were otherwise, for the illegitimate son of a Sudra, in the absence of preferable sons, is his heir. That *the property is almost invariably*

(1) (1864) 2 M.H.C.R., 196 et seq.

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small of itself prevents any question coming before the Courts. Further, the practice is so well understood that litigation would be hopeless."

"Our reasoning, therefore, is that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring. Tankooram and his brother are decided to be Hindus. They are Hindu sons of a woman, of a class lower than the fourth of Manu's classes, and in this case the sons are cognate to her and to one another, as the children of a class not twice-born, out of wedlock, and entitled to inherit to their mother, and only not capable of inheriting to their father."

"Of the cognation between her and her offspring there exists no doubt whatever."

"All the analogies of Hindu Law are against the view of a bastard taken by the law of England."

"Ulpian points to the true distinction, and one which is entirely in conformity with the doctrines of Hindu Law. As agnation and consanguinity are the offspring of a marriage by the *Jus civile*, no spurious son can have them, but he is related to his own mother and to his brother by that mother."

Finally the learned Judges felt justified in holding that:

"All the analogies of Hindu Law and the plain rules of justice and equity are in favour of the evidence of heritable blood between the illegitimate sons of Hughes by this Hindu mother."

In *Tara Chand v. Reeb Ram*(1), FRERE and HOLLOWAY, JJ., held that the descendants of Hughes following Hindu manners and customs were governed by the Mitakshara Hindu Law, relying upon *Abraham v. Abraham*(2). In *Krishnayyan v. Muttusami*(3), it was held that the illegitimate sons of a Sudra V, though entitled to inherit to their father V, if he had died divided from V's brother S, could not prevent the whole property passing to their father's brother S by survivorship, nor could they inherit collaterally to their said paternal uncle S in preference to S's widows. The learned Judges (TURNER, C.J., and MUTHUSAMI AYYAR, J.) say that:

"The illegitimate son is placed in the Mitakshara on the same footing with a daughter's son, and the conception of co-parcenary presupposes sapinda relationship and a legal marriage."

If, according to the Mitakshara (as now settled), sapinda relationship depends only upon having particles of the same

(1) (1866) 3 M.H.C.R., 50.

(2) (1863) 9 M.L.A., 195.

(3) (1884) I.L.R., 7 Mad., 407.

body, I am not sure that it necessarily presupposes legal marriage. As that very learned lawyer J. C. Ghose says (page 184 of his book on the Principles of Hindu Law, II Edition):

"The texts of Gautama, Parasara and Devala and the interpretations of the Mitakshara, the Parijata, and the other commentaries, except the *Dayabhaga*, leave no room for doubt that sapinda meant connected through bodily particles"

(which connection ceased with the fourth descendant). I might also refer to the Vaidyanatha Dikshitiyam (see Setlur's Collection of Hindu Law Books on Inheritance, pages 549 and 550) as to the meaning of the word *sapinda*. Then the learned Judges say:

"Inasmuch as neither a widow, nor a daughter, nor a daughter's son can exclude a coparcener's right of survivorship, it appears to us that neither can an illegitimate son do so."

Then they state:

"Another question is whether as illegitimate sons, the second appellant and his brother were entitled to succeed to their paternal uncle Sundara. Adverting to the several secondary sons known to the ancient Hindu Law, six of them are declared to be heirs to kinsmen in Datta Chandrika, section V, 22. It follows that illegitimate children, who are inferior to them all and who do not exclude the daughter's son, cannot succeed to collateral heirs."

Though the question decided in *Mayna Bai v. Uttaram*(1) by PHILLIPS and HOLLOWAY, JJ., was in some respects different from the question which arose in *Krishnayyan v. Muttusami*(2) the right of collateral succession and the general status of illegitimate sons were considered in the earlier case and I am bound to say that I was rather struck by the fact that no reference at all was made to this earlier decision in the later case. If the decision in *Krishnayyan v. Muttusami*(2) has to be distinguished from that in *Mayna Bai v. Uttaram*(1) it can only be on the ground that while two illegitimate sons may have cognate blood through their common mother which enables them to inherit collaterally to each other, an illegitimate son has no such connexion by blood with his paternal uncle through his putative father as to allow collateral succession to his uncle. This case of *Krishnayyan v. Muttusami*(2) was

(1) (1864) 2 M.H.C.R., 196.

(2) (1884) I.L.R., 7 Mad., 407.

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"Under the Mitakshara, among Sudras, where a father left a son by a wedded wife, and an illegitimate son, the ordinary rule of survivorship incidental to a family co-parcenary was held to apply ; and the illegitimate son, having survived the legitimate, was held entitled by survivorship to succeed to the family estate, which was impartible, on the death of his brother without male issue."

In that case their Lordships approved of the decision in *Sadu v. Baiza and Genu*(3) which was disapproved by COLLINS, C.J., and MUTTUSWAMI AYYAR, J., in *Parvathi v. Thirumalai*(2). If the legitimate and illegitimate sons could form a Hindu Law coparcenary, it seems to me difficult to hold that they had no mutual heritable blood. NANABHAI HARIDAS, J. (whose opinion was relied on by their Lordships of the Privy Council), says in *Sadu v. Baiza and Genu*(9) :—

"While admitting, therefore, that the position of a *Dasiputra* in a Sudra family does differ in important particulars from that of

(1) (1885) I.L.R., 8 Mad., 557.

(3) (1880) I.L.R., 4 Bom. 37.

(5) (1889) I.L.R., 12 Mad., 277.

(7) (1900) I.L.R., 23 Mad., 171.

(9) (1880) I.L.R., 4 Bom., 37 at p. 46.

(2) (1887) I.L.R., 10 Mad., 334.

(4) (1885) I.L.R., 11 Calc., 702.

(6) (1915) I.L.R., 33 Mad., 1144.

(8) (1891) I.L.R., 18 Calc., 151 (P.C.).

an Aurasaputra, I am not prepared to allow that the former is not a member of the family at all, nor that he is not a co-parcener, and not, therefore, entitled to succeed by right of survivorship. His legal status as a son is unquestionably recognized, and accordingly he inherits from his father even before the latter's widow ; and if there are Aurasaputras of his father, he succeeds to his father's estate jointly with them. He is clearly therefore their co-parcener. That he is their brother, not only in the popular, but also in the legal acceptance of the term is evident from the Mitakshara, Chapter 1, Section XII, 1, 2, where they are spoken of both by Yajnyavalkya and Vignanesvara as his 'brethren' and 'brothers' (*bhratarah*). Whether he can as a brother inherit anything from them or not, is a question upon which we are not called upon to pronounce any opinion in this case, for the plaintiff here does not claim any self-acquired property of Mahadu ; nor are we called upon to express any opinion upon the other question, whether he can inherit anything from collaterals."

That, in ancient Hindu Law, he came in as one of the twelve classes of sons there can, in my opinion, be no doubt and his being allowed afterwards only to share with the widow, daughter and daughter's sons instead of inheriting his father's estate wholly was a development of the later Smritis and commentators just as the rule of survivorship itself and the doctrine of unobstructed heritage in the Mitakshara and the doctrine of right by birth were later developments. It seems to me that the authority of *Krishnayyan v. Muttusami*(1), *Ranoji v. Kandoji*(2) and *Parvathi v. Thirumalai*(3), so far as they treat the illegitimate son as not a co-parcener or a *sapinda* require reconsideration in the light of the Privy Council decision in *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing*(4). In *Ramalinga Muppan v. Paradai Goundan*(5) an instructive decision of BENSON and BHASHYAM AYYANGAR, JJ., is reported. Plaintiff and R were divided brothers in a family of Sudras. R kept a permanent concubine, by whom he had two illegitimate sons. Both of these sons predeceased R, leaving legitimate sons of their own then surviving. R then died. The question was whether the legitimate sons of the illegitimate sons of R were entitled to inherit R's property in preference to R's divided brother, the plaintiff. BASHYAM AYYANGAR, J., says at page 523 :

(1) (1884) I.L.R., 7 Mad., 407.

(3) (1887) I.L.R., 10 Mad., 334.

(5) (1902) I.L.R., 25 Mad., 519 et seq.

(2) (1885) I.L.R., 8 Mad., 557.

(4) (1895) I.L.R., 18 Calc., 151 (P.C.).

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"It is unnecessary to consider whether the decisions of this Court in *Krishnayyan v. Muttusami*(1) and *Parvathi v. Thirumalai*(2) above referred to are in any way affected and, if so, to what extent, by this decision of the Privy Council,"

[that is, the decision in *Joyendra Bhupati Hurrochundra Mahapatra v. Nittyanand Man Sing*(3).] Then in an earlier portion of his judgment at page 521, that very learned Judge says:

"There is no direct authority either in the Hindu Law texts or in judicial decisions, applicable to the case" before him. I might say almost the same about the present case. Then at page 524, the learned Judge proceeds to decide by analogy and says:

"An illegitimate son's right of inheritance to his father's property, or at least to a part of it, is not contingent but absolute, as in the case of a legitimate son, since, if he has legitimate half-brothers or other heirs of his father down to a daughter's son, he gets a half share and, in the absence of such heir, the whole estate. The Sudra's illegitimate son is therefore in a position more analogous to that of a legitimate son than to that of other relations whose right of inheritance is liable to obstruction. The principles, therefore, applicable to the succession of sons and grandsons of legitimate sons may by analogy be applied to the sons and grandsons of an illegitimate son, namely, that they should be considered capable of representing the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died."

"It may be doubtful whether the illegitimate issue of the illegitimate son can, on the principle of *jus representationis*, represent the illegitimate son, if, before the inheritance opened, the latter predeceased his father. But it is unnecessary to consider that question as the respondent is the legitimate son of his father."

In *Ruvji valad Mahadu v. Sakuji valad Kaloji*(4), an illegitimate son was held not entitled to claim collateral succession. The judgment is however too short to be of much value and merely follows the expressions of opinion in certain Madras and Allahabad cases. The denial to an illegitimate son of a right to collateral succession can be justified on the ground that by express texts, he comes under the second class of six sons who are debarred from inheriting to kinsmen collaterally, this being one of the anomalies of the Hindu Law which do not rest

upon any principle but only upon texts. I could understand such a view and it may be too late to go behind the established precedents which deny right of collateral succession and which have ignored the decision in *Mayna Bai v. Uttaram*(1). But that an illegitimate son is not connected by blood with his father and mother so as to have *sapinda* relationship with them is in my opinion (with the greatest deference to opinions contra) unsustainable. In *Soundararajan v. Arunachalam Chetty*(2) I considered the status of an illegitimate son and I was of opinion that the illegitimate son of a Sudra born not of an adulterous or incestuous connexion must be treated in all respects as a son subject only to his being treated as on a lower status to a legitimate son and to his being compelled to share his inheritance with the widow, daughter and daughter's sons, owing to express texts of Hindu law. The literal meaning of "*aurasa* son" corresponds to the English expression "son born of the loins" and there are expressions in sacred writings (like the expression *Marutasya Aurasaputrah* in the Ramayana) which show that an illegitimate son can be called the *aurasa* son of the putative father. All analogies as between father and son, or mother and son should in my opinion be applied in his case except that by the course of decisions based upon rather obscure texts he is precluded from claiming rights of collateral succession. Those obscure texts state that an illegitimate son is not a *dayada* (heir) but is only a *bandhu* (that is, they clearly recognize his blood relationship). The glosses to Manu's Slokas 158 and 160, Chapter IX, "except to their fathers" and "to collaterals" are the commentators' and are not in the texts. Again Golap Chandra Sarcar points out (Hindu Law, third edition, pages 187 and 188) that there are only three Smriti texts available on the rights of illegitimate sons to direct succession to their fathers, namely, one of Brihaspati, one of Manu and one of Yagnavalkya. As far as I know, there is no separate text as to the succession to an illegitimate son of a Sudra, and succession to him must, in my opinion, be treated as if he was an ordinary Sudra. The respondent's vakil relied on *Shome Shankar Rajendra Varere v. Rajesar Swami Jungam*(3). That decision could be rested (as

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(1) (1884) I.L.R., 7 Mad., 407.

(2) (1887) I.L.R., 10 Mad., 334.

(3) (1895) I.L.R., 18 Cal., 151 (P.C.).

(4) (1910) I.L.R., 34 Bom., 321.

(1) (1911) 2 M.H.C.R., 196.

(2) (1916) I.L.R., 39 Mad., 136 (F.B.).

(3) (1899) I.L.R., 21 All., 99.

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it was rested among other grounds) on the text of Manu (as interpreted by commentators) that an illegitimate son is not a collateral heir as he comes under the second set of six sons who are not heirs though they are kinsmen, Chapter 1, Mitakshara. That he is a kinsman, that is, a man connected by blood relationship, is admitted in sections 30 and 31, Chapter 1, Mitakshara, the very sections which are relied on to show that he is not an heir to collaterals. The distinction between the first six classes of sons and the second set is not that the first set of sons are kinsmen and the second are not kinsmen, but that the first set are both kinsmen and heirs while the second set are only kinsmen, so far as collaterals are concerned. In *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*(1) it is no doubt stated that sapinda relationship presupposes a lawful marriage. I am unable to understand this observation which seems merely to follow the opinion found in a Madras decision already quoted. Sarvadhikari in his "Principles of the Hindu Law of Inheritance," at page 944, so far as inheritance is concerned, thinks that an illegitimate son ought also to succeed to collaterals, but, as I said before, it is probably too late to go back on the long course of decisions which have established the contrary.

The direct question arising in this present case has not been so far as I know covered by any decision, namely, whether the putative Sudra father can inherit to his illegitimate son born of a connexion not adulterous and incestuous.

Though I have dealt in detail with the several arguments relied on by the respondent's learned vakil, I think that the question before us really depends on the construction to be placed on Yagnavalkya's text as to the course of succession in the absence of lineal descendants and that all other considerations are of very doubtful relevancy and tend only to obscure the real point for decision. In Chapter 2, section 1, Placitum 2, the Mitakshara quotes Yagnavalkya's texts as follows:—

"The wife and the daughters also, both parents, brothers likewise and their sons, gentiles, cognates, pupils and a fellow student: on failure of the first among these, the next in order is the heir to the estate of one who departed to heaven leaving no male issue. This rule extends to all classes."

(1) (1899) I.L.R., 21 All., 99 at pp 103 and 104.

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Then in section 3, the Mitakshara considers why the parents are entitled to succeed and bases the right solely on "*propinquity*" of blood. This general rule, of bringing in the parents after the wife and daughters (in default of the two kinds of sons) must clearly apply to succession to an illegitimate son of a Sudra. The putative father of a *Sudra* by a permanently kept concubine is a "father" under the Hindu Law, and I am inclined strongly to hold, under the above text of Yagnavalkya quoted (Yagnavalkya 2, 136 and 137), that such putative father is clearly entitled to inherit to his illegitimate son after the mother of that son. The learned City Civil Judge, while admitting that, by analogy based on reciprocity, the putative father will be the heir to the illegitimate son, denied the father's right solely on the ground that the illegitimate son in this case was not the heir to his father because the mother was a widow. His view that the illegitimate son is not an heir being opposed to the Full Bench decision in *Soundararajan v. Arunachalam Chetty*(1), the reasoning on which his opinion was based against the father's right of inheritance falls to the ground. (I am, however, not inclined to rely on the doctrine of reciprocity which is not a safe guide in Hindu Law and I rely on the text of Yagnavalkya itself and on the Mitakshara, section 3, Chapter II). I would therefore reverse the decision of the City Civil Judge and remand the suit for fresh disposal as the issues Nos. 4, 5 and 6 have not been disposed of in the Lower Court. As however during the course of the arguments, I expressed the view that the question, being an important one of first impression, had better be decided by a Full Bench and as my learned brother also was of a similar opinion, I would refer to a Full Bench for decision the following question of law, namely:—

"Whether, where an illegitimate son was born of a permanently kept concubine and under the Hindu Law he would be the sole heir or one of the heirs to his putative father's properties, his father could, if the said father survived the illegitimate son, inherit the said son's properties when that son left no widow or issue and his mother had predeceased him."

I might add that, if the question is answered in the negative, the logical conclusion which would follow is that the properties escheat to Government.

NAPIER, J.—I concur.

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(1) (1916) I.L.R., 39 Mad., 133 (F.B.).

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ON THIS REFERENCE—

T. Ethiraja Mudaliyar for the appellant.—The putative father is entitled to succeed to the estate of his illegitimate son. Illegitimate son is a *son*. The right to inherit is dealt with in Mitakshara, chap. 2, sec. 1, plac. 2, which expressly says that 'the rule extends to all classes.' As the general rule is that the father is an heir to the son, he must succeed unless this right is taken away by any express text. The fact that some decisions of this Court have held that an illegitimate son does not succeed to collaterals does not, even if those decisions are right, affect this question. I rely on *Jogendro Bhupathi Hurrochundra Mahapatra v. Nityanand Man Sing*(1) and *Sadu v. Baiza and Genu* (2) the reasoning in which was approved of by the Privy Council. An illegitimate son can offer *pinda* to his putative father: see Ghose's Hindu Law, page 583. *Mayna Bai v. Uttaram*(3) recognizes the existence of heritable blood between illegitimate sons and their mother and between two illegitimate brothers and this has not been dissented from up to date. That a son by a permanent concubine is entitled to inherit has been settled by *Soundararajan v. Arunachalam Chetty*(4).

T. Narasimha Ayyangar (with *A. K. Mallava Rao*) for the respondents, Nos. 1 and 2.—The putative father is not an heir. Mitakshara chap. 2, sec. 1, plac. 2, which allows a father to inherit to his son, deals only with legitimate sons. Only *legitimate* wife, daughter, father, mother, etc., are referred to in that placitum. These words are used there only in their primary sense: see *Meenakshi v. Muniandi Panikkan*(5). Otherwise even a concubine will inherit. The illegitimate son is not a *son*, but is only a *dasi putra*. The question of the son of a *Sudra* by a *dasi* being given a share is dealt with in Mitakshara, chap. 1, sec. 12. He is not a co-parcener and he has no right by birth. See Mitakshara, chap. 1, sec. 11, plac. 1, for the definition of legitimate son (*aurasa*) and legal wife. The other kinds of sons are dealt with in the succeeding placita. Placitum 28 says that "the legitimate son is the sole heir of his father's estate; but for the sake of charity, he should give maintenance to the rest." *Sapinda*ship is based only on legal marriage. The Privy Council case of *Jogendro Bhupathi*

(1) (1891) I.L.R., 13 Cal., 151 (P.C.).

(2) (1880) I.L.R., 4 Bom., 37.

(3) (1864) 2 M.H.C.R., 196.

(4) (1916) I.L.R., 39 Mad., 136 (F.B.).

(5) (1915) I.L.R., 38 Mad., 1144.

Hurrochundra Mahapatra v. Nityanand Man Sing(1)* and the Bombay case of *Sadu v. Baiza and Genu*(2) are distinguishable as the facts there were peculiar. I rely on the reasoning which does not allow an illegitimate son to succeed to collaterals. The other cases quoted in the ORDER OF REFERENCE were referred to and distinguished.

The other respondent did not appear.

T. Ethiraja Mudaliyar in reply.—*Sapinda* relationship under the Mitakshara is based on propinquity only.

The Court expressed the following OPINIONS:—

WALLIS, C.J.—The question has been dealt with so very fully by SADASIVA AYYAR, J., in the ORDER OF REFERENCE and in the judgment to be delivered by KUMARASWAMI SASTRIYAR, J., that I shall state my reasons for concurring in the answer proposed by them very shortly. Manu only mentions the right of a Sudra father to give his illegitimate son a share if he chooses, but at the date of Yagnavalkya, the illegitimate son was recognized as one of his father's nearest heirs. In the few slokas (144 to 149) upon which this part of the Mitakshara is a commentary, Yagnavalkya deals first with partition during the father's lifetime, and then with partition by the brothers after the father's death. Next he enumerates the twelve classes of sons who are to inherit to the father, each class excluding the subsequent classes and all other heirs.

"A legitimate (*aurasa*) son is one born of a lawfully wedded (*dharma*) wife. Equal with him is the son of an appointed daughter." (Sloka 128.)

This is the son of a daughter without brothers who had been appointed by the father to remain in his own *gotra* and to bear sons who were to be regarded as his sons, a possibility which occasioned the numerous warnings in the texts against marrying a girl without brothers. These are the first two classes of sons. It is immediately after the enumeration of the twelve classes of sons, and before dealing with the other heirs who are to take "in default of male issue," that Yagnavalkya treats of the rights of the Sudra's illegitimate son as regards partition and succession. On partition during the father's life his share was to be at the father's discretion which was still wide in those times. After the father's death, he was

(1) (1891) I.L.R., 18 Cal., 151 (P.C.).

(2) (1880) I.L.R., 4 Bom., 37.

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entitled to share with the legitimate brothers, but only to half a share.

"If there be no brothers nor daughter's sons, he then takes the whole." (Sloka 134.)

This would be perfectly logical, if by daughter's sons were meant the sons of the appointed daughter who were equal to the *aurasa* sons, and I cannot help thinking this was originally so, an inference which is supported by the fact that Medhatithi, as interpreted by Dr. Jolly in his History of the Hindu Law, page 187, puts the daughter's sons here on the same footing as legitimate sons as regards their shares of inheritance. But, as has been pointed out, the words for daughter's sons used by Yagnavalkya include as well daughter's sons generally who would have no claims to come in preference to the other sons. When we come to the Mitakshara, some six hundred years later according to some estimates, we find the daughters mentioned as well as the daughter's sons. Much later the Dattaka Chandrika includes the widow; and it is now settled that in the absence of legitimate sons the illegitimate son only takes half if there are widows, daughters or daughter's sons. This looks as if there had been an advancement of these three classes to take along with the illegitimate son. Simultaneously the artificial sons became obsolete with the exception of the *dattaka* who was admitted to rank with an *aurasa* son. But, however this may be, it does not affect the fact that from the time of Yagnavalkya onwards the illegitimate son has been an heir to his father and an heir of a very high rank excluding all the subsequent classes of sons which at that time included even the *dattaka* or son given in adoption. No doubt the general principle was that the inheritance went to the next sapinda, and that though the relation of sapindaship depended on community of particles it existed, at any rate among the higher castes, in later times only between persons who were born of a regular marriage, but the texts show an exception to the rule in the case of the illegitimate sons of Sudras who were excluded from the sacramental forms of marriage. This being so, and the illegitimate son being heir to the father, I can see no reason why the father also should not on the usual principle be heir to the illegitimate son in the case put in the Order of Reference. This view also seems to me to be in accordance with

the decision of the Bombay High Court in *Sadu v. Raiza and Genu*(1), which was accepted and acted on by the Privy Council in *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing*(2), that an illegitimate son of a Sudra was a member of the family and a co-parcener of his legitimate brother, to whose share he succeeded by virtue of the co-parcenership in preference to the brother's widow. It was held that the legitimate brother would take the illegitimate brother's share in the same way. If this be so, it seems to me to involve *a fortiori* that there is no sufficient reason for refusing to allow the father to succeed to the illegitimate son according to the ordinary rule just as the illegitimate son succeeds to the father. My answer is in the affirmative.

OLDFIELD, J.—I concur in the answer proposed, because such concurrence is in my opinion entailed by the decision in *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing*(2). For the language used in that decision and in *Sadu v. Raiza and Genu*(1), the judgment in which was apparently endorsed by their Lordships of the Privy Council without reservation, appears to me to entail that a co-parcenary exists between the legitimate and illegitimate sons in virtue of a relationship and not as specially created by the recognition of the latter in the texts for special purposes which they specify, and subject to special limitations, which those purposes imply. Such relationship can be traced only through the affiliation of both sons to their common father; and the result, which must be accepted, is the recognition of the illegitimate son as a son in the most comprehensive sense, subject only to certain disabilities not at present material; and consequently of his father as connected with him by the ordinary paternal relationship. From such a relationship the father's right to inherit from him follows.

As this ground of decision is adequate, I refrain from discussion of the texts or discussion of the reasoning employed in the three cases, which have for many years been accepted as stating the law in this Presidency: *Krishnayyan v. Muttusami*(3), *Ranoji v. Kandoji*(4) and *Parvathi v. Thirumalai*(5). I

(1) (1880) I.L.R., 4 Bom., 37.

(3) (1884) I.L.R., 7 Mad., 407.

(2) (1891) I.L.R., 18 Cal., 151 (P.C.).

(4) (1895) I.L.R., 8 Mad., 557.

(5) (1887) I.L.R., 10 Mad., 334.

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moreover offer no opinion regarding the possibility of reconciling our conclusion in the present case with the well settled course of decisions, by which the illegitimate son's right of succession to collaterals is at present negatived.

KUMARASWAMI SASTRIYAR, J.—The question referred to us for decision is "*whether, where an illegitimate son was born of a permanently kept concubine and under the Hindu Law he would be the sole heir or one of the heirs of his putative father's properties, his father could, if he survived the illegitimate son, inherit the said son's properties, when that son left no widow or issue and his mother had predeceased him.*"

The meaning of the term *dasi-putra* in the texts has been the subject of conflicting decisions, but it is unnecessary to refer to them, as the law, so far as this Presidency is concerned, has been settled by the recent decision of the Full Bench in *Soundararajan v. Arunachalam Chetty* (1). In order to entitle an illegitimate son of a Sudra to succeed, all that is necessary is that the connection between his parents should be continuous and neither adulterous nor incestuous.

There can be little doubt that the Smritis treat the illegitimate son of a Sudra as one capable of *inheriting* his father's property by virtue of the relationship of father and son subsisting between them. In dealing with the subject of "the partition of heritage" Yagnavalkya in verses 128 to 132 deals with the twelve classes of sons, namely, (1) the *Aurasa* or the son of the lawfully wedded wife, (2) *Putrika Suta* or son of the appointed daughter, (3) *Kshetrāja*, the son begotten on a wife by a *sagotra* under the rules relating to Niyoga, (4) *Gudhaja*, one secretly begotten in the house, (5) *Kanina*, the son of an unmarried daughter, (6) *Paunarbhava*, the son of a woman who has been previously married, (7) *Dattaka*, one who is given in adoption by his father or mother, (8) *Krita*, a son purchased from his parents, (9) *Kriṭrīma*, the son adopted by the man himself, (10) *Swayam-datta*, one given himself as a son, (11) *Sahodha*, a son of a woman pregnant at the time of marriage and (12) *Apariddha*, a person who has been forsaken by his parents and is adopted as a son. In verse 132, he states that each of the classes of sons is in the absence of the preceding one the giver of the funeral cake

(1) (1916) I.L.R., 39 Mad., 136 (F.B.).

and the inheritor of a share of the property of his father. Then follow verses 133 to 135 which run as follows (I adopt Mandlik's translation):—

"The law is propounded by me in regard to sons equal by class. A son begotten on a *dasi* by a Sudra becomes even the partaker of a share by the father's choice, after the death of the father the brother should make him a half-sharer. An illegitimate son of a Sudra if brotherless can take the whole unless there is a son to any of the daughters of the Sudra."

Then follow the well-known slokas 135 and 136 which form the basis of the law of inheritance to sonless Hindus and which run as follows:—

"The wife, daughters, both parents, brothers and likewise their sons, gotrajas, bandhus, a pupil and a fellow student. Of these on failure of the preceding the next following in order is heir to the estate of one who has departed for heaven leaving no son (*putra*). This rule extends to all classes."

Then follows sloka 137 which prescribes a special rule as regards a hermit, an ascetic and a student. Other writers describe as many as seventeen classes of sons, but it is not necessary to refer to them.

Turning to Manu who deals with the subject of inheritance in Chapter IX we find that he describes twelve classes of sons in verses 166 to 177 and in verse 179 states that—

"a son who is begotten by a Sudra on a female slave or the slave of his slave may, if permitted by his father, take a share of the inheritance."

Verse 180 runs as follows (I adopt the translation given in the Sacred Books of the East):—

"These eleven, the son begotten on the wife and the rest as enumerated above, the wise call substitutes for a son taken, in order to prevent a failure of the funeral ceremonies."

Verse 181 states that sons begotten by strangers belong in reality to him from whose seed they sprang, but not to the man who took them. Verses 182 and 183 refer to a son of uterine brothers (who is said to be the son of all) and to a son of one of several wives who is said to be the son of all the wives. Verses 184 and 185 run as follows:—

"On failure of each better son each next inferior is worthy of the inheritance; but if there be many of equal rank they shall all share the estate (184). Not brothers, nor fathers, (but) sons take the

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paternal estate; but the father shall take the inheritance of a son who leaves no male issue, and his brothers (185)."

It is clear that Manu declares the father of each class of sons enumerated by him above to take the inheritance of the son who dies leaving no male issue.

It will be observed that both Manu and Yagnavalkya deal with the *dasi-putra* of a Sudra immediately after the twelve classes of sons and the context shows that the *dasi-putra* was treated as the son of a Sudra and placed on a footing superior to the illegitimate son of the twice born classes by being given a share on a partition between himself and his brothers and also the right to share with the daughter's son, and to take the whole estate in the absence of sons and daughter's sons. But for this special provision the illegitimate son of a Sudra would take only in default of all *aurasa* and *putrika putra* or other sons classed by the Smriti writers as superior and the fact that a special text was necessary to give him a favourable position cannot in my opinion be treated as showing an intention to exclude him from the category of sons whom the Smriti writers mention as capable of inheriting to their father. As the verses in Manu and Yagnavalkya dealt with sons common to all the four castes (with the reservation that marriage or concubinage between a woman of higher caste with a man of the lower caste was strictly forbidden) a special rule has to be introduced in order to give the son of a Sudra by a concubine the right which no other illegitimate son had, namely, that of getting a share with the legitimate son, daughter and daughter's son and in their absence of succeeding to the whole estate in preference to his father's brother and agnates. There is no reason to suppose that the Smriti writers attached any special stigma to the illegitimate son of a Sudra by a *dasi* as a reference to the twelve kinds of sons allowed to the twice born classes shows that several of them can by no stretch of imagination be said to be the legitimate sons of their father or even to induce a *prima facie* belief as to the father being the author of their being. Manu, Gautama, Vasishta, Bodhayana and other Smriti writers of undoubted eminence who placed the *gudhaja* or son of concealed birth in the first group of six sons who are said to be "heirs and kinsmen" would hardly have refused heirship or kinsmanship to the son of a Sudra born of a connection which had a

greater element of certainty as to paternity about it. It is also extremely unlikely that so far as Sudras were concerned the Smriti writer would have treated the absence of a marriage between a Sudra and the *dasi* as any very serious matter. In dealing with the various forms of marriage they state that the lowest forms (*Aura*, *Rakshasa*, *Gandharva*, *Paisacha*) which can by no pretence be said to be anything but pure concubinage were intended for Sudras: see Gautama, Chapter 19; Baudhayana, Chapter II. The Grihya Sutras prescribe no Vedic ritual to be observed in the case of marriages amongst Sudras; and Yagnavalkya in Chapter II, *sloka* 10, expressly states that the Vedic rites beginning from conception and ending with the burning ground were for the twice-born classes alone. Far from treating the illegitimate son as a bastard without rights of inheritance Smriti writers placed him in a very favourable position and almost equal to the *aurasa* or *dattaka* son. Jimutavahana gives the reason for the illegitimate son of a Sudra sharing with the legitimate daughter's son as follows:—

"since the one though born of an unmarried woman is the son of the owner and the other though sprung from a married woman is only his daughter's son."

A similar explanation is given by Raghunandhana in his *Dayatatwa. Brihat Parasara* while laying down the general rule that the illegitimate son is only the son of the mother makes an exception in the case of Sudras and observes the son by a slave of a Sudra is the fulfiller of desire and offers the pinda. Twelve sons are mentioned by the rishis. They are offerers of the pinda one after the other in the order mentioned. Balambhatta in his commentary states that the use of word *haret* (हरत) in the text of Yagnavalkya indicates that the illegitimate son acquires a right by birth like the legitimate son. Raghunandhana in his *Dayatatwa* explains the word *Amsa* (share) as meaning 'a share equal to that of other sons.' Both his relationship by propinquity to his putative father and his right to offer funeral oblations are nowhere disputed. A consideration of the position assigned to the illegitimate son of a Sudra when compared to that of illegitimate sons of other classes fully bears out the view of SESHAGIRI AYYAR, J., in *Meenakshi v. Muniandi Panikkan*(1), that

(1) (1915) I.L.R., 38 Mad., 1144 at p. 1149.

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"in cases of Sudras continuous concubinage was regarded as equivalent to marriage, although the children of such irregular union did not rank equally with those with whose mother there was a formal marriage"

—a view in which SADASIVA AYYAR, J., concurred in *Soundara-*

The position accorded to the illegitimate son in the scheme of succession and the place where his rights are dealt with by Manu and Yagnavalkya and also the fact that Vignaneswara in the Mitakshara deals with the rights of the illegitimate son at the end of the chapter relating to *Apratibandhadaya* or inheritance by indefeasible right strongly support the view taken by West and Buhler and concurred in by BHASHYAM AYYANGAR, J., in *Ramalinga Muppan v. Pavadai Goundan*(2), that the position of an illegitimate son of a Sudra is more analogous to that of a legitimate son than to that of relations who inherit by right liable to obstruction. His position, so far as the Smriti writers are concerned, is by no means inferior to that of a *Dattaka*. The Smritis clearly assume that there is heritable blood between the illegitimate son of a Sudra and his putative father. There is nothing so far as I can see in the Smritis to support the argument of Mr. Narasimha Ayyangar based largely on the observations in *Ranoji v. Kandoji*(3) and *Parvathi v. Thirumalai*(4), that the share of the illegitimate son was given in lieu of maintenance and that he was treated as a person having no legal connection with the family of his illegitimate father but only as an outsider a *quasi nullius filius* who was given something because of the moral right which he had, to be supported by the author of his being. Why a share should have been given to the Sudra illegitimate son while the sons of the twice-born were given only an allowance for maintenance or why the right in lieu of maintenance should have taken the form of the right to share with the natural son, the widow, daughter and daughter's son and to get the whole estate of his divided putative father in their absence (cutting out the father's legitimate brothers and other collaterals) has not been explained and it seems to me is not possible of any satisfactory explanation.

(1) (1916) I.L.R., 39 Mad., 136 at p. 152 (F.R.).

(2) (1902) I.L.R., 25 Mad., 519 at p. 524.

(3) (1885) I.L.R., 8 Mad., 557 at p. 523. (4) (1887) I.L.R., 10 Mad., 334 at p. 345.

The authorities show that the illegitimate son was always considered as *inheriting* to his putative father. Vignaneswara distinctly states that all classes of sons without exception have the right of inheritance to their father's estate because of the text of Manu.

"Not brothers, nor parents, but sons are the heirs to the estate of the father" (Manu, Chapter IX, verse 185).

In *Pandaiya Telaver v. Puli Telaver*(1), SCOTLAND, C.J., observed that the Hindu Law does not, like the English Law, consider an illegitimate son *quasi nullius filius* and that in the case of Sudras illegitimate sons succeed to their father by right of inheritance. In *Venkataraman v. Venkatalakshmi Ammal*(2) a similar view was taken and illegitimate sons of a Sudra were declared entitled to rights of survivorship *inter se*. All the sastris consulted by the Chief Justice had not the slightest doubt that

"where illegitimate sons succeeded to their father, the brothers will succeed to one another living and dying undivided."

All the subsequent cases which deal with the rights of an illegitimate son deal with his rights as based on inheritance to his putative father whatever the view taken as to his rights to succeed to the putative father's collaterals. So far as the mother is concerned no doubt has ever been cast on the decision in *Mayna Bai v. Uttaram*(3), that illegitimate brothers succeed not only to their mother but to each other.

The position of an illegitimate son was considered in *Sadu v. Baiza and Genu*(4), and it was held that when a legitimate and an illegitimate sons succeed to the property of their father they take as co-parceners and that the share of the legitimate son who leaves no male issue passes by survivorship to the illegitimate son. In dealing with the position of an illegitimate son NANA-BHAI HARIDAS, J., after setting out the arguments advanced against him and stating the disabilities he was under, observed as follows:

"While admitting therefore that the position of a *dasi-putra* in a Sudra family does differ in important particulars from that of an *aurasa putra*, I am not prepared to allow that the former is not a member of the family at all, nor that he is not a co-parcener, and

(1) (1863) 1 M.H.C.R., 478.

(3) (1864) 2 M.H.C.R., 196.

(2) 2 Strange, 136.

(4) (1880) I.L.R., 4 Bom., 37.

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not, therefore, entitled to succeed by right of survivorship. His legal status as a son is unquestionably recognised and accordingly he inherits from his father even before the latter's widow; and if there are *aurasa putras* of his father, he succeeds to the father's estate jointly with them. He is clearly, therefore, their co-parcener. That he is their brother, not only in the popular, but also in the legal acceptance of the term is evident from the Mitakshara, chapter 1, section XII, 1, 2, where they are spoken of both by Yagnavalkya and Vignanesvara as brethren and brothers (*bhratarah*)."

WESTROFF, C.J., while agreeing with the view taken by NANABHAI HARIDAS, J., emphasised the fact that the *dasi-putra* was dealt with by the author of the Mitakshara before he treats of obstructed heritage, i.e., the rights of succession on failure of sons primary or secondary treating the *dasi-putra* as amongst these in the case of Sudras. In *Ranoji v. Kandoji*(1), MUTTUSWAMI AYYAR, J. (at page 562) while referring to this contention was inclined to the view that no inference can be drawn from this fact as the passage introduced a special rule and the share given to the illegitimate son was given to him in satisfaction of the claim to maintenance which he had at one time in common with the illegitimate sons of the twice-born classes. With all respect an examination of the Smritis shows that there is nothing in them to support the view as to the share being given in lieu of maintenance or to suggest that at some period the illegitimate son's rights were enlarged, he being given a share in lieu of maintenance. An examination of the development of Hindu Law as to the various forms of marriages and the twelve classes of sons shows that greater importance was being gradually attached to marriage and legitimacy and that even in the time of Manu and Yagnavalkya distinction based on these considerations were drawn between the various classes of sons. It is hardly likely that if the Sudra illegitimate son was not in the pale of heirs at any anterior period he would have been given the extensive rights conferred, in lieu of a bare right of a maintenance. On the contrary there is considerable force in the observation of SADASIVA AYYAR, J., in the Order of Reference that

"in ancient Hindu Law he came in as one of the twelve classes of sons,"

(1) (1885) I.L.R., 8 Mad., 557.

and that

"his being allowed afterwards only to share with the widow, daughter and daughter's sons instead of inheriting his father's estate wholly was a development of the later Smritis and commentators."

In *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing*(1), their Lordships of the Privy Council following *Sadu v. Baiza and Genu*(2), held that amongst Sudras governed by the Mitakshara the legitimate and the illegitimate sons took by survivorship and that consequently the illegitimate son succeeded to an impartible estate by rights of survivorship in preference to the widow of the legitimate son. As their Lordships state that the same rules apply to impartible estates as to partible estates for determining who is the heir, the fact that they were dealing with an impartible estate makes no difference. It appears from the report that Mr. Arathoon, Counsel for the appellants referred to the Madras decisions in *Krishnayyan v. Muthusami*(3) and *Ranoji v. Kandoji*(4) where a contrary view was taken to that in *Sadu v. Baiza and Genu*(2), but their Lordships of the Privy Council, after referring at some length to the judgment of NANABHAI HARIDAS, J., and WESTROFF, C.J., in *Sadu v. Baiza and Genu*(2) followed the decision.

I am of opinion that the effect of the decision of the Privy Council is to settle the law as propounded by NANABHAI HARIDAS, J. and to make the illegitimate son a member of the family of his putative father capable of inheriting to his father and succeeding to his legitimate brother's share by right of survivorship. It is difficult to see how there can be a *co-parcenary under the Mitakshara* with its necessary incidence of survivorship between two males who cannot for want of heritable blood be heirs to each other or to the person whose estate they inherit. The effect of the decision has been thus summarized by BHASHYAM AYYANGAR, J., in *Ramalinga Muppan v. Pavadai Goundan*(5):—

"If the legitimate son dies without leaving male issue, the illegitimate son becomes entitled to the whole estate. If the illegitimate son predeceases the legitimate son, leaving male issue and the legitimate son afterwards dies without leaving male issue, the whole property will devolve by survivorship on the issue of the

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(1) (1891) I.L.R., 18 Calc., 151 (P.C.). (2) (1889) I.L.R., 4 Bom., 37.
 (3) (1884) I.L.R., 7 Mad., 407. (4) (1885) I.L.R., 8 Mad., 557.
 (5) (1902) I.L.R., 25 Mad., 519 at p. 523.

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illegitimate son. This must be the necessary result if, as affirmed by the Privy Council, the legitimate and the illegitimate sons on the death of the father hold the family property as members of a joint family."

The rights of an illegitimate son and his position in the family of his putative father received a further extension in *Ramalinga Mupan v. Pavadai Goundan*(1), where it was held that in cases where an illegitimate son predeceases his putative father the illegitimate son's son would be entitled to a share as against the deceased brother of his grandfather as representing his father who if he had survived would have been entitled to a share.

Sir V. BHASHYAM AYYANGAR, J., was of opinion that a Sudra illegitimate son's right of inheritance was not contingent but absolute as in the cases of a legitimate son and that he was in a position more analagous to that of a legitimate son than that of other relations whose right of inheritance is liable to obstruction.

So far as competition between the illegitimate son and the widow of his putative father is concerned the view taken by MUTTUSWAMI AYYAR, J., in *Parrathi v. Thirumalai*(2) that she excludes the illegitimate son is, having regard to the decisions in *Chinnammal v. Varadarajulu*(3) and *Meenakshi Arni v. Appakutti*(4) (which hold that they divide the estate equally), no longer good law.

I am of opinion that the illegitimate son of a Sudra is one of the classes of sons recognised by Hindu Law and allowed to a Sudra in addition to the twelve classes of sons enumerated as common to all the four castes. In the case of Brahmans, Kshatriyas and Vysyas the classes of sons enumerated in verses 128 to 132 of Yagnavalkya and 166 to 177 of Manu except the *aurasa* and *dattaka* sons are obsolete, and in the case of Sudras they have in addition to *aurasa* and *dattaka* a third class of sons, namely, the '*dasi-putra*.' It seems difficult to see why under verse 185 of Manu in which succession is provided for in the case of the son dying issueless, the right of the father's illegitimate son should not be established, especially as verse 184 refers to sons of *all classes* succeeding to the estate in order of rank.

Where an illegitimate son of a Sudra dies, succession to him has to be traced according to the rules laid down as regards

(1) (1902) I.L.R., 25 Mad., 519 at p. 523. (2) (1887) I.L.R., 10 Mad., 334.
(3) (1892) I.L.R., 15 Mad., 307. (4) (1910) 20 M.L.J., 359.

apratibandha and *sapratibandha daya* as he is capable of inheriting and of transmitting heritable blood. If he has a legitimate issue or illegitimate sons who will satisfy the conditions of '*dasi-putras*,' they succeeded. In their absence the same rule should be applied as to the case of legitimate sons in the rules contained in verses 135 and 136 of Yagnavalkya and his putative father who is his '*pita*' in the legal and ordinary acceptance of the term would succeed. In the preceding verses the word '*pita*' is used in reference to sons whose mothers were not married to the fathers and different classes of sons are enumerated. There is nothing to indicate that the word '*pita*' in those verses was to be confined to the father of an *aurasa* or *dattaka* son and there is no reason why such a limitation should be imported into the meaning of the word in verses 135 and 136.

It has been argued strenuously by Mr. Narasimha Ayyangar that an illegitimate son has not been specially mentioned in Chapter II dealing with succession to a sonless Hindu and reference has been made to *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*(1). I do not think any inference against the illegitimate son can be drawn from the omission as in my opinion the illegitimate son of a Sudra was already referred to in the chapter dealing with the unobstructed heritago and having been included in the category of sons there was no reason for making any special mention of an illegitimate son of a Sudra in dealing with the heirs of a person who left no sons. If the illegitimate son of a Sudra was treated as a person who is a mere outsider and not a member of the family of his father, his exclusion in Chapter II may be a ground for not applying the rule of succession therein stated to him, but if his position is that stated by HARIDAS, J., in *Sadu v. Baiza and Genu*(2) it is difficult to see why separate mention is necessary.

I am of opinion that so far at least as the father is concerned the word *pita* should, for the purposes of tracing succession to the illegitimate son of a Sudra who is a '*dasi-putra*,' be taken to include a putative father. It is unnecessary to determine whether such a son is the '*sapinda*' of his father so as to enable him to inherit to other collaterals assuming that sapinda

(1) (1899) I.L.R., 21 All., 99 at p. 102. (2) (1880) I.L.R., 4 Bom., 37.

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relationship can only exist in the case of a valid marriage. Vignaneswara in dealing with the twelve classes of sons observes that :—

“the divisions of sons into two classes, the first six being heirs and kinsmen and the latter six kinsmen and not heirs must be expounded as signifying that the first six may take the heritage of their father's sapindas and samanodakas if there be no nearer heirs but not the last six.”

And adds that as regards however consanguinity and the performance of the duty of offering libations of water and so forth, both classes of sons are equal. The Saraswati Vilasa describes all the twelve classes of sons as *sapindas* of their father. As between the illegitimate son and his putative father filial relationship exists in my opinion for all purposes of inheritance and succession. It would be unreasonable to place the *dasi-putra* in a worse position than the *gudhaja* who is classed amongst heirs and kinsmen. The fact that the *gudhaja* is now obsolete is no ground for cutting down the rights of the *dasi-putra* whose sonship is recognised in the Kali age. The fact that the word *pita* or *pitaran* is wide enough to include the putative father owing to special considerations does not necessarily imply that a *dasi-putra* becomes *ipso facto* the preferential heir of all his father's collaterals in case of competition between him and the agnates of his father.

So far as collateral succession is concerned, all the Courts have held that an illegitimate son is not the heir to his putative father's collateral relations. The ground on which the exclusion is based is that the rule which guides collateral succession is based on the text of Manu as to the inheritance going to the nearest sapinda and as consequently excluding an illegitimate son as sapindaship presupposes a lawful marriage. A long catena of cases beginning from *Nissar Murtojah v. Kowar Dhunwunt Roy*(1), decided so long ago as 1863 have taken this view. There is considerable force in the view taken by Sarvadlukari in his learned treatise on the Law of Inheritance that all the analogies of Hindu Law are in favour of allowing him the right of succession to collaterals. Were the matter *res integra* and the case

were one of first impression to be decided on a consideration of the Smritis and commentaries, I would be inclined to hold with my learned brother SADASIVA AYYAR, J., that the illegitimate son of a Sudra is for the purpose of inheritance to collaterals in the same position as his *aurasa* son. The current of authorities against the view is very strong. I need only refer to *Krishnayyan v. Muttusami*(1), *Ranoji v. Kandoji*(2), *Parvathi v. Thirumalai*(3), *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*(4) and *Ramalinga Mupan v. Pavadai Goundan*(5), and I consider it unnecessary for the purpose of this reference to dissent from them.

Even assuming that the order of succession to a sonless Hindu given by Manu, Yagnavalkya and propounded by Vignaneswara in Chapter II, Section 1, placitum 2 of the Mitakshara would not *in terms* apply owing to the word *pita* being confined to the legitimate father, and to the want of sapinda relationship between a Sudra and *dasi-putra*, I see nothing to prevent succession to the illegitimate son being traced by analogy to the rule laid down in verses 135 and 136 of Yagnavalkya as explained in Chapter II, Section 1, placitum 2 of the Mitakshara especially as the Hindu Law recognises heritable blood between a Sudra and his *dasi-putra* and Manu states that the father of every one of the classes of sons enumerated by him succeeds to the property of the heirless son. The whole law of succession to dancing girls and prostitutes in cases not expressly provided for by the rules relating to *sridhana* has been built up by Courts on analogies furnished by other parts of the Hindu Law. In *Kamakshi v. Nagarathnam*(6), SCOTLAND, C.J., and COLLET, J., held that in the absence of any positive rule relating to the particular kind of property in dispute (the hereditary office of dancing girls attached to a temple) the law to be applied is the general law of inheritance regarding daughters or sons. In *Subramania Mudali v. Balakrishnaswami Naidu*(7), ARDUR RAHIM and SRINIVASA AYYANGAR, JJ., in dealing with the question of heirship to a dancing girl whose grandmother

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(1) (1863) Marshall's Reports, 609.

(1) (1884) I.L.R., 7 Mad., 407.
 (2) (1885) I.L.R., 8 Mad., 557.
 (3) (1887) I.L.R., 10 Mad., 234.
 (4) (1899) I.L.R., 21 All. 99.
 (5) (1902) I.L.R., 25 Mad., 519.
 (6) (1870) 5 M.H.C.R., 161.
 (7) (1917) 33 M.L.J., 207.

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was the issue of a marriage between her parents observed as follows:—

“The rules of *stridhana* obviously do not apply to such property and there is no other rule of succession laid down in the Smritis or the commentaries prescribing the devolution of property of a woman of this caste, except it be the general rule that to the nearest sapinda the inheritance next belongs.”

They acted on analogies and held that the great grand-father's brother's daughter succeeded in preference to her great grandfather's daughter's son. The argument that the analogy afforded by sapinda relationship, cannot be applied as there was no marriage is met by the observations that according to Vignaneswara, sapinda merely connotes relationship and reference is made to the Acharadhyaya of the Mitakshara (the commentary of Vignaneswara on verse 52). In *Venku v. Mahalinga*(1), MUTTUSWAMI AYYAR, J., was of opinion that in the case of adoptions by dancing girls questions as to inheritance and collateral succession should be adjudicated upon in the absence of a positive rule of law to the contrary with reference to the custom of the caste and the analogies of Hindu Law as indicated in *Kamakshi v. Nagarathnam*(2). In *Ramalinga Muppan v. Pavadai Gounden*(3), BHASHYAM AYYANGAR, J., rested the right of representation of the legitimate son of an illegitimate Sudra on the analogy of legitimate sons and grandsons and observed:

“The principles, therefore, applicable to the succession of sons and grandsons of legitimate sons may by analogy be applied to the sons and grandsons of an illegitimate son, viz., that they should be considered capable of representing the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died.”

Though there are no texts in the Smritis expressly recognising the right of an adopted son to inherit to his adoptive mother's relations, Courts have enforced the right on general principles of equity and good conscience and analogy to the right of the *aurasa*. The principle of *atidesa* whereby principles laid down with reference to one case are applied to other analogous cases was recognised by Jaimini in his *Mimamsa* (Books VII and VIII of Jaimini's *Mimamsa*).

(1) (1888) I.L.R., 11 Mad., 393.

(2) (1870) 5 M.H.C.R., 161.

(3) (1902) I.L.R., 25 Mad., 519 at p. 524.

Reference was made during the argument to the doctrine of reciprocity and it was argued that if the illegitimate son of his father was an heir to his putative father (as he undoubtedly is under Hindu Law) there was no reason to hold the converse not to be true. I think there is considerable force in the argument. Except in the case of females who come in only under special texts and the hermit, ascetic and brahmachari referred to in verse 137, I have not been referred to any instance where heritable blood is recognised between persons *who could not be the heirs of each other*. Where therefore a text expressly declares that a male is the heir of male, there is, in the absence of anything to the contrary in other texts, nothing to prevent the converse rule from being applied as a rule of equity and good conscience even though the case is not specially provided in the texts so long as there is nothing against it in the Smritis.

I would for the foregoing reasons answer the question referred in the affirmative.

N.B.

APPELLATE CIVIL—(FULL BENCH).

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield
and Mr. Justice Kumaraswami Sastriyar.

VAIDYANATHA SASTRI (PLAINTIFF), APPELLANT,

v.

SAVITHRI AMMAL AND TEN OTHERS (DEFENDANTS),
RESPONDENTS.*

1917,
January,
17 and 23,
April,
18 and 19
and July,
26.

*Hindu Law—Widow's alienation, not for necessary purpose—Subsequent adoption
—Right of adopted son to set aside alienation and recover alienated property.*

A Hindu widow alienated certain properties for a purpose not binding on the inheritance, and thereafter adopted a son.

Held, by the FULL BENCH that the alienation was not binding on the adopted son and that he could sue, during the life-time of the widow, to set aside the alienation and recover the properties so alienated, his cause of action arising from the time of his adoption.

Sreeramulu v. Kris'amma (1903) I.L.R., 26 Mad., 143, overruled.

Bonomali Roy v. Jagat Chandra Bhowmick (1905) I.L.R., 32 Calc., 669 (P.C.), and dictum in *The Collector of Madura v. Muttoo Ramalinga Sathupathy* (1868) 12 M.L.A., 397 at p. 413, followed.

* Second Appeal No. 275 of 1915.

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SECOND APPEAL against the decree of K. KRISHNAMA ACHARIYAR, the Subordinate Judge of North Arcot, in Appeal No. 41 of 1914 preferred against the decree of N. RAMASWAMI, the District Munsif of Tiruvannamalai, in Original Suit No. 361 of 1913.

The plaintiff brought this suit to establish his right to the plaint lands and to recover possession thereof from defendants Nos. 2 to 11 claiming the same as the adopted son of the last male owner, the first defendant's husband, by virtue of an adoption made by the first defendant in June 1908 under the authority of her husband and with the consent of his sapindas. In the alternative, he prayed for a declaration that the sale of the lands by the first defendant to the second defendant under whom the other defendants claimed was void and not binding on him after the first defendant's death. The alienation in second defendant's favour was made in the year 1901, i.e., seven years before plaintiff's alleged adoption. The defendants denied the factum and validity of the plaintiff's adoption and his right to sue during the widow's life-time. The District Munsif upheld the plaintiff's adoption and finding that the alienation by the first defendant in favour of the second defendant was not made for any necessary purpose, decreed possession of the lands to the plaintiff with costs, but ordered at the same time that plaintiff should pay compensation for the improvements made by the second defendant. Defendants Nos. 2 to 8 appealed. The Subordinate Judge on appeal agreed with the District Munsif as to the factum and validity of the plaintiff's adoption, gave a declaration of the invalidity of the sale beyond the life-time of the first defendant, but dismissed the suit so far as the claim for possession was concerned, relying on *Sreeramulu v. Kristamma*(1). Plaintiff preferred this Second Appeal to the High Court.

T. R. Krishnaswami Ayyar for the appellants.

K. S. Ganesa Ayyar for the second respondent.

The other respondents were not represented.

This Second Appeal came on for hearing in the first instance before SADASIYA AYYAR and SPENCER, J.J., who made the following ORDERS OF REFERENCE TO A FULL BENCH:—

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SADASIYA AYYAR, J.—I must confess that the strong inclination of my mind is to follow the decision of Justice Sir BHASHYAM

(1) (1933) I.L.R., 26 Mad., 143.

AYYANGAR in *Sreeramulu v. Kristamma*(1). I was a party to the decision in *Subbamma v. Subrahmanyam*(2) and in my judgment in that case I have mentioned a few further considerations which, in my opinion, ought to induce courts to support the validity of alienations by a widow heir till at least the end of her life. The legal status of a Hindu widow and the legal status of a Hindu reversioner have been made so anomalous and complex by commentators and by the decisions of courts that almost any decision in which such rights are discussed by even an eminent Judge like Sir BHASHYAM AYYANGAR can be subjected to criticisms of a plausible character. Of course, it follows that another decision coming to a diametrically opposite conclusion like that of Sir N. CHANDAVARKAR, J., in *Ramakrishna v. Tripurabai*(3) can be made the subject of not less effective criticisms by lawyers of learning. I shall not therefore try to add to the confusions and anomalies existing on this subject by attempting an elaborate support of Sir V. BHASHYAM AYYANGAR's views or an elaborate criticism of Sir N. CHANDAVARKAR's views. I feel, however, bound to state (with reference to the argument of Mr. T. R. Krishnaswami Ayyar *contra*) that I am not able to see any inconsistency between Sir V. BHASHYAM AYYANGAR's views found in different parts of his judgment as to the starting point for the period of limitation as regards suits brought (a) during the life-time of the widow and (b) after the death of the widow, nor do I think it against the law to hold that the reversioner who succeeds by reason of a widow's surrender of the estate in her hands, does not thereby enable the said reversioner to recover the properties which had been alienated by her before that surrender even during her life-time.

As regards *Bonomali Roy v. Jagat Chandra Bhowmick*(4) their Lordships of the Privy Council do not indicate the section of the Limitation Act of 1859 under which the suit was treated as barred or what the period of limitation (six years or twelve years) was, by whose lapse, the suit became barred. That Act does not contain schedules of articles like the later Acts of 1877, 1882 and 1908 and makes no such difference between suits brought during the life-time of the widow and after the death of the widow as is made in articles 125 and 141, Schedule 2 of the

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(1) (1903) I.L.R., 26 Mad., 143.
(3) (1909) I.L.R., 33 Bom., 88.

(2) (1916) 30 M.L.J., 260.
(4) (1905) I.L.R., 32 Calo., 669 (P.C.).

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present Limitation Act. It seems to contain only one general section (section 12) corresponding to article 144 of the present Act giving a period of twelve years for possession of immoveable property or of any interest therein. Section 16 of that Act gives six years for all suits not expressly provided for. A suit to set aside a lease improperly granted by a manager is not expressly provided for in that Act. An adopted son as distinguished from a contingent reversioner becomes entitled to a vested interest on the date of his adoption in his adoptive father's estate. His right to bring a suit under the Act of 1859 for possession of his said vested interest in the immoveable property (though physical possession might be postponed till the death of the widow alienor, his adoptive mother) might be made to arise under the Act of 1859 on the date of his adoption itself. Further in that Privy Council case, the alienation by way of lease had been made, not by B, the widow and heir of the last male owner but by B's mother-in-law (whom I shall call A) acting as manager for her son's widow B. The question in that case was as to when the cause of action for C, the son adopted by B (the daughter-in-law) to her husband to sue to set aside the lease granted by his adoptive grandmother and to recover possession of the property, arose and not the question of his right to sue for bare possession of any property alienated by his adoptive mother directly. Now, the right to avoid the lease granted by A was in the widowed daughter-in-law B between 1837 (when the lease was granted) and 1846 (the date of the adoption of C by B) but as soon as the adoption was made, the right to avoid became vested in the adopted son C and it was that right that was held to be barred (if I understand the Privy Council decision aright) probably by section 16 of the Act of 1859.

It will be seen from the judgment of the High Court of Calcutta in pages 672 to 674 that the setting aside of the lease of 1837 was held necessary before possession could be got from the lessee and that suit was held barred under the Act of 1859 at the latest twelve years after the adoption of C. The decision of the Privy Council in *Bonomali Roy v. Jagat Chandra Bhomick*(1) has therefore, in my opinion, no bearing on the question as to the applicability of sections 125, 141 and 144 of the present Limitation Act or on the question as to whether an alienee from

(1) (1905) 1 L.R., 32 Calc., 66 (P.C.).

the widow herself (not from her alleged manager acting beyond the scope of the manager's authority as in the Privy Council case) is valid in the alienee's favour during the life-time of the widow against the adopted son.

However, as my learned brother thinks that the question should be referred to a Full Bench, I do not think that I should object to this difficult question of law being so referred to a Full Bench on the mere ground that the principle of *stare decisis* should not be lightly departed from.

SPENCER, J.—The question which arises for our decision in this Second Appeal is whether an adopted son who has been adopted by a widow under authority given by her husband, can during the widow's life-time sue to recover possession of property alienated for purposes not binding upon the inheritance at a date prior to the adoption. The question has been answered in the negative in *Sreeramulu v. Kristamma*(1), by BHASHYAM AYYANGAR, J. He held that if an alienation was made not for a necessary purpose the subject of it would fall into possession as a vested remainder only at the termination of the widowhood, and the adopted son must wait till that event to bring a suit to recover it. We have not been referred to any other decision of this Court directly on the point. But this decision was dissented from in *Ramakrishna v. Triupurebai*(2), by CHANDAVARKAR and HEATON, JJ.; and in *Sinnachami alias Kumarettu Serragar v. U. A. R. Ramaswami Chettiur*(3), the late Chief Justice expressed a doubt whether *Sreeramulu v. Kristamma*(1), had been correctly decided. In Mayne's Hindu Law, eighth edition, paragraph 197, the question is considered as to the date on which the right of the adopted son arises in the case of an adoption by a widow after her husband's death; and the learned author quotes several authorities for his opinion that the son's rights date from the adoption. He notices the decision of BHASHYAM AYYANGAR, J., in *Sreeramulu v. Kristamma*(1), and observes that this decision proceeds upon a view which, if correct, cuts at the root of his reasoning. He says:

"When the case arises again it will be material to consider whether the widowhood, that is, the possession of a widow's estate

(1) (1903) 1 L.R., 26 Mad., 143.

(2) (1909) 1 L.R., 33 Bom., 83.

(3) (1911) 10 M.L.T., 463.

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The question has now arisen again for a decision by this Court. The Privy Council decision in *Bonomali Roy v. Jagat Chandra Bhowmick*(1), to some extent supports the view taken in *Ramakrishna v. Tripurabai*(2). In that case a widow adopted a son in 1846 who attained majority in 1856 and died in 1880. The widow who, prior to the adoption, granted a lease of a portion of her husband's estate died in 1894. It was held by their Lordships of the Privy Council that the right of action to set aside the lease as invalid, arose on the adoption and that the time would begin to run from the date when the adopted son attained majority. This dictum cannot be explained away on the ground that the Act of Limitation in force when the cause of action arose was Act XIV of 1859 because even under that Act the possession of a widow would not become adverse to the right of a reversioner until the widow's death [see *Sambasiva v. Ragava*(3)], and therefore the decision is only explainable on the supposition that their Lordships placed the rights of an adopted son on a different footing from those of a reversioner. In *Sreeramulu v. Kristamma*(4), BHASHYAM AYYANGAR, J., held that the starting point for the period of limitation in such suits was the date of adoption (see head-note). This conclusion would seem a little inconsistent with his conclusion on the other point that arose. It was sufficient for the purpose of that case to hold that the suit was not barred by limitation, and the learned Judge's view upon this point must therefore be treated only as alternative to the view expressed as to the adopted son's right of suit. At the bottom of page 146 he observes that if the suit to recover property improperly alienated were maintainable during the widow's life-time, the period of limitation should be computed from the date of adoption, the article applicable being article 144; but at the top of page 155 he observes that if the suit were brought after the widow's death article 141 would be applicable and the period of 12 years must be reckoned from the date of her death. It seems unreasonable to suppose that different articles of limitation should be applied according to the circumstances of the particular case. Evidently the learned Judge

(1) (1905) I.L.R., 32 Calc., 669 (P.O.).
(3) (1890) I.L.R., 13 Mad., 512.

(2) (1909) I.L.R., 33 Bom., 88.
(4) (1903) I.L.R., 26 Mad., 143.

felt the difficulty of applying the articles of the Limitation Act to his conclusion upon the other point. *Subbamma v. Subrahman-yam*(1) to which one of us was a party was a case of surrender by a widow in favour of a reversioner, and it was held that it merely had the effect of accelerating the succession. It seems anomalous that a reversioner who succeeds by reason of a widow's surrender of her life interest should be at once enabled to recover the properties of the last male owner which have been improperly alienated by the widow, while an adopted son's remedy should be postponed till the widow's death. It is clear that an adopted son's right is higher than that of a mere reversioner whose right of action is limited by article 141. If adoption divests the widow's estate as the adopted son derives his right to sue through his father, can it be held that it does not divest the estate of alienees from the widow? I am not much impressed by considerations as to the inequity caused to purchasers from a widow whose calculations as to their prospects of enjoyment during the widow's life are liable to be disturbed by a subsequent adoption. The length of a widow's life is in any case a matter of uncertainty and speculation and persons who take property from limited owners without proper consideration do not deserve much sympathy. The sooner that the validity of such alienation is challenged in a court of law the better the position in which each side will find itself to adduce evidence as to the necessity for the transaction. Sufficient has been said in the full discussion in *Ramakrishna v. Tripurabai*(2), to show that the correctness of the Madras decision based upon the opinion of BHASHYAM AYYANGAR, J., is open to question. I am of opinion that the Bombay decision represents the correct view of the law, and that a reference should be made to a Full Bench on the question *whether an adopted son who has been adopted by a widow acting under the authority of her husband can, during the widow's life-time, set aside the alienations made, not for necessary purpose before he was adopted and recover the property so alienated.*

ON THIS REFERENCE—

T. R. Ramachundra Ayyar (with T. R. Krishnaswami Ayyar) for appellant.—I submit that the view of Sir BHASHYAM

(1) (1916) 30 M.L.J., 260.

(2) (1909) I.L.R., 33 Bom., 88.

VAIDYANATHA SASTRI v. SAVITHRI AMMAL. AYYANGAR, J., in *Sreeramulu v. Kristamma*(1) is wrong and that of CHANDAVARKAR, J., in *Ramakrishna v. Tripurabai*(2) is correct. The passage taken from *Moniram Kolita v. Keri Kolutani*(3) and italicized by Sir BHASHYAM AYYANGAR, J., in *Sreeramulu v. Kristamma*(1) at page 153 has been wrongly understood in that case and it must be understood as laid down in *Ramakrishna v. Tripurabai*(2). Mayne in his Hindu Law, eighth edition, pages 262, 263, sums up the prevailing opinion that the right of the adopted son springs into existence on his adoption: see *Bonomali Roy v. Jagat Chandra Bhowmick*(4). *Sreeramulu v. Kristamma*(1) was doubted in *Sinnachami alias Kumarettu Servaigar v. U. A. R. Ramasami Chettiar*(5); see also *Kancherla Venkata raman v. Koganti Venkatramiah*(6). All the other High Courts are of the same opinion; likewise the text-writers: see *Moro Narayan Joshi v. Balaji Raghunath*(7), *Hari v. Vaman*(8), *Harek Chand v. Bejoy Chand Mohtoh*(9), *Amirta Lal Bagchi v. Jatindra Nath Chowdry*(10) and *Sahdeo Singh v. Ramnandan Singh*(11). Article 141 provides only for remainder-man or reversioner; an adopted son is neither.

K. S. Ganesa Ayyar for the second respondent.—I contend for the view of Sir BHASHYAM AYYANGAR, J., which has been followed in *Venkamma v. Pattaya*(12) and *Singaram Chettiar v. Kalyanasundaram Pillai*(13). The last is a case of a surrender by a widow after an alienation. The effect of an adoption is just like a surrender as both are voluntary acts of her own: see for similar cases of surrender—*Subbamma v. Subrahmanyam*(14) and *Chidambaramma v. Sareddi Hussainamma*(15): vide *Bapanna Venkata v. Bappanna*(16) (a case of adoption) and *Sircar on Adoption*, page 417. The principle that a person cannot derogate from his own grant ought to apply. *Bonomali Roy v. Jagat*

(1) (1903) I.L.R., 28 Mad., 143.

(2) (1909) I.L.R., 33 Bom., 88.

(3) (1880) I.L.R., 5 Calc., 776.

(4) (1905) I.L.R., 32 Calc., 669 at p. 677 (P.C.).

(5) (1911) 10 M.L.T., 463.

(6) (1914) 27 M.L.J., 569.

(7) (1885) I.L.R., 19 Bom., 809 at p. 819.

(8) (1900) 2 Bom. L.R., 411.

(9) (1905) 9 C.W.N., 795 at p. 798.

(10) (1905) I.L.R., 32 Calc., 165.

(11) (1907) 4 A.L.J., 354.

(12) (1910) 8 M.L.T., 320.

(13) (1914) M.W.N., 735.

(14) (1916) 30 M.L.J., 260 at p. 262.

(15) (1916) I.L.R., 39 Mad., 565.

(16) (1910) 6 I.C., 443.

Chandra Bhowmick(1) is distinguishable on the grounds that it was an alienation by a guardian and not by a widow and the alienation there was before the Limitation Act of 1859.

[WALLIS, C.J.—If a widow's alienations cease to be good on remarriage, why should they not similarly cease to be good on adoption?]

Remarriage puts an end to widowhood but an adoption does not; see *Murugai v. Viramakali*(2).

T. R. Ramachandra Ayyar (in reply).—An adopted son is in a better position than a contingent reversioner; he is equal to a son born then. On the extent of the powers of a widow: see *The Collector of Masulipatam v. Cavalry Venkata Narrainapah*(3) and *Lakshmana Raw v. Lakshmi Ammal*(4).

The FULL BENCH delivered the following OPINIONS:—

WALLIS, C.J.—This reference which was argued before the WALLIS, C.J. long vacation raises a question of considerable difficulty which has given rise to much difference of opinion. On the one hand we have the judgment of DAVIES and BHASHYAM AYYANGAR, JJ., in *Sreeramulu v. Kristamma*(5), which is supported by SADASIVA AYYAR, J., in the ORDER OF REFERENCE. On the other hand we have the current of Bombay decisions ending with *Ramakrishna v. Tripurabai*(6), with which SPENCER, J., agrees.

With reference to the decisions of the Privy Council which have been cited on either side, I may say at once that I do not consider *Bamundoss Mookerjee v. Mussamut Tarinee*(7) and *Moniram Kolita v. Keri Kolutani*(8), as of any assistance because the point now in question did not in any way arise for consideration by their Lordships and was not considered by them. As regards the first case it had been held by the Bengal Sudder Dewani Adawlat in *Ranee Krishnamonee v. Rajah Oodwunt Singh*(9), that an alienation for necessary purposes made by a widow before adoption could not be questioned by the adopted son. This was all that was decided, the head-note seems to go far beyond the decision. The judgment no doubt proceeded

(1) (1905) I.L.R., 32 Calc., 669 (P.C.).

(2) (1878) I.L.R., 1 Mad., 226 at p. 228. (3) (1861) 8 M.I.A., 529 at p. 550.

(4) (1882) I.L.R., 4 Mad., 160.

(5) (1903) I.L.R., 26 Mad., 143.

(6) (1909) I.L.R., 33 Bom., 88.

(7) (1858) 7 M.I.A., 169.

(8) (1880) I.L.R., 5 Calc., 776.

(9) (1823) 3 Ind. Dew. Ad. Rep., 228.

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on the view that the alienation would not have been binding at all upon the adopted son, if it had not been for a necessary purpose, but the point really did not arise. In the course of this case a pandit expressed the somewhat extravagant opinion that a widow who had a power of adoption but had not yet exercised it was in the position of a *femme enciente*, and more than twenty years later the right of such a widow to the possession and enjoyment of the estate left by her husband was questioned on the strength of this opinion in *Bamundoss Mookerjee v. Mussamut Tarinee*(1). The Sudder Dewani in 1850 overruled this contention in an elaborate judgment, which is set out at page 177, etc., of Moore's report, in which they pointed out that the decision in *Ranee Krishnamonee v. Rajah Oodwunt Singh*(2) was no authority for such a proposition and observed, it seems to me, *obiter* :

"In that case the son who was adopted became the undoubted heir; and it was of course the correct doctrine that no sale by a widow who possesses only a very restricted life interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity."

Though their Lordships expressed their agreement with the principles laid down in the judgment of the Sudder Court and their entire concurrence in it, it seems to me to be going too far to regard them as having adopted as their own the *obiter dictum* of the Sudder Court on a question which did not arise. More weight attaches to the observation of their Lordships in the well-known case of *The Collector of Madura v. Moottoo Ramalinga Sathupathy*(3) that

"the rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption," but this observation again was purely *obiter*.

On the other hand I am unable to agree with BHASHYAM AYYANGAR, J., in regarding the observation of their Lordships in *Moniram Kolita v. Keri Kolutani*(4) as direct authority the other way. In considering the question whether the well-known texts about the widow keeping unsullied the bed of her lord required

(1) (1858) 7 M.I.A., 169.

(3) (1868) 12 M.I.A., 397 at p. 443.

(2) (1823) 3 Sud. Dew. Ad. Rep., 228.

(4) (1880) I.L.R., 5 Cal., 776.

them to hold that her estate was forfeited by an act of unchastity committed after succession to the estate, their Lordships observed that, if it were so held, a purchaser or mortgagee from her would lose his estate in consequence of an act of unchastity committed by her prior to the sale or mortgage. The implication that in such a state of the law mortgages and alienations made by the widow before the act of unchastity would remain unaffected appears somewhat far-fetched, even if it be assumed for the moment that the same considerations would be applicable in the case of adoption as in the case of unchastity.

The more recent decision of their Lordships in *Bonomali Roy v. Jagat Chandra Bhowmick*(1) is, however, much more in point. The alienation in that case was said to have been made in 1837 by the widow's mother-in-law acting on her behalf. The widow subsequently in 1846 adopted a son who attained majority in 1856. The widow having died in 1894, the adopted son's representative sued for possession in 1897. The present contention that an alienation by a widow enures for her lifetime and is not divested by a subsequent adoption does not appear to have been raised for the plaintiff, the argument being that under the dispositions of the original owner the mother-in-law had the power to alienate the property for the term of the widow's life. Their Lordships, however, appear to have held expressly that the adopted boy's cause of action for the recovery of the alienated property arose on the date of his adoption, and that time began to run against him in 1856 on his attaining majority, and that the suit became barred in twelve years under Regulation II of 1803 and Act XIV of 1859.

This decision which is in accordance with the decisions of the Bombay Court and in accordance with their Lordships' dictum in *The Collector of Madura v. Moottoo Ramalinga Sathupathy*(2) is later than the decision of this Court in *Sreeramulu v. Kristamma*(3) and, so long as it stands unexplained, I feel bound to follow it.

At the same time I feel considerable reluctance in differing from the judgment of BHASHYAM AYYANGAR, J., in *Sreeramulu v. Kristamma*(3) and the opinion of SADASIVA AYYAR, J., one of the referring Judges, because I think there is much to be said

(1) (1905) I.L.R., 32 Cal., 889 (P.C.). (2) (1868) 12 M.I.A., 397 at p. 443.
(3) (1903) I.L.R., 26 Mad., 143.

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for the view taken by them that in the present state of the Hindu Law a Hindu widow, who, it is now well settled, has full powers of disposition over the income and accumulations of her widow's estate, should not be permitted, when in the exercise of such powers of disposition she has alienated for consideration her interest in whole or in part, to abridge the interest which she has parted with and derogate from her own grant by the subsequent exercise of a power of adoption which she is under no legal duty to exercise. It is well settled that a widow who has been authorized to adopt is at full liberty to adopt or not as she pleases and cannot be compelled by law to do so. Whether she is under a moral duty to adopt seems to me to be a matter for her own conscience, especially in these days when it is certainly open to question whether the old views as to the religious necessity of adoption to a sonless man are so universally or so strongly held and whether the temporal inconveniences attending it are not more fully realized. Moreover, to hold that the adopted son takes subject to the widow's prior alienations for the duration of her life would not interfere with the exercise of her powers of adoption unless the alienations were so considerable as to deter the boy's parents from giving him in adoption, and this I think is a consideration which should be regarded by the widow at the time of the alienation.

It has been held by this Court in *Subbamma v. Subrahmanyam*(1) that a widow cannot by surrendering her interest in the estate to the next reversioner deprive prior alienees for consideration from her of their right to enjoy the alienated property during her lifetime, and I think there is much to be said for applying the same rule to adoptions. I do not pursue the question further, because in the present state of the authorities and especially in deference to the *dictum* in *The Collector of Madura v. Mootoo Ramalinga Sathupathy*(2) and the decision in *Bonomali Roy v. Jagat Chandra Bhowmick*(3) I feel bound to answer the reference in the affirmative.

OLDFIELD, J.

OLDFIELD, J.—The question referred is *whether a son, adopted by a Hindu widow under her husband's authority, can during her lifetime recover property alienated by her for no necessary purpose*

(1) (1916) 30 M.L.J., 260.

(2) (1868) 12 M.I.A., 397 at p. 443.

(3) (1905) I.L.R., 32 Calc., 669 (P.C.).

before the adoption was made. In answering it in the affirmative, I confine myself to what, with all respect, seems to me the only safe ground of decision in such cases, the current of judicial authority. For, of the other grounds relied on, it is not clear on which side the weight of the argument from inconvenience would preponderate, if the uncertainty of the law authorized its consideration; and it is useless to recur to the very general wording of ancient texts, which have been dealt with frequently by the Courts.

It will facilitate the application of the authorities and define the issue before us, if the first citation is from the decision of this Court, which has occasioned the reference and from which we are asked to dissent: *Sreeramulu v. Kristamma*(1). Its foundation, as I understand it, is the statement, that

“a Hindu widow has an absolute right to the fullest beneficial interest in her husband's property for her life and that she has a personal interest therein, which she can exercise at her will and pleasure by giving or transferring the estate to another for her own life or, speaking more accurately, for the term of her widowhood”:

and no doubt this statement gives with sufficient accuracy the general effect of the nine cases and of Act XV of 1856, which are referred to as supporting it. But it is useless, as justified by them, for the present purpose, because they relate only to cases of the widow's death or remarriage, in which her widowhood and her estate ended together and the distinction between the duration of the one and the other would not have affected the determination of the estate she had conveyed. It is otherwise, when the making of an adoption is in question. For there is no dispute but that it terminates the widow's estate, although her widowhood continues: *Dhurm Das Pandey v. Mussamut Shama Soondri Dibiah*(2). If therefore the distinction proposed is valid, if, that is, the widow's power is correctly defined as being to dispose only of a widow's estate subject to all its legal incidents, not of an estate for the term of her widowhood, the authorities referred to are inconclusive and the statement of law founded on them must be rejected for the present purpose.

This distinction and the first of these views can in my opinion be sufficiently supported by reference to the principle

(1) (1908) I.L.R., 28 Mad., 143.

(2) (1843) 3 M.I.A., 229 at p. 242.

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enunciated in general terms in *Dhurm Das Pandey v. Mussamat Shama Soondri Dibiah*(1). For in view of those terms I cannot follow the suggestions that the widow can by unnecessary alienations diminish even temporarily the estate, which the son inherits at once on his adoption, and that the making of an adoption is to be excluded from the contingencies, which, like the widow's death or remarriage, her alienee must face as determining his rights, if necessity for the alienation cannot be proved. Before, however, turning to the arguments, by which those suggestions are supported [and they are in fact identical with those employed in *Sreeramulu v. Kristamma*(2)], I deal with the decisions, which favour the contrary conclusion.

It is not worthwhile to consider in detail those, which deal with the widow's powers generally and without reference to the effect of an adoption on their exercise, because, although some of them refer explicitly to her alienations as of a widow's estate, others refer to them as of an estate for her widowhood: and, as already observed, the maintenance of the distinction between these descriptions would have had no effect on the conclusion. There are, however, three cases in which an adoption was in question; and they are in my opinion decisive in favour of the adopted son's immediate right to recover from the alienee. In *Bamundoss Mookerjee v. Mussamut Tarinee*(3) the Privy Council adopted comprehensively the judgment of the Sudder Dewani Adalat under appeal before it, endorsing the following reference to another case, *Banee Krishnamonee v. Rajah Oodwunt Singh*(4):

"The point was whether a retrospective right could be claimed by a son, after he had been adopted, so as to bar a sale made by his adoptive mother previous to his adoption to the injury of his rights, at that time contingent and eventual, but which actually accrued to him upon his adoption. In that case the son, when adopted, became the undoubted heir; and it was of course the correct doctrine that no sale made by the widow, who possesses only a very restricted life interest, could hold good against any ultimate heir, whether an adopted son or otherwise unless under circumstances of strict necessity."

This recognition of the adopted son's right was, though the fact is not expressly referred to in *Bamundoss Mookerjee v.*

(1) (1843) 3 M.I.A., 229 at p. 242.

(3) (1858) 7 M.I.A., 169.

(2) (1903) I.L.R., 26 Mad., 143.

(4) (1823) 3 Sud. Dew. Ad. Rep., 228.

Mussamut Tarinee(1) accorded, as reference to the Sudder Dewani Adalat Report shows, in a suit instituted during the lifetime of the widow. Next there is a similar statement of the law in *Collector of Madura v. Moottoo Ramalinga Sathupathy*(2) made explicitly in the judgment of the Privy Council, though no doubt merely *obiter*. These two authorities are of course only indirect, the first being important mainly as evidence of an early recognition of the principle it involves. But to the remaining case, *Bonomali Roy v. Jagat Chandra Bhowmick*(3) no such objection is available, since the question dealt with in the judgment of the Privy Council was whether the suit brought by a person claiming under the adopted son was in time and it was held that, if the latter had a cause of action, it arose on the date of his adoption. The fact that the law of limitation then in force was Act XIV of 1859 is no ground of distinction from the present case, since the question was of the starting point for, not the period of, limitation; and, since a reversioner's cause of action arose under the earlier Act, as it does now, on the widow's death, the distinction in favour of the adopted son is marked clearly; *Sambasiva v. Ragava*(4) and in review, *Raghava v. Sambasiva*(5). These decisions of the Privy Council are accordingly irreconcilable with *Sreeramulu v. Kristamma*(6). It must be added that the last-mentioned case has been dissented from by the only other High Court, which has considered it; *Ramakrishna v. Tripurabai*(7).

It remains to deal shortly with the other considerations, by which the decision in *Sreeramulu v. Kristamma*(6) has been supported. They include first an argument from the explanation given in *Lakshmana Rau v. Lakshmi Ammal*(8) of the decision in *Bamundoss Mookerjee v. Mussamut Tarinee*(1) already referred to, in which it seems to me (with all respect) that the connection in which that explanation was given is overlooked. The Court was dealing with a point very similar to the main point dealt with in the earlier case, the effect on the widow's power of alienation of her possession of an authority to adopt; and it

(1) (1858) 7 M.I.A., 169.

(3) (1905) I.L.R., 32 Calc., 669 (P.C.).

(5) (1891) 1 M.L.J., 392.

(7) (1899) I.L.R., 33 Bom., 88.

(2) (1868) 12 M.I.A., 397 at p. 443.

(4) (1890) I.L.R., 13 Mad., 512.

(6) (1903) I.L.R., 26 Mad., 143.

(8) (1882) I.L.R., 4 Mad., 160.

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therefore had no occasion, especially as it held that the alienation in question before it was made for a necessary purpose, to define an adopted son's rights, to decide the date from which he could assert them or to consider the portion of the judgment extracted above, in which *Ranee Krishnamonee v. Rajah Oodwunt Singh*(1) is referred to. The reference, which follows in *Sreeramulu v. Kristamma*(2) to the decision in *Ganapathi Aiyar v. Savitriammal*(3) appears to disregard the fact that no alienation by the widow was in question in the latter case, her action, as the Court found, consisting only in the creation of documentary evidence of the oral devise by her husband, under which the alienee claimed; and therefore nothing at present material was decided. Next an extract from the judgment in *Meniram Kolita v. Keri Kolitani*(4) is relied on as showing that the validity of a widow's alienation can be affected only by her conduct prior to it and not, it is to be inferred, by her subsequently making an adoption; but the *dictum* in question, which no doubt actually mentions only prior conduct, is not statedly applicable to it alone and occurs in the course of a hypothetical argument from inconvenience, in connexion with which any conclusion *ex silentio* would be unsafe. Lastly it is argued that article 125, Schedule II of the Limitation Act, 1908, impliedly postpones the right to recover possession from a widow's alienee until after her death or re-marriage. The answer is firstly that substantive rights under Hindu Law cannot be regarded as curtailed by mere implication from a provision relating to procedure; and secondly that an adopted son is not and has not been shown to be on the same footing as a reversioner and that his suit for possession will be covered by article 14+.

The arguments, by which the conclusion in *Sreeramulu v. Kristamma*(2) is supported, failing, I would dissent from the decision in that case and answer the question referred in the affirmative.

KUMARASWAMI SASTRIYAR, J.—The question referred to us for decision is *whether an adopted son who has been adopted by a widow acting under the authority of her husband can during the widow's life time set aside alienations made not for necessary*

(1) (1823) 3 Sud. Dew. Ad. Rep., 228. (2) (1903) I.L.R., 26 Mad., 143.
(3) (1898) I.L.R., 21 Mad., 10. (4) (1880) I.L.R., 5 Calo. 776 (P.C.).

purposes before he was adopted and recover the property so alienated.

It has now been well settled that an adopted son has all the rights of a natural son in his adoptive father's estate. He acquires by right of adoption an interest in his adoptive father's ancestral property and the same right to question his alienations as the *aurasa* son. He succeeds to collaterals of his adoptive father and holds the same position as the natural son unless his right has been specially curtailed by express texts.

When a widow adopts a son under authority from her husband the son so adopted succeeds to the estate of his adoptive father by right of inheritance just in the same way as the natural born (*aurasa*) son. The estate which the widow had between the date of her husband's death and the date of the adoption is *at once divested* and becomes vested in him not as succeeding to the widow making the adoption but to the deceased person in pursuance of whose authority the adoption was made. Though his rights arise only from the date of his adoption they are paramount to those of the widow who is at once relegated to the position of a female member of the family entitled only to maintenance and residence in the family house. The position of such an adopted son is clearly and accurately set out by FARRAN, J., in *Moro Narayan Joshi v. Balaji Raghunath*(1), where he observes as follows:—

"Now an adopted son claims from and through his adoptive father. His adoption however does not relate back to the death of his adoptive father; *Bamundoss Mookerjee v. Mussamut Tarinee*(2). He comes in bound by such acts of the widow as would bind the natural heirs of the husband after her and entitled to set aside (in the absence at all events of stipulations to the contrary) such unauthorized alienation of the widow as they succeeding upon her death would be entitled to set aside. The only difference between him and other full-heirs of the husband for the purpose I am considering seems to be that rights spring into existence the moment of his adoption and displace the rights of the widow while the rights of other reversioners await the determination of the widow's estate by her death."

(1) (1895) I.L.R., 19 Bom., 809.

(2) (1858) 7 M.I.A., 169.

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In *Ranee Krishnamonee v. Rajah Oodwunt Singh*(1) it was held that a sale made by a widow to the prejudice of her late husband's property before the adoption made by her under authority given by her husband will not be valid as against the adopted son unless made under circumstances of necessity and that he was entitled to possession. This case was referred to by the Calcutta Sudder Court in *Bamundoss Mookerjee v. Mussamut Tarinee*(2) which was affirmed by the Privy Council; *Bamundoss Mookerjee v. Mussamut Tarinee*(2). Referring to *Ranee Krishnamonee v. Rajah Oodwunt Singh*(1) the Judges of the Sudder Court observed as follows:—

"The point in that suit was whether a retrospective right could be claimed by a son after he had been adopted so as to bar a sale made by his adoptive mother previous to his adoption to the injury of the rights at that time contingent and eventual but which actually accrued to him upon his adoption. In that case the son when adopted became the undoubted heir, and it was of course the correct doctrine that no sale made by a widow who possesses only a very restricted life interest in the estate would have been good against any ultimate heir whether an adopted son or otherwise unless made under circumstances of strict necessity."

Their Lordships of the Privy Council simply confirmed the judgment of the Sudder Court with the remark that they entirely agreed in the principles laid down in the judgment which was in their opinion most able and elaborate: *Bamundoss Mookerjee v. Mussamut Tarinee*(2). In *The Collector of Madura v. Moottoo Ramalinga Sathupathy*(3), their Lordships distinctly lay down that the rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption.

In *Lakshmana Rau v. Lakshmi Ammal*(4), the decision of the Privy Council above referred to was considered and it was held the decision established that during the period between her husband's death and the adoption only such acts as are authorized and would be effective against reversioners, would bind the son taken in adoption and that acts in excess of her powers under Hindu Law may be challenged by the adopted son.

(1) (1823) 3 Snd. Dew. Ad. Rep., 228.
(3) (1868) 12 M.I.A., 397.

(2) (1858) 7 M.I.A., 169 at p. 246.
(4) (1882) I.L.R., 4 Mad., 160.

The decision of the Privy Council in *Bamundoss Mookerjee v. Mussamut Tarinee*(1) was also considered by the Bombay High Court in *Nathaji Krishnaji v. Hari Jogoji*(2), where relying on the authority of the case, the Court upheld the right of the adopted son to set aside unauthorized alienation made by a Hindu widow between the date of her husband's death and the adoption made in pursuance of authority given by him. So far as the Bombay High Court is concerned a series of well-considered decisions clearly establish the adopted son's right to recover immediate possession. I need only refer to *Lakshman v. Radhabai*(3), *Moro Narayan Joshi v. Balaji Raghunath*(4) and *Ramakrishna v. Tripurabai*(5).

Though the rights of the adopted son commence only from the date of his adoption it is undoubted law that he divests the estate of the widow making the adoption and her co-widows and the interest (wholly or partially) of all persons in possession of the property of his adoptive father to whom he would have a preferential title if he had been in existence as adopted son at his adoptive father's death. In *Dhurm Das Pandey v. Mussumut Shama Scondri Dibiah*(6) their Lordships of the Privy Council observe (p. 243):

"and objection has been made that pending the suit an act of adoption was executed by the respondent whereby the whole property was divested from the mother and vested in the adopted son. Now upon the authorities there can be no doubt that that is the result of an act of adoption because the property is in the widow from the death of the husband till the power of adoption is exercised. Then that adoption divests it from the widow and vests it in the adopted son."

The authorities in my opinion clearly establish the view that an adoption puts an end to the widow's estate as fully and effectually as her death.

Such being the rights of an adopted son who on adoption claims under a title paramount to that of the widow and divests her of the estate she held, the question is whether the widow who alienates properties *without any legal necessity* and the alienee from such widow have any rights or equities which would

(1) (1858) 7 M.I.A., 169.
(3) (1857) I.L.R., 11 Bom., 609.
(5) (1909) I.L.R., 33 Bom., 48.

(2) (1871) 8 Bom. H.C.R.(A.C.J.), 67.
(4) (1895) I.L.R., 19 Bom., 809.
(6) (1843) 3 M.I.A., 229.

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entitle the alienee to possession as against the adopted son. I find it difficult to see how the purchaser from a Hindu widow who has only limited powers of alienation and who alienates property without any necessity or justifying circumstances such as would bind the reversioners after her death or re-marriage can invoke any principles of Hindu Law or any equity to prevent the adopted son (whose adoption has put an end to the widow's estate just as effectively as her death or re-marriage) from claiming possession of properties which were alienated. I can see very little equity in postponing the adopted son to a purchaser from the widow who contrary to the principles of Hindu Law and the directions of Smriti writers [alienates the estate for no necessity. Whatever may be the nature of the estate taken by a Hindu widow succeeding to her sonless husband it is clear that her powers of alienation are restricted. As pointed out by the Privy Council in *The Collector of Masulipatam v. Cavalry Vencata Narrainapah*(1), the estate she takes is a qualified proprietorship with powers of alienation for purely worldly or secular purposes only where there is justifying necessity and the restrictions to the powers of alienation are inseparable from her estate. So far as the texts and Smritis go they do not countenance the view that a widow can make a valid alienation of any kind or to any extent without justifying necessity and no distinction is drawn as to alienations purporting to be for her lifetime only. The text of Katyayana is specific and enjoins her to keep the bed of her lord unsullied to enjoy with moderation his estate and pass it on to his heirs. Brihaspathi observes that she has not got property therein to the extent of gift, mortgage or sale except for spiritual or religious purposes. The restraints on powers of alienation by a Hindu widow are based, as pointed out by their Lordships of the Privy Council in *The Collector of Masulipatam v. Cavalry Vencata Narrainapah*(1), not merely for the protection of the material interests of her husband's relations but by reason of the opinion of all the Smriti writers as to the necessity of a Hindu widow being under the advice and protection of her husband's elderly relations. I can find nothing in any of the Smritis or commentaries to warrant the view that they empower a Hindu

(1) (1861) 8 M.I.A., 529.

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widow to do what she likes with her limited estate. On the contrary the limitations imposed and the reasons given for the imposition thereof show to my mind clearly that such an idea was repugnant to the minds of the Smriti writers. So far as judicial decisions go, all that they decide is that a Hindu widow may deal with her interest in the property inherited at her pleasure so long as such dealing enures for the term she is entitled to the estate as widow succeeding to her sonless husband and no prejudice to the reversion is caused thereby: see *Muthu Naicken v. Srinivasa Ayyangar*(1). This is chiefly due to the fact that there is in existence no person who can demand present possession of the estate (the reversionary heirs having only a *spes successionis*) and the widow is estopped from contesting the validity of her own grant. The title of the alienee is therefore incapable of being defeated by any superior title arising during the widow's life.

That the estate of the widow is not an indefeasible life estate but only an estate *durante viduitate* is clear. It is not disputed that the adopted son would divest the widow of all the properties which remain unalienated at the time of the adoption and it is well settled law that her re marriage will have the same effect so far as the reversioners of her husband are concerned. It is difficult to see how the widow can under these circumstances be said to have an absolute indefeasible estate in the property inherited by her from her husband during the term of her natural life. If she has not got such an estate it is still more difficult to see how any alienation by her can last a moment longer than the cessation of the widow's estate either by death, re-marriage or an adoption which certainly divests her as completely as if her husband had left male issue. To speak of any portion of the estate which has been alienated by her without any legal necessity as having been 'lawfully severed' for the period of her natural life is with all respect unsupported by any texts of the Hindu Law or any principle of Hindu Jurisprudence. It has not been suggested by anybody that a gift of the whole or any part of the estate would, if made prior to the adoption, disentitle the son to claim possession from the donor. As pointed by CHANDAYAR, J., in *Ramakrishna v. Tripurabai*(2),

(1) (1911) 1 M.W.N., 82.

(2) (1099) I.L.R., 33 Bom., 88.

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the doctrine enunciated in *Sreeramulu v. Kristamma*(1), would be equally applicable if the widow alienated the *whole of the properties* before adopting a son and yet it can hardly be contended that such a result was ever contemplated by Smriti writers.

There seems to me to be no real analogy between the position of a father to whom a son is born after an alienation and a Hindu widow who adopts under authority of her husband after making an unauthorized alienation. Though the fiction of constructive pregnancy through permission to adopt has been exploded by a series of decisions, the adopted son on his adoption becomes the son and heir of his father and the adoption has retrospective effect in so far as it divests wholly or partially the estate of all persons whom he would have either excluded from the inheritance or shared with. The estates held by a sonless father and a Hindu widow with authority to adopt are essentially different in nature and extent, and the difference has been pointed out by CHANDAVARKAR, J., in *Ramakrishna v. Tripurabai*(2) and by COLLINS, C.J., and HANDLEY, J., in *Jagannadha v. Papamma*(3). So far as rever-sioners are concerned their position is quite different from that of an adopted son. Till the death of the widow or the termination of her estate, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband as the property under Hindu Law descends to those who would have been heirs to the husband if he had lived up to and died at the moment of her death. When however the widow makes a valid adoption a son is by fiction of law born to her husband the moment she adopts and he by virtue of his sonship succeeds immediately to his father's property as effectually as if he was a posthumous son.

The decision of the Privy Council in *Bonomali Roy v. Jagat Chandra Bhowmick*(4) supports the view that the adopted son is entitled to immediate possession of property wrongfully alienated by a widow before his adoption. The facts of the case are fully set out at pages 669 to 671 of the report and the judgment of the High Court appears on pages 672 to 674 of the

(1) (1803) I.L.R., 26 Mad., 143.

(2) (1909) I.L.R., 33 Bom., 88. (3) (1893) I.L.R., 16 Mad., 400 at p. 404.

(4) (1905) I.L.R., 32 Calc., 669 (P.C.).

report. It will be seen that the adopted son sued to set aside a perpetual lease granted between the date of the death of his adoptive father and his adoption and recover possession. Various contentions were put forward which are fully dealt with in the judgment of the High Court. One of them was that the lease was executed by the mother-in-law of the widow acting as her guardian and that as the lease was not repudiated by her it must be taken to be the act of the widow and consequently limitation began to run as against the adopted son only from the death of the widow. If the view taken in *Sreeramulu v. Kristamma*(1), namely, that the cause of action for possession arose only on the widow's death were correct, it is clear that the suit would not have become barred at the date of its institution, assuming that the lease was one executed by the widow's guardian on her behalf and ratified by her. The following passage in the judgment of their Lordships of the Privy Council shows that they were of opinion that the right to possession arose immediately on adoption :—

“ On the most favourable view for the appellants she (Hemlate the mother-in-law of the widow making the adoption) granted the putni as manager of the estate for Brajeswari (the widow who adopted the plaintiff) the then legal owner. If the putni was void the period of limitation ran from the date on which it was granted under Regulation II of 1803 as amended by Regulation II of 1805 which was then in force. But if it was voidable only by Brajeswari's successor the right of action arose on the adoption of Banwari Lall and time would begin to run against him from the date when he attained majority in 1856. Under either Regulation II of 1803 or Act XIV of 1859 time ran from the date when the cause of action arose.”

It was contended by Mr. Ganesa Ayyar in the course of his able argument that the question as to the right of the adopted son to set aside the alienation of his adoptive mother did not arise for determination as the Courts were only concerned with the lease granted by her mother-in-law acting under an *anumati patra* granted by adopting widow's father-in-law. A reference to the judgment of the High Court which deals with every possible alternative case or contention and the judgment of the Privy Council which deals with the point of view most favourable

(1) (1903) I.L.R., 26 Mad., 143.

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to the plaintiff and treats the lease as one by the widow making the adoption shows that the aspect of the case now before us was considered. It is no doubt true that the decision in *Sreeramulu v. Kristamma*(1), was not cited at the bar or considered by their Lordships but this is hardly a ground for overlooking what is in my opinion the plain result of the decision of their Lordships. In *Sivagnanam Servaigar v. Ramaswami Chetti*(2), Sir ARNOLD WHITE, C.J., observed that the decision in *Sreeramulu v. Kristamma*(1) does not seem to be reconcilable with the decision of the Privy Council and SPENCER, J., is of the same opinion in the ORDER OF REFERENCE.

In *Amrita Lal Bagchi v. Jatindra Nath Chowdry*(3) which was a suit to set aside an alienation by a widow who subsequently made an adoption it was held following *Lakshman v. Radhabhai*(4), *Nathagi Krishnaji v. Hari Jagoji*(5), *Moro Narayan Joshi v. Balaji Raghunath*(6), *Bijoy Gopal Mukerji v. Nil Ratan Mukerji*(7) that the cause of action which an adopted son has to set aside an alienation accrued as soon as he is adopted and that as he was barred, those who came after him were likewise barred even though the suit was within twelve years from the date of the widow making the alienation. The view taken was that as the adopted son divests the estate of the widow and becomes entitled to possession immediately he is adopted and not on her death, article 141 of the Limitation Act has no application as it only provides for cases when the person suing is entitled to possession on the death of the female. In *Kancherla Venkataraman v. Koganti Venkatramiah*(8), WALLIS, C.J., and SESHAGIRI AYYAR, J., following *Moro Narayan Joshi v. Balaji Raghunath*(6), *Hari v. Waman*(9), *Harek Chand v. Bejoy Chand Mahtab*(10) and the view taken in *Sreeramulu v. Kristamma*(1) as to the article of the Limitation Act applicable, held that the adopted son is governed by article 144 and has twelve years from the date of his adoption. The facts as appear on the judgment show that the widow before adopting the plaintiff entered into a partition with her mother-in-law which the learned

(1) (1903) I.L.R., 28 Mad., 143.

(3) (1905) I.L.R., 32 Calc., 165.

(5) (1871) 8 Bom. H.C.R., 167.

(7) (1903) I.L.R., 30 Calc., 990.

(9) (1900) 2 Bom. L.R., 411.

(2) (1912) 22 M.L.J., 85.

(4) (1887) I.L.R., 11 Bom., 609.

(6) (1895) I.L.R., 19 Bom., 509.

(8) (1914) 27 M.L.J., 569.

(10) (1905) 9 C.W.N., 795.

Judges agree in holding was not binding on the adopted son. If the learned Judges intended to adopt the view of BHASHYAM AYYANGAR, J., in *Sreeramulu v. Kristamma*(1) on the other question and to hold with him that the adopted son had no right to recover possession of property alienated by the widow prior to the adoption till the death of the widow it is difficult to see why article 141 of the second schedule to the Limitation Act would not apply and exclude article 144 which is only a residuary article as quoad the property alienated the adopted son would be in the same position as any other Hindu entitled to the possession of immoveable property on the death of a Hindu female. SESHAGIRI AYYAR, J., in dealing with *Runchordas v. Parvatibai*(2) observes

"The principle of the decision is that until the plaintiff's right to immediate possession accrues his right to possession is not barred. In the case of a reversion the cause of action will accrue on the death of the widow; in the case of an adopted son, on his adoption"

and the observations suggest that he was not in agreement with the view of BHASHYAM AYYANGAR, J., that the right to possession in case of alienation prior to the adoption accrues only on the death of the widow.

Reference has been made to cases where it has been held that a reversioner to whom the widow surrenders the estate (and thereby accelerates the succession) cannot sue to set aside the alienation made by her till she dies. These cases have in my opinion no bearing or application to cases of adoption by the widow. The whole doctrine of surrender and consequent acceleration of the estate of the reversioners has no basis in Hindu Smritis but has been evolved by courts of justice on general principles of jurisprudence. An anticipation of interest involved by the theory of relinquishment or the defeasance of an ulterior interest by the intermediate acts on the part of the widow are hardly contemplated by the Hindu law-givers. It is clear that the surrender by the widow and the acceptance of the estate by the reversioner are purely matters of contract. The widow is not bound to surrender the estate nor is the reversioner bound to accept it except on terms which would apply to any other transfer of immoveable property so far as prior alienees are concerned and conditions which Courts will impose on considerations of

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(1) (1903) 26 Mad., 143.

(2) (1899) I.L.R., 23 Bom., 725 (P.C.).

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justice, equity and good conscience. To a voluntary relinquishment by the widow based on no considerations of duty to her husband or his spiritual benefit courts have very properly refused to annex the right to defeat alienations made by her which would enure longer but for her voluntary act. As between the widow, the prior alienee, and the reversioners claiming title under a subsequent surrender the alienee has a clear equity to retain possession and the fruits of his purchase till at least the widow dies. But what equity is there in favour of a person who purchases property from a Hindu widow knowing that there is absolutely no necessity for the sale and that she has authority to adopt which she could exercise at any time. It is his clear duty to enquire as to whether she has authority to adopt just as it is the duty of a person dealing with a qualified owner to enquire into the existence of necessity for the alienation. It is no doubt true that the power to adopt has no legal effect till it is actually exercised but the adoption made in pursuance does not put the adopted son in the same position as a volunteer. Having regard to the spiritual importance attached by Hindu law-givers to sonship and the care and anxiety displayed by them to provide for a substitute in case a son is not born, there can be little doubt that a Hindu widow who has been solemnly enjoined by her husband to perform (what was in his eyes at least) the sacred duty of adopting a son so as to continue his name and lineage and to enjoy and transmit the property to his descendants is under a strong moral obligation sanctioned by the dictates of duty and the pieties of human life to carry out his wishes. It is true she cannot be compelled to adopt but this is due not to the unimportance of the duty but to the absence of any legal machinery by which she can be compelled to perform so personal an act. Self-interest often deters her from performing a duty which according to all Hindu law-givers and the views and sentiment of the great majority of Hindus is of paramount importance to the spiritual needs of her husband and his ancestors but the duty if performed is far from a purely voluntary act on her part but on the contrary one which she was bound to perform by all the dictates of duty and morality as understood by Hindu Law and sentiment. It has been argued that it would be a hardship on the widow to terminate the alienation made by her as it would place a difficulty in the way of her dealing with

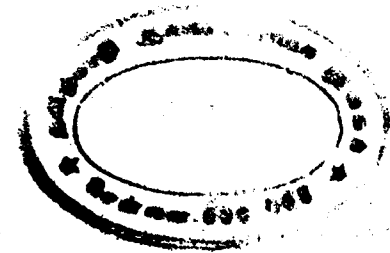


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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 11, EXPL. V; SEC. 47 AND O. XX, R. 12:—See RES JUDICATA.

—SCH. II, SEC. 18:—See ARBITRATION.

—O. I, R. 8:—See MUTT.

—O. XII, R. 5:—Stay of execution by an

Appellate Court—Order for execution by Court of first instance in ignorance of order of stay—Order for execution, validity of.] Held by the Full Bench:—

Where subsequent to an interim order for stay of execution made by an Appellate Court without notice to the decree-holder but before its communication to the Court of first instance, an order of attachment is made by the latter Court, the order of attachment is not void and ineffectual as having been made without jurisdiction, but is legally valid. The order is effective only from the time it is communicated to the first Court. *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar* (1910) I.L.R., 38 Mad., 74 and *Bessesswari Choudhury v. Hurro Sundar Mosumdar* (1892) 1 O.W.N., 226, followed. *Hukum Chand Boid v. Kamalanand Singh* (1906) I.L.R., 33 Cal., 927, not followed. *Ramanathan v. Arunachellam* (1915) I.L.R., 38 Mad., 768, overruled.

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CUSTOMARY LAW OF SOUTH KANARA—Kushikanam lease—Compensation for improvements—Right of tenant to possession until payment—Possession by tenant after period of lease, nature of—Possession, if adverse—Notice to quit, if necessary—Customary law of Malabar—Malabar Compensation for Tenants Improvements Act (Madras Act I of 1900), principles of, if applicable.] Under the customary law of South Kanara, a kushikanam lessee is, as in Malabar, entitled to remain in possession of the holding after the expiry of the period fixed in the lease until he is paid the value of the improvements;

consequently, he does not acquire title by adverse possession by remaining in possession of the lands for more than twelve years after the expiry of the lease. *Srinivasa Pillai v. Venkatammal* (1918) 24 M.L.J., 296 and *Kummatha Vittal Kunhi Kuthalai Baji v. Reverend Antoni Goveas* (1918) M.W.N., 389, referred to. *Subbraveti Ramiah v. Gundala Ramanna* (1910) I.L.R., 33 Mad., 280, distinguished. A kushikanam lessee who remains on the land after the period fixed in the lease, awaiting the payment of compensation for improvements, is not holding over as a tenant, and, in the absence of evidence of assent by the landlord to the continuance of the tenancy, is not entitled to a notice to quit. Section 5 of the Malabar Tenants Improvements Act (I of 1900) only embodies the customary law of Malabar and South Kanara.

Thema v. Kunhi Pathnomma ... (1918) I.L.R., 41 Mad., 119

DEBT before partition, father's, son's pious obligation to discharge after partition:—
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ESTATES LAND ACT (MADRAS ACT I OF 1908), SEC. 26—*Suit in a Revenue Court—Contract between previous landholder and tenant as to rate of rent—Rate, lower than the lawful rate, whether binding on successor—Validity of contract—Jurisdiction of Revenue Court to decide.* A Revenue Court exercising jurisdiction under the Madras Estates Land Act is competent to decide all incidental questions the determination of which is necessary for the disposal of the main question arising in the case; and in a suit filed to contest the right to sell a holding for arrears of rent under the Act the Revenue Court can decide on the validity of a contract between the landholder's predecessor in title and the tenant as to the rate of rent, although the objection to its validity is based on grounds other than those specified in section 26 of the Act. *Raja of Pittapore v. Sreerama Charyulu* (1911) M.W.N., 30, explained.

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SEC. 40, CL. (3)—'Years' in, meaning of—*Swami-bhogam*, whether rent or cess within section 8, clause (11)—*Agreement between landlord and tenant for a consolidated grain rent, enforceability of.* In section 40, clause (3) (a) of the Madras Estates Land Act, 'preceding ten years,' means the ten years preceding the year in which the Collector determines the amount of the commuted rent and not the ten years preceding the year in which the suit is instituted; and 'year' means the year of the lease, that is, the year for which the landlord is entitled either by custom or contract to claim rent, and not the *faski* or the calendar year. *Swami-bhogam* is 'rent' within section 3, clause (11) and is not a cess. Where a fixed grain *pattam* (rent) has been agreed to, the arrangement is binding on both the parties and it is not open to the tenant to reopen the same on the ground that certain illegal cesses were included therein. When the Revenue Court refuses commutation, an appeal lies under Schedule A, clause 4 of the Act only to the District Collector and not to the District Court; and hence no second appeal lies to the High Court from such order of refusal. *Jesatoollah Paramanick v. Jugodindro Narain Roy* (1874) 22 W.R., 12, followed.

Sivanupattia Thevar v. Zamindar of Urkal ... (1918) I.L.R., 41 Mad., 100

EXECUTION, order for, by Court of First Instance in ignorance of the Appellate Court's order for stay:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLI, R. 5.

HINDU LAW—*Promissory note executed by father before partition—Renewal of the note by father after partition—Son's liability on such note—Pious obligation to discharge father's debts, extent of.* A Hindu son is not liable during his father's lifetime on a promissory note executed by his father after partition in renewal of a note executed by the father before partition. The recent decision of the Judicial Committee in *Sahu Ram Chandra v. Bhup Singh* (1917) L.R., 44 I.A., 126, does not overrule the long line of decisions as to the right of the creditor of a Hindu father to sue the father and the sons for an antecedent debt incurred by the father for purposes neither illegal nor immoral and to attach and to bring to sale the interest of the sons as well as of the father in execution of the decree in such a suit. Per KUMARASWAMI SASTRIYAR, J.—The decision in *Sahu Ram Chandra v. Bhup Singh* (1917) L.R., 44 I.A., 126, makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son assuming that it arises at all during the lifetime of the father, arises only if the father's share or his self-acquisitions are insufficient to meet the debts.

Peda Venkanna v. Sreenivasa Deekshatulu ... (1918) I.L.R., 41 Mad., 136

LANDLORD AND TENANT, agreement between, for a consolidated grain rent:—See ESTATES LAND ACT (MADRAS ACT I OF 1908), SEC. 40, CL. (3).

LEASE, *Kushikanam*:—See CUSTOMARY LAW OF SOUTH KANARA.

LIMITATION:—See LIMITATION ACT (IX OF 1908), SEC. 7 AND ART. 44.

— See MUTT.

LIMITATION ACT (IX OF 1908), SEC. 7 AND ART. 44—*Sale by a Hindu mother as guardian of her only son—Second son in the womb at the time of sale—Subsequent sale by both the sons to another—First purchaser dispossessed by the latter—Suit in ejectment—Limitation.* The plaintiff claimed under a sale-deed executed by a Hindu widow as guardian of her only son at a time when she had another son in the womb. The plaintiff was afterwards forcibly ejected by the appellant who had obtained a later sale-deed from the elder son who executed it both on behalf of himself and his minor brother. The plaintiff sued in ejectment more than three years after the first son's attaining majority but within three years of the attainment of majority by the second. Held, that no suit having been brought by the first son within the period prescribed by article 41 of the Limitation Act to set aside the sale, the plaintiff's right to the share of the first son became absolute and that as the mother did not execute the sale-deed as guardian of the second son, his share in the suit land did not pass to the plaintiff. Held also, that as the causes of action for the two sons were different, section 7 of the Limitation Act had no application to the facts of the case. *Doraiswami Serumadan v. Nondisami Saluvan* (1915) I.L.R., 38 Mad., 118 (F.B.), distinguished.

Kandasami v. Irusappa ... (1918) I.L.R., 41 Mad., 102

..., SEC. 29 (1) (b), 'affect' in, meaning of—*Applicability of the Act to affect periods of limitation prescribed by Provincial Insolvency Act (III of 1907).* Held by the Full Bench, that recourse cannot be had to the general provisions of the Limitation Act (IX of 1908) in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act (III of 1907), as such recourse would affect the specially prescribed period of limitation, within section 29 (i) (b) of the Limitation Act. *Abu Backer Sahib v. The Secretary of State for India* (1911) I.L.R., 34 Mad., 505 (F.B.), followed.

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..., ARTS. 120, 134 AND 144:—*See MUTT.*

MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (MADRAS ACT I OF 1900):—*See CUSTOMARY LAW OF SOUTH KANARA.*

MUTT—*Improper alienation of mutt properties by the head of the mutt—Suit by disciples under Order I, rule 8, Civil Procedure Code (Act V of 1908), to set aside the alienation and for possession to be given to the head of the mutt for the time being, whether maintainable—Limitation—Limitation Act (IX of 1908), arts. 120, 134 and 144, applicability of.* The disciples of a mutt have sufficient 'interest' within Order I, rule 8 of the Civil Procedure Code to maintain a representative suit not only for a declaration of the invalidity of an improper alienation of the mutt properties by the head of the mutt, but also for a decree directing possession to be given to the head of the mutt for the time being. It is immaterial whether the head of the mutt be a trustee or only a life-tenant. The suit being one for possession, the article of the Limitation Act applicable is not 120, but article 134 or 144, according as the head of the mutt is a trustee or only a life-tenant; and the right to sue for possession arises from the date of the alienation or when possession begins to be adverse. Possession which is adverse to the institution is equally adverse to the plaintiffs who sue on its behalf.

Chidambaranatha Thamtiran v. Nallasiva Mudaliar. (1918) I.L.R., 41 Mad., 12

PENAL CODE (ACT XLV OF 1860), SS. 441 AND 448—*Criminal trespass—Finding that the trespass was committed with one of the intents specified in the section, whether necessary—Knowledge of the consequences of the trespass, whether sufficient to inculcate.* Held by the Full Bench (AYLING, J., differing):—Trespass is an offence under section 441, Indian Penal Code, only if it is committed with one of the intents specified in the section and proof that a trespass committed with some other object was known to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction under section 448, Indian Penal Code. Distinction between 'intention' and 'knowledge of likelihood,' pointed out. *Queen-Empress v. Rayapadayachi* (1896) I.L.R., 19 Mad., 240, followed. *Emperor v. Lakshman* (1902) I.L.R., 26 Bom., 558, and the view of BENSON, J., in *Sellamuthu Sertuigaran v. Pollamuthu Karuppan* (1912) I.L.R., 35 Mad., 186, not followed. *Per* AYLING, J.—A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intent to insult or annoy within section 441, Indian Penal Code: but where the trespasser knows that his trespass is practically certain in the natural course of events to cause

insult or annoyance, it is open to the court to infer an intent to insult or annoy. It is a question of fact whether this presumption of intent is displaced by proof of any independent object of the trespass.

Vullappa v. Bheema Rao ... (1918) I.L.R., 41 Mad. (F.B.), 156

PROMISSORY NOTE, executed by father before partition—*Renewal after partition—Son's pious obligation to discharge the debt:*—*See HINDU LAW* ... 186

PROVINCIAL INSOLVENCY ACT (III OF 1907)—*Limitation, periods of, prescribed by:*—*See LIMITATION ACT (IX OF 1908), SEC. 29 (1) (b).*

RENT, rate of, lower than the lawful one, contract as to, validity of:—*See ESTATES LAND ACT (I OF 1908), SEC. 26.*

RES JUDICATA—*Civil Procedure Code (Act V of 1908), sec. 11, expl. V, sec. 47 and O. XX, r. 12—Previous suit for land and past and future profits—Decree for land and past profits and no decision as to future profits—Second suit for future profits, maintainability of.* Held by the Full Bench (AYLING, J., contra):—When in a suit for possession and past and future mesne profits the Court gives a decree for mesne profits down to the date of suit, and says nothing about subsequent mesne profits, a fresh suit to recover them is not barred under section 11, Civil Procedure Code. *Ramaswami Iyer v. Sri Rangaraja Iyengar* (1915) 2 L.W., 8, overruled. *Kuppasamy Aiyar v. Venkataraniar* (1905) 15 M.L.J., 462, applied.

Doraisami v. Subramania ... (1918) I.L.R., 41 Mad., 168

REVENUE COURT, jurisdiction of:—*See ESTATES LAND ACT (MADRAS ACT I OF 1908), SEC. 26.*

WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859)—*Scope of the Act—'Workman,' meaning of—Status of accused, proof of—Duty of complainant to prove—Absence of proof.* The accused received an advance of Rs. 2,500 and contracted to supply coolies to a rubber estate. Under the contract, he was to receive a commission of 10 per cent on the wages of the Kol maistris and coolies and an additional Rs. 25 a month, if he resided on the estate. Having failed to fulfil his contract, he was proceeded against under the Workman's Breach of Contract Act. On a difference of opinion between SADASIVA AYYAR and PHILLIPS, JJ., as to whether the accused was a 'workman' within the meaning of the Act. Held, by AYLING, J., agreeing with SADASIVA AYYAR, J.:—(1) That the accused was not a 'workman' within the meaning of the Act, and (2) That the word "workman" means a person who engages in manual labour of some kind, whether skilled or unskilled. *Gilby v. Subbu* (1884) I.L.R., 7 Mad., 100, *Calaram v. Chenjappa* (1890) I.L.R., 13 Mad., 351, *Mamabari, In re* (1914) 27 M.L.J., 892 and *Re Rosario Quadros* (1915) I.L.R., 38 Mad., 551, followed. *Rousson v. Hanama Mestri* (1877) I.L.R., 1 Mad., 280 and *High Court Proceedings, dated 18th July 1867* (1867) 3 M.H.C.R., App. xxv, disapproved.

Kunhi Moidin v. Channu Nair. ... (1918) I.L.R., 41 Mad., 182

the estate. I have already shown that the theory that she could do what she pleases with the estate during her life-time finds no sanction in Hindu Law. From the point of view of the widow's interest I should think that any check on her power of squandering her husband's estate or alienating it without any necessity is for her benefit having regard to the ignorance of the vast majority of Hindu females. In an age when legislation has been directed towards and is being called for to protect ignorant people against their own imprudent acts, I think we can well preserve the rules of Hindu sages and law-givers who recognizing the limitations of Hindu females and the temptations afforded by poverty have secured to them protection against their own improvidence. It is difficult to see why a purchaser who purchases without any necessity for the sale and who knows that death or remarriage would put an end to her rights should be encouraged in any 'reasonable expectation' that the widow would violate a clear moral duty for her benefit.

Cases relating to agreements between the widow and the father or guardian of the adopted son or the adopted son himself if he is of age, whereby the rights of the adopted son are postponed or put an end to have also no bearing on the question. Where an adopted son is a minor the arrangement is supported on the ground that it was for his benefit and that but for the arrangement he would not have been adopted and so worse off. I doubt very much if courts would uphold an agreement which is distinctly disadvantageous to the minor. In cases where the adopted son is a major he is competent to contract so as to divest himself of rights which accrue to him under Hindu Law.

As observed by Mayne in his work on Hindu Law it would be cutting at the root of all well-recognized principles as to the status of an adopted son and the consequences of an adoption to hold that alienations without necessity would bind the adopted son during the widow's life-time. I feel little hesitation in following *Ramakrishna v. Tripurabai*(1), and answering the question referred to us in the affirmative.

N.R.

(1) (1909) I.L.R., 33 Bom., 83.

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—
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APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

KANDASAMI NAIKEN (FIRST DEFENDANT), APPELLANT,

v.

IRUSAPPA NAIKEN AND TWO OTHERS (PLAINTIFF AND DEFENDANTS
Nos. 2 AND 3), RESPONDENTS.*

Limitation Act (IX of 1908), sec. 7 and art. 44—Sale by a Hindu mother as guardian of her only son—Second son in the womb at the time of sale—Subsequent sale by both the sons to another—First purchaser dispossessed by the latter—Suit in ejectment—Limitation.

The plaintiff claimed under a sale-deed executed by a Hindu widow as guardian of her only son at a time when she had another son in the womb. The plaintiff was afterwards forcibly ejected by the appellant who had obtained a later sale-deed from the elder son who executed it both on behalf of himself and his minor brother. The plaintiff sued in ejectment more than three years after the first son's attaining majority but within three years of the attainment of majority by the second.

Held, that no suit having been brought by the first son within the period prescribed by article 44 of the Limitation Act to set aside the sale, the plaintiff's right to the share of the first son became absolute and that as the mother did not execute the sale-deed as guardian of the second son, his share in the suit land did not pass to the plaintiff.

Held also, that as the causes of action for the two sons were different, section 7 of the Limitation Act had no application to the facts of the case.

Doraisami Serumadan v. Nondisami Salavan (1915) I.L.R., 38 Mad., 118, distinguished.

SECOND APPEAL against the judgment of V. VENUGOPALA CHETTI, the District Judge of Chingleput, in Appeal No. 260 of 1914, preferred against the decree of R. V. KRISHNA AYYAR, the Additional District Munsif of Chingleput, in Original Suit No. 317 of 1913.

The material facts and contentions are set out in the judgment of SADASIVA AYYAR, J.

C. V. Anantakrishna Ayyar and P. S. Narayanaswami Ayyar for the appellant.

K. Bhashyam Ayyangar for the first respondent.

The other respondents were not represented.

* Second Appeal No. 954 of 1915.

SADASIVA AYYAR, J.—The first defendant is the appellant. The plaintiff sued in ejectment basing his title on a sale-deed of 1893 (Exhibit A) executed to him by the mother of the defendants Nos. 2 and 3. The plaintiff was in possession till 1909 when he was ejected forcibly by the first defendant who had obtained a sale-deed from the second defendant in 1908 (Exhibit II). The sale-deed (Exhibit II) was executed by the second defendant for himself and also for the third defendant who was then a minor. The second defendant attained majority in 1903 while the third defendant attained majority about the end of 1911 or the beginning of 1912. The suit was brought in July 1912.

The sale-deed by the mother of the defendants Nos. 2 and 3 to the plaintiff was executed by her as guardian of the second defendant alone, the third defendant (the posthumous son of his father) not having been born then. The statement of the District Judge in paragraph 2 of his judgment that the plaintiff's sale-deed was executed by the mother of the defendants Nos. 2 and 3 acting as the guardian of both is clearly an error.

Both the lower Courts have found that the sale-deed of 1893 in favour of the plaintiff was executed for no consideration and that the minor second defendant as whose guardian his mother executed it got no benefit under it. The District Munsif dismissed the plaintiff's suit.

On appeal the learned District Judge has given a decree in plaintiff's favour on the following reasoning, as I understand his judgment:—

(a) The second defendant did not sue to set aside his mother's sale-deed of 1893 within three years of his attaining majority. (The said three years expired in 1906) Both the defendants Nos. 2 and 3 ought to have sued to set aside such sale within 1906. As they did not do so they are barred under article 44 of Limitation Act from questioning the sale.

(b) Even if article 44 did not apply, article 144 would have applied to a hypothetical suit for possession if it had been brought by the defendants Nos. 2 and 3 just before the plaintiff was forcibly dispossessed in 1909. Such a suit would have been dismissed as barred as at that time the plaintiff had been in possession for sixteen years. (The District Judge gives the figure 18.) Hence the plaintiff had obtained title by adverse possession against the defendants Nos. 2 and 3 on the date when he was

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dispossessed in 1909. The plaintiff basing his right on his title so perfected by adverse possession is entitled to sue in ejectment the first defendant who claims from the defendants Nos. 2 and 3.

Mr. Anantakrishna Ayyar, the appellant's learned vakil, argued as follows:—

(a) That even though a suit by a ward who has attained majority to set aside his guardian's alienation may be barred under article 44, he can avoid it as defendant by denouncing it in the suit for possession brought by the alienee.

(b) That the lower Appellate Court was wrong in holding that the plaintiff was in adverse possession of the land as against the defendants Nos. 2 and 3 between 1893 and 1909 as his possession between 1893 and 1903 at least (when the second defendant attained majority) must have been as agent of the defendants Nos. 2 and 3; and

(c) That the sale-deed of 1893 was executed by the mother, not as guardian of both the defendants Nos. 2 and 3 as mistakenly supposed by the lower Appellate Court but as guardian of the second defendant alone.

The third defendant was therefore not bound to have it set aside so far as his interest in the property is concerned. The plaintiff also could not have acquired the third defendant's undivided interest by adverse possession as the third defendant had three years from his attaining majority (that is, till the end of 1914) to sue to recover possession of his interest and as the first defendant had recovered possession in 1909 itself of third defendant's said interest before third defendant's right to recover possession from plaintiff had become barred. It is clear from *Madugula Latchiah v. Pally Mukkalinga*(1) that the sale-deed executed by a guardian ought to be set aside by a ward by instituting a suit within the period mentioned in article 44 and that till it is so set aside, the title vests in the alienee. It is also established by that decision that, though article 44 describes the suit to be brought by the ward as a suit merely to set aside the transfer of his property by his guardian, if the transferee has obtained, and is in, possession and the ward has therefore to add a prayer for the relief of possession, article

44 alone still applies to the suit though brought for both the reliefs. Section 28 of the Limitation Act says that at the determination of the period limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. As the second defendant's right to institute a suit under article 44 for setting aside the sale of 1893 and for possession of the property from the plaintiff became barred in 1906, his right to such property became extinguished under section 28 of the Limitation Act and the plaintiff became the owner of the second defendant's interest in the property in 1906. As he has brought the suit in 1912 and as his title to the second defendant's interest of which he became the owner in 1906 subsisted at the date of the suit, his claim for possession of such interest has to be decreed. I must therefore reject the contention (a) put forward by Mr. Anantakrishna Ayyar.

Coming to his contention (b), I am unable to accept Mr. Anantakrishna Ayyar's argument that the agency power given to the plaintiff by the second defendant's mother under Exhibit I was a general power of attorney which made him the second defendant's agent as regards the management of the plaintiff's property also which had been alienated by the second defendant's mother on the day previous to the execution of the agency deed. It seems to me clear that the plaintiff's property was excluded from the agency and I am unable to differ from the finding of fact arrived at by the lower Appellate Court that plaintiff's possession between 1893 and 1903 was adverse to the defendants Nos. 2 and 3.

Coming to the last contention (c), it is clear from the wording of Exhibit A that the sale-deed was executed by the second defendant's mother as guardian of the second defendant alone. Plaintiff-respondent's learned vakil asked us to presume in the plaintiff's favour that the second defendant's mother intended to execute it in the exercise of all the powers to alienate which she possessed though she may not have known that she had the power to execute it also as guardian of the child then in her womb. I do not think that a Court is bound to stretch any point in favour of a person like the plaintiff who took advantage of the helplessness of his mother-in-law (the second and the third defendant's mother) to obtain a sale-deed without consideration in fraud of his brother-in-law from her. The sale-deed therefore

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did not affect the third defendant's undivided interest in the plaint properties. He was hence not bound to have it set aside under article 44. As against his interest, the plaintiff could rely only upon adverse possession under article 144. But as article 144 read with sections 6 and 28 of the Limitation Act did not bar the third defendant's rights or confer title on the plaintiff as regards third defendant's rights before the plaintiff was dispossessed in 1909, the plaintiff cannot claim any title to the third defendant's interests in the properties. (It is unnecessary to consider whether the third defendant's interest has passed to the first defendant in this case owing to the sale-deed executed by the second defendant in the first defendant's favour in 1918.) The contention (c) has therefore to be upheld. Mr. K. Bhashyam Aiyangar next contended for the plaintiff that, as the second defendant could have when suing on his own behalf (in the suit governed by article 44) to set aside the sale by his mother of his undivided interest also joined in that suit a cause of action as the next friend of the third defendant (or as managing member of the undivided family consisting of himself and the third defendant) to recover possession of the third defendant's interests also in that same suit, the principle of the Full Bench decision in *Doraisami Serumadan v. Nondisami Saluvan* (1) applied and that, therefore, the third defendant had also become barred in 1906 from claiming title to his undivided share. I think that, that decision gave as wide an effect to section 8 of Act XV of 1877 (corresponding to section 7 of the present Act) as possible and that it is wholly undesirable to extend the scope of that section further. Where two brothers have got the same cause of action (that is, where all the material allegations giving rise to a right of suit are the same), where the whole right litigated and the nature of the entire claim litigated are the same and where under such circumstances the elder brother could institute a suit for himself and his younger brother on that joint right and joint cause of action, section 7 would become applicable according to the Full Bench decision and would bar the younger brother's right when the eldest brother's became barred. But in this case the second defendant's cause of action and his right to bring a suit depend upon the fact of his mother's

(1) (1915) I.L.R., 38 Mad., 118.

execution of Exhibit A and a suit on such right of his is governed by article 44 whereas the third defendant's right of suit has nothing to do with Exhibit A or with article 44 and his suit would have been governed by article 144. The mere fact that under Order I, rule 1, Civil Procedure Code, the second defendant suing for himself and praying for one particular remedy could have joined in that same suit another cause of action vesting in the third defendant for whom he (second defendant) could have acted as next friend will not bring such a suit within the ambit of section 7 of the Limitation Act which contemplates the existence in two or more persons of a joint right and a joint cause or joint causes of action in support of a single suit.

In the result the lower Appellate Court's decree will be modified and a preliminary decree for partition of the plaint properties into two equal shares will be passed. The plaintiff's right to recover from the first defendant mesne profits on the said half share from fasli 1319 is also declared. Final decree will be passed (after taking the necessary steps contemplated by law) by the District Munsif as regards possession to plaintiff of the particular land which might fall to his half share in division and in respect of the sum due to him for value of mesne profits.

The plaintiff must pay the first defendant's costs on half the value of the plaintiff's claim throughout and bear his own costs. (The right to the other half share as between the defendants Nos. 1 and 3 is not decided in this suit.)

SPENCER, J.—The plaintiff obtained a sale-deed in respect of the suit properties in 1893 from the mother of the defendants Nos. 2 and 3. In this document (Exhibit A) she described herself as the wife of her deceased husband and as the mother and protecting guardian of second defendant. The statement of the District Judge that she acted as guardian of defendants Nos. 2 and 3 in this transaction is incorrect. In the plaint it was stated that she acted in the capacity of guardian of the second defendant alone, and for the purpose of this Second Appeal it may be taken that the third defendant was in his mother's womb on the date of sale.

Accepting the finding of the Judge that the possession by the plaintiff of the plaint lands which are not included in the lands entrusted under Exhibit I to his management as an agent

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of the family, was adverse, it is clear that, unless the time be extended under section 6 of the Limitation Act, his title must have been perfected by prescription before the first defendant obtained a conveyance of them from the second defendant in 1908.

The second defendant being eight years old in 1893 as stated in Exhibit A must have attained his majority in 1902 or at least by 1903.

His title to his share of the ancestral property alienated became extinguished in 1906, when for three years after attaining majority he failed to set aside the transfer made by his guardian during his minority (vide sections 6 and 28 of the Limitation Act), and therefore he had no interest of his own to convey to his transferee (first defendant) in 1903 when he executed Exhibit II on behalf of himself and his minor brother.

But in 1893, there was not any alienation of the third defendant's share in the property of the Hindu joint family to which he belonged at his conception.

Both the lower Courts have found that the sale in 1893, regarded as an alienation of ancestral property, was without consideration and for no justifiable necessity. Third defendant attained majority less than three years before the institution of this suit.

Hence the title of the third defendant which was not alienated in 1893 and was kept alive by his legal disability up to the date of this suit (section 6 of the Limitation Act) does not stand on the same footing with the title of the second defendant which was alienated in 1893 and became extinguished by limitation in 1906.

The District Judge without making any distinction has treated the title of both these defendants as extinguished. It is now argued in support of his judgment that time should be calculated under section 7 of the Limitation Act as running against both, on the ground that they were jointly entitled to institute a suit to recover their property and that one could give a valid discharge without the concurrence of the other.

I consider that section 7 of the Limitation Act does not apply to the circumstances of this case. Owing to their interests having become split up, defendants Nos. 2 and 3 were not joint in estate in respect of this particular property, after the execution of Exhibit A.

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The cause of action for the second defendant to set aside the alienation made by his guardian is not identical with the cause of action for the third defendant or his representative in interest to obtain a partition of his share of family property upon a subsisting title from a third party who was in wrongful possession thereof.

When the second defendant attained majority he was not competent to give a lawful discharge of the third defendant's claim, under the circumstances found to have existed in this case.

Thus this case is distinguishable from *Doraisami Serumadan v. Nondisami Saluran*(1). I agree that the appellant is entitled to succeed in respect of third defendant's undivided moiety of the suit property and that he must fail as regards the second defendant's moiety, and that costs should be awarded as stated in my learned brother's judgment.

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APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

SIVANUPANDIA THEVAR AND TEN OTHERS (PLAINTIFFS),
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v.

MEENAKSHI SUNDARA VINAYAKA VISAKAPERUMAL
SETHURAYAR AVARGAL,

MINOR ZAMINDAR OF URKAD REPRESENTED BY KRISHNA RAO,
MANAGER OF THE ESTATE UNDER THE COURT OF WARDS
(DEFENDANT), RESPONDENT.*

Estates Land Act (Madras Act I of 1908), sec. 40, cl. (3)—'Years' in, meaning of — Swami-bhogam, whether rent or cess within section 3, clause (1) — Agreement between landlord and tenant for a consolidated grain rent, enforceability of.

In section 40, clause (3) (a) of the Madras Estates Land Act, 'preceding ten years,' means the ten years preceding the year in which the Collector

(1) (1915) I.L.R., 38 Mad., 118.

* Second Appeals Nos. 1074 to 1084 of 1916.

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determines the amount of the commuted rent and not the ten years preceding the year in which the suit is instituted; and 'year' means the year of the lease, that is, the year for which the landlord is entitled either by custom or contract to claim rent, and not the *fasli* or the calendar year.

Swami-bhogam is 'rent' within section 3, clause (11) and is not a cess.

Where a fixed grain *pattam* (rent) has been agreed to, the arrangement is binding on both the parties and it is not open to the tenant to reopen the same on the ground that certain illegal cesses were included therein.

When the Revenue Court refuses commutation, an appeal lies under Schedule A, clause 4 of the Act only to the District Collector and not to the District Court; and hence no second appeal lies to the High Court from such order of refusal.

Jesatoolah Paramanick v. Jugodindro Narain Roy (1874) 22 W.R., 12, followed.

SECOND APPEALS against the decrees of A. EDGINGTON, the District Judge of Tinnevely, in Appeals Nos. 186 to 188, 191, 195, 196, 205, 206, 210, 222 and 226 of 1915, preferred against the decrees of J. GANAPATHI PILLAI, the Honorary Deputy Collector of Tinnevely, in Summary Suits Nos. 121—123, 126, 131, 132, 141, 142, 146, 153 and 162 of 1914, respectively. The material facts appear from the judgment.

T. R. Venkatarama Sastriar, T. R. Ramachandra Ayyar and S. Ramaswami Ayyar for the appellant.

V. Ramesam for the respondent.

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SADASIVA AYYAR, J.—These eleven second appeals have arisen out of suits brought by the tenants of the Urkad Estate to have their rents, which had been mostly paid in grain and partially in cash consolidated and commuted to a definite money rent under section 40, clause 1 of the Madras Estates Land Act. One or more or all of the following six questions arise for decision in these second appeals.

Firstly, whether the lower Courts were right in construing section 40, clause 3 (a) of the Estates Land Act to mean that the Collector in making the determination as to the proper money rent should have regard to the average value of the rent actually accrued due to the landholder during the ten years preceding the year of the determination of such commuted rent or whether the true meaning of that section is that the Collector should have regard to the average value of the rent during the ten years preceding the institution of the suit. I am clear that according to the true construction of the language of the section, it means the ten years preceding the year when the Collector

determined the amount of the commuted rent by his decision in the suit. I think that it is unreasonable to hold that an average rent of ten preceding years was intended (ordinarily) to come into force not immediately after the ten years but with a break or interval occupied by the period during which the suit was pending.

Mr. Venkatarama Sastriar mentioned some inconveniences which would be felt by the Courts (Original and Appellate) in the trial of such suit if his interpretation of the section (namely the ten years preceding the institution of the suit) was not accepted. I do not think that those inconveniences are of such a serious nature as to override what I consider to be the plain meaning of the clause. It was further to be remembered that this average of ten years is only to form one of the considerations for the fixing of the commuted rent that the Court is at liberty to take other facts also into consideration where the circumstances are peculiar (such as where some of the ten years are extraordinary years). I think that in the decision of these cases relating to commutation of rent in second appeal, we ought not to interfere with the discretion of the lower Courts except on very clear grounds as the whole question of commutation permits of and is intended by the legislature to be governed by the experience of Revenue officers and by equitable considerations (some of a rough and ready character) permitting of the use of large discretion and practical sense.

Then the second contention of the appellants is that the year mentioned in the clause means the calendar year beginning with the 1st January and not the *fasli* year as taken by the lower Courts. I am unable to find that this contention was raised in the lower Courts and I do not think that it is raised even in the grounds of the second appeal to this Court. However, I may shortly state that neither the calendar year nor the *fasli* year as such is intended by this clause, but the year for which the landlord according to custom or contract is entitled to claim rent in other words, the year of the lease. Section 3, clause 59 of the General Clauses Act (X of 1897) applies only as stated in the beginning of the section itself "where there is nothing repugnant in the subject or context." I think it is very clear from the subject and context of section 40 of the Madras Estates Land Act that the year

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mentioned therein means the yearly period for which rent is claimable as between the landlord and tenant and not the calendar year which would break up the year of the lease into two. In the present suits, the year of the lease happens to be the fasli year.

Then the third question argued related to the point whether the landlord is entitled to claim a small cash, *swami-bhogam* rent of seven fanams per kottah of lands. The word *swami-bhogam* itself implies that it is the landlord's perquisites as owner of the land (in other words profits which he is entitled to get from the tenant who occupies his land) and it clearly comes within the definition of rent found in section 3, clause (11). I do not think it is open to us to indulge in mere speculation and to infer that because the landlord gets half the net grain profits (after making certain deductions) as grain rent the cash rent or *swami-bhogam* cannot also form part of the rent, but it is a 'cess' having nothing to do with rent.

The fourth question that we have to consider is really the most important question in these cases:—namely, whether when a fixed grain pattam had been agreed upon between the landlord and the tenant in respect of the lands (in one case seven years before suit and in other cases twenty years before suit) the lower Courts ought to have made a deduction from that pattam rent in order to ascertain what may be called the real grain rent which is commuted under section 40. This deduction is claimed by the appellants on the ground that the pattam so agreed upon included some cesses and dues declared to be illegal in the case of waram lands.

I think that the very word 'pattam' clearly means 'rent' and even though the pattam might have been fixed after considering the claims of the landlord to certain dues which are not legally recoverable, we must treat the transaction under which the pattam was so fixed as due to an arrangement of compromise between the landlord and the tenant by which both parties gave up their respective claims to insist upon the actual measurement of the gross produce each year by which the landlord gave up his claim whether enforceable or not to recover certain cesses and by which both parties finally agreed that the rent shall be such and such a consolidated quantity of grain thereafter. In such a case, I think it is not only very inconvenient,

but is also not permissible to allow either party to go behind that arrangement and re-open it by contending that the rent ought to be higher or lower than the rents then fixed. I think I am fortified in this view by *Jeeatoollah Paramanick v. Jugodindro Narain Roy*(1) where Mr. Justice AINSLIE says (page 13):

"The attempt which is now made to break up the total rent into its elements and take exception to some of them on the ground that they are illegal cannot be permitted."

The present case is stronger than *Jeeatoollah Paramanick v. Jugodindro Narain Roy*(1) as the details by which the total fixed rent was made up seem to have been specified in the contract in that case, whereas we have had no such details in writing before us. It is complained that the Deputy Collector did not allow such details to be brought up in the evidence of witnesses. So far as I could see it seems to have been allowed by the Deputy Collector to be brought out in the evidence of prosecution witness No. 11 who prepared a statement showing those cesses so far as the waram lands are concerned. As regards defendant's witness No. 1 he said in answer to Court "In fixing the grain rent whether all items, such as kaval, kankanam, pichai, kalvaivari, which are set apart either for the landlord or the ryot or for common expenses when produce is divided were taken into consideration or not, I do not know I was not present when the grain rent was fixed." He could not therefore have given any evidence as to whether the grain pattam was fixed with reference to the inadmissible cesses also or not. I think therefore that no importance could be attached to the Deputy Collector's not having allowed questions to be put to the witness about these details.

The next fifth contention in these appeals relates to the commutation prices fixed by the lower Courts at Rs. 9 per kottah. That price was based on the Taluk office reports. The objection to that price is based on the ground that the price of grain prevailing at the Zamindar's village granary was the price which ought to be considered. The lower Courts adopted the Taluk office prices as the plaintiffs did not prove that they were higher than the village prices, the Taluk office prices being based on the bazaar prices. Having regard to the evidence

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which shows that about 4 annas per kottah might be required to transport the grain to the bazaar from the village and also considering that it is always understood that the price at the village of the parties is invariably less than the price prevailing in the bazaar of the nearest town, I think that a deduction from the bazaar prices of at least 4 annas per kottah ought to be allowed. I would therefore allow such a deduction as regards the price.

Then the last point argued was whether the lower courts were justified in refusing to commute the rent as regards some of the lands involved in Second Appeals Nos. 1077 and 1033 of 1916 on the ground that the tenants of those lands had not got themselves recognized as pattadars by the landlord and hence those lands could not be said to be in their holdings having regard to the definition of holding in section 3, clause (3) of the Madras Estates Land Act (Section 40 allows the ryot to sue for commutation only in respect of lands in his 'holding'). Mr. Ramaswami for the respondent took a preliminary objection to our considering this point. That objection is that when the revenue court has refused commutation, an appeal lies to the Collector [see column 6 (a) of Schedule A to the Madras Estates Land Act against serial No. 4] and that therefore the appeals filed to the District Court on that point and the second appeals filed to this Court against the District Judge's decision on that same point are both incompetent. I think I must accept the validity of this preliminary objection and therefore express no opinion on the soundness of this (sixth) contention.

In the result subject to the modification as regards the price of grain these second appeals must stand dismissed with costs.

SPENCER, J.

SPENCER, J.—I agree. On the first point I would add that I think that if the legislature had intended that the years to be taken as a basis for the calculation of rent should be the ten years preceding the institution of the suit, it would have said so in section 40 as it did in sections 31 and 37, and that in the absence of such words the lower courts were not wrong in considering what was the rent in the years next preceding the determination of the rent. On the other points, I have nothing to add as I entirely agree with the views taken by my learned brother.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

APPABU ROWTHER *alias* KADIRSA ROWTHER (DEFENDANT),
APPELLANT,

v.

SEENI ROWTHER *alias* MUHAMMAD ABDUL KADIR
ROWTHER (PLAINTIFF), RESPONDENT.*

1916,
November, 21
and 1917,
March, 14.

Arbitration—Suit after submission, with respect to the subject-matter of the reference—Award given during the pendency of the suit, validity of—Power of Court to stay trial—Civil Procedure Code (Act V of 1908, Schedule II, Sec. 18.)

A private reference to arbitration of a subject of a dispute, does not prevent either party filing a suit in a Court of law in respect of the same matter. The arbitrators thereupon become *functus officio* and any award by them is without jurisdiction.

Where there is a previous agreement to refer a matter to arbitration and a suit is filed in respect of the subject-matter of that agreement the Court has a discretion under section 18 of the second schedule to the Civil Procedure Code to stay the trial of the suit.

Doieman and Sons v. Ossett Corporation (1912) 3 K.B., 257 and *Shao Babu v. Udit Narain* (1914) 12 A.L.J., 757, followed.

Rama Chandra Pal v. Krishna Lal Pal (1912) 17 C.W.N., 351, explained.

Indian legislation on the subject historically reviewed.

APPEAL against the order of V. DANDAPANI for K. KRISHNAMA ACHARIYAR, the Subordinate Judge of Madura, in Original Suit No. 122 of 1913.

The necessary facts appear from the judgment.

K. V. Krishnaswami Ayyar and K. V. Sesa Ayyangar for the appellant.

L. A. Govindaraghava Ayyar for the Hon. Mr. T. Ranga-chariyar for the respondent.

JUDGMENT.—The facts which have led up to this appeal may be thus shortly stated. The appellant and the respondent agreed to refer their disputes to the decision of certain arbitrators on the 20th of August 1912 (Exhibits I and Ia). For some time nothing was done under the reference. The appellant sent a notice revoking the arbitration and subsequently filed a

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suit to enforce his rights ignoring the reference altogether. This was on the 25th of August 1913 (Original Suit No. 17 of 1913), while the suit was pending, the arbitrators gave the award on the 1st of October 1913. Thereupon on the 13th December 1913 the respondent filed Original Suit No. 122 of 1913 for a decree in terms of the award. The lower Court passed a decree as prayed for. Mr. K. V. Krishnaswami Ayyar, the learned vakil for the appellant, has raised various objections to the decree. The only one which requires consideration is the contention that on the filing of Original Suit No. 77 of 1913 the arbitrators became *functus officio*, that consequently their award was *ultra vires* their powers and that the Court acted without jurisdiction in passing a decree embodying the terms of the award.

We think this objection is well founded. A short resume of the legislative provisions on this question is necessary to appreciate the appellant's contention. Under section 28 of the Contract Act it was not ordinarily open to parties to ignore the Courts of the country and to set up a tribunal for deciding their disputes. One exception was recognized to the effect that if the parties had agreed to refer their disputes to arbitration, the existence of the agreement shall be a bar to seeking redress in the ordinary courts. The section also recognized the right of one of the parties to sue for the specific performance of the agreement to refer.

Then came the Specific Relief Act of 1877 which by section 21 took away the right to sue for the specific enforcement of the contract, but preserved the right to the party who was willing to abide by the agreement, to object to the trial of a suit filed by the other party.

Lastly, we have section 22 of second schedule to the Code of Civil Procedure which has repealed that portion of section 21 of the Specific Relief Act which enabled the defendant to plead the agreement to refer as a bar to the suit. The result of these various legislative provisions is to bring the Indian Law into conformity with the English Law on the subject. The provisions of the Indian Arbitration Act which apply to Presidency Towns and to Karachi are to the same effect.

In our opinion the intent to be gathered from these Acts is that the rights of a party to seek the assistance of the properly

constituted Courts of the realm are unrestricted. The right inhering in a suitor to sue is preserved intact.

In order to provide against the contumacious conduct of a plaintiff who has agreed to refer, but who wants to resile from it by instituting a suit, section 18 of the second schedule has been introduced. Under that section if the Court is apprised that an agreement to refer was entered into, it may stay the trial of the suit. In a given case, the Court may consider that the arbitrators would be able to decide the case far more efficaciously than the Court itself. In such a case, the Court may ask the arbitrator to give his decision. But the discretion is in the Court, the paramount idea being that a tribunal constituted by the parties should not come in conflict or usurp the function of the tribunal which the sovereign has provided.

This view receives support from the judgment of FLETCHER Moulton, L.J., in *Doleman and Sons v. Ossett Corporation*(1). The learned Lord Justice points out that as soon as an action is brought in respect of the subject-matter of the reference, the arbitrators become *functus officio*. It is also pointed out that the case of an award having been given prior to the suit would be different, for then a new right would have been substituted for the original one to enforce which a suit can be instituted. Mr. L. A. Govindaraghava Ayyar contended that the language of section 18 of the second schedule implies that the arbitrator's jurisdiction ceases only on the settlement of the issues in the suit, because it is open to the defendant till then to ask for stay of the suit. We are unable to accept this contention. The time limit for filing objections should not be construed as validating the reference till then.

The learned vakil for the respondent also argued that his client had referred to the existence of the agreement to refer and to the award passed, in his written statement, and that further steps should have been taken by the Court with reference to these contentions. He also contended that the adjournment of the trial practically amounted to a stay of the suit. On examining the B diary, we are satisfied that the trial was never stayed as contemplated by section 18 of the second schedule. The decision in *Rama Chandra Pal v. Krishna Lal Pal*(2) was on section 21 of

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(1) (1912) 3 K.B., 237.

(2) (1912) 17 C.W.N., 351.

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the Specific Relief Act before the last 37 words were repealed. On the other hand *Sheo Babu v. Udit Narain*(1) supports the view we have taken.

We must therefore set aside the decree passed in the respondent's suit, Original Suit No. 122 of 1913, and dismiss it. It is said that the suit of the defendant is still pending. In the circumstances, we think each party should bear his own costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

1917,
March, 20.

THEMA AND ANOTHER (PLAINTIFFS), APPELLANTS IN BOTH
SECOND APPEALS,

v.

KUNHI PATHUMMA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Customary law of South Kanara—Kuzhikanam lease—Compensation for improvements—Right of tenant to possession until payment—Possession by tenant after period of lease, nature of—Possession, adverse—Notice to quit, if necessary—Customary law of Malabar—Malabar Compensation for Tenants Improvements Act (Madras Act I of 1900), principles of, if applicable.

Under the customary law of South Kanara, a *kuzhikanam* lessee is, as in Malabar, entitled to remain in possession of the holding after the expiry of the period fixed in the lease until he is paid the value of the improvements; consequently he does not acquire title by adverse possession by remaining in possession of the lands for more than twelve years after the expiry of the lease.

Srinivasa Pillai v. Venkatammal (1913) 24 M.L.J., 296 and *Kummatha Vittil Kunhi Kuthalai Haji v. Reverend Antoni Goveas* (1913) M.W.N., 339, referred to.

Subbrapeti Ramiah v. Gundala Ramanna (1910) I.L.R., 33 Mad., 260, distinguished.

A *kuzhikanam* lessee who remains on the land after the period fixed in the lease, awaiting the payment of compensation for improvements, is not holding over as a tenant, and, in the absence of evidence of assent by the landlord to the continuance of the tenancy, is not entitled to a notice to quit.

Section 5 of the Malabar Compensation for Tenants Improvements Act (I of 1900) only embodies the customary law of Malabar and South Kanara.

SECOND APPEALS against the decrees of V. C. MASCARENHAS, the Subordinate Judge of South Kanara, in Appeals Nos. 50 and 51

(1) (1914) 12 A.L.J., 757.

* Second Appeals Nos. 1504 and 1505 of 1916.

of 1916, preferred against the decrees of V. KUNHI RAMAN NAYAR, the District Munsif of Kasaragod, in Original Suits Nos. 426 and 427 of 1914 respectively.

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The suit properties belonged to the second defendant's tarwad. They were granted by the karnavan to the first defendant's uncle Kunhali under a registered *kuzhikanam* deed, dated 6th August 1885, for a term of fifteen years. The lease was transferred by Kunhali to the first defendant, who continued in possession of the land even after the expiry of the period of the lease. The plaintiff obtained a usufructuary mortgage of the suit lands as well as some other lands from the second defendant and instituted these suits on the 22nd July 1914 for recovery of possession of the lands comprised in the *kuzhikanam* lease and offered to pay the value of the improvements made by the first defendant on the holding in each of the suits. The plaintiff also alleged that he gave notice to quit on 7th March 1914 to the first defendant asking the latter to quit the lands by the 13th April 1914. The District Munsif decreed the suit, but on appeal the learned Subordinate Judge reversed the decree and dismissed the suit, holding that the notice to quit was not a proper and reasonable notice in the circumstances of the case, and that the suit was also barred by limitation. The plaintiffs preferred these Second Appeals in the two suits.

J. L. Rosario for the appellants.

C. Madhavan Nair for the respondents.

The following JUDGMENT of the Court was delivered by :—

SESHAGIRI AYYAR, J.—The Subordinate Judge is wrong on both the points decided by him. There can be no question of adverse possession in favour of the defendant, because under the customary law of Malabar, the *kuzhikanam* lessee is entitled to remain in possession until he is paid the value of the improvements.

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In this respect, the law is the same in South Kanara: *Srinivasa Pillai v. Venkatammal*(1). It is true that section 5 of the Malabar Compensation Act does not in terms apply to South Kanara but as was pointed out in *Kummatha Vittil Kunhi Kuthalai Haji v. Reverend Antoni Goveas*(2), that section only embodies the customary law of Malabar and South Kanara.

(1) (1913) 24 M.L.J., 296.

(2) (1913) M.W.N., 339.

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Consequently on the expiry of the period fixed, the tenant does not become a trespasser. The decision in *Subbraveli Raminah v. Gundala Ramaswami* (1) quoted by the Subordinate Judge has no application to Malabar *kuzhikanam* tenants. We must therefore hold that the defendant has not acquired a title by prescription.

On the question of the reasonableness of the notice to quit, we think that under the law a tenant who remains on the land awaiting the payment of the compensation to him is not holding over as a tenant. Section 5 of the Malabar Compensation Act says that he is entitled to remain on the land, notwithstanding the fact that the tenancy has determined; therefore his possession is not by virtue of a tenant's right, but because there are moneys due to him which have to be ascertained and paid. In the present case the period of lease was fixed, and on the expiry of that period, the tenancy came to an end. We have not been referred to any evidence showing that the landlord assented to the continuance of the tenancy. Mr. Madhavan Nair strongly relied upon a decision of this Court in Second Appeals Nos. 771 to 773 of 1914. In that case it was found that the tenant made a yearly payment. Moreover the period of the tenancy was not fixed. We do not think that decision compels us to hold that when a period is fixed and there is no subsequent assent by the landlord, the quondam tenant is entitled to any notice.

Such suits should be regarded as practically suits for redemption. The Court should on ascertaining the value of the improvements fix a time within which the compensation will have to be paid and pass a decree directing surrender on the expiry of that period.

We reverse the decree of the lower Appellate Court, direct him to get the improvements re-valued, to fix a time for payment and to pass a decree for surrender on the expiry of that period. The tenant in possession is bound to give credit to the plaintiff for the rent reserved. This will be done in taking the accounts. Costs will abide the result.

K.R.

(1) (1910) I L.R., 33 Mad., 200.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Srinivasa Ayyangar.

SETHURAMA, AYYANGAR (DEFENDANT), APPELLANT,

1917,
March,
15 and 21.

SUPPIAH PILLAI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*
Estates Land Act (Madras Act I of 1908), sec. 26—Suit in a Revenue Court—Contract between previous landholder and tenant as to rate of rent—Rate lower than the lawful rate, whether binding on successor—Validity of contract—Jurisdiction of Revenue Court to decide.

A Revenue Court exercising jurisdiction under the Madras Estates Land Act is competent to decide all incidental questions the determination of which is necessary for the disposal of the main question arising in the case; and in a suit filed to contest the right to sell a holding for arrears of rent under the Act the Revenue Court can decide on the validity of a contract between the landholder's predecessor in title and the tenant as to the rate of rent, although the objection to its validity is based on grounds other than those specified in section 26 of the Act.

Raja of Pittapore v. Sreerama Charyulu (1911) M.W.N., 30, explained.

SECOND APPEAL against the decree of J. G. BROWN, the District Judge of Madura, in Appeal No. 199 of 1914, preferred against the decree of MUHAMMAD GHOUSE SAHIB Bahadur, the Deputy Collector of Melur Division, in Summary Suit No. 17 of 1914.

The defendant was the landholder of the holding of which the plaintiffs were the tenants. The defendant attached the holding under the Madras Estates Land Act for arrears of rent said to be due from the plaintiffs. The plaintiffs brought this summary suit in the Deputy Collector's Court of Melur under section 112 of the Act to set aside the attachment on the ground that the amount of arrears for which the attachment was made was not due to the defendant inasmuch as the plaintiffs were entitled to a remission under a contract entered into between them and the predecessor in title of the defendant. The plaintiff claimed that the said contract was binding on the defendant (who was the present landholder) and that the Revenue Court was not competent to go behind the contract in the summary suit. The Revenue Court found that there was a payment

* Second Appeal No. 1323 of 1915.

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of the amount of rent due after deducting the amount agreed to be remitted, and held that the amount for which the attachment was made was not due and that the attachment should consequently be raised. The defendant appealed to the District Court, which dismissed the appeal, holding that the Revenue Court was not competent to decide upon the validity of the contract which was found to be true and observed that a question of this kind could not be gone into in summary proceedings in a Revenue Court but only in an ordinary action in a Civil Court. The defendant preferred this Second Appeal.

A. Krishnaswami Ayyar for the appellant.

C. S. Venkatachariyar for the respondent.

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JJ.

JUDGMENT.—The question which arises for decision in this appeal is whether a Revenue Court exercising jurisdiction under the Estates Land Act is entitled to decide objections (other than those specified in section 26 of the Act), to the validity of a contract under which a ryot claims to hold the holding on a rent less than the ordinary or the lawful rent payable on the land. The landlord is an office holder in a temple and the lands or rather the revenue constitute the manyam attached to the office. A predecessor of his received Rs. 200 from the ryot and agreed to allow him remission of five-eighths of the assessment in perpetuity. The present office holder claims the full rent, declines to be bound by the agreement and contends that his predecessor who owned the manyam as an office holder cannot bind his successor by such an agreement. The question arises in a suit brought by the tenant contesting the landlord's right of sale under section 112 of the Act. The learned District Judge in appeal declined to go into the question as he thought that that question was competent only to an ordinary Civil Court.

We are unable to agree with him. For deciding whether the landlord is entitled to sell the holding the Court must find whether any arrears of rent are due and for this purpose, it must decide what the rent or rate of rent is. The rent or rate of rent cannot be determined without considering for the purpose of the suit whether the contract granting the remission is valid. Section 26 assumes that the contract except as affected by the provisions of the section is valid. If the existence or the validity of the contract is questioned that must be first determined before

the provisions of section 26 are applied. If the Court has jurisdiction to determine a matter, it must have jurisdiction to decide all questions necessary for that determination. If a previous judicial rescission is necessary before the contract could be repudiated, it may be that the Revenue Court would be bound to give effect to the contract subject only to the provisions of section 26; but the landlord in this case was not a party to the contract and denies the authority of his predecessor to bind the successor.

In *Raja of Pittapore v. Sreerama Charyulu*(1) the Raja of Pittapore sued a ryot in the ordinary Civil Court and prayed for declarations: (i) that the contract of his predecessor granting remission to the ryot was not binding on him, and (ii) that the proper rent was Rs. 500 a year and prayed for the recovery of arrears of rent. Objection was taken to the jurisdiction of the Civil Court to entertain the suit on the ground that a suit to determine the rent and for recovery of arrears was exclusively cognizable by the Revenue Court and that the declaration as to the invalidity of the contract was only ancillary to the main reliefs. This contention prevailed in the first Court, but in appeal here the plaintiff withdrew his last two prayers, and this Court held that the prayer for declaration of the invalidity of the agreement was not ancillary, but was substantial relief and on that ground held that the Civil Court had jurisdiction, no doubt was entertained that the Revenue Court would have jurisdiction to decide on the validity of the contract if the matter arose incidentally, for determining the rate of rent. We must therefore reverse the decree of the Lower Appellate Court and remand the appeal for disposal according to law. Costs to abide.

K.R.

(1) (1911) M.W.N., 30.

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JJ.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Seshagiri Ayyar.

1917,
February,
22, 23
and
March, 22.

CHIDAMBARANATHA THAMBIRAN *alias* SIVAGNANA
DESIKA GNANA SAMBANDA PANDARA SANNADHI
AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

P. S. NALLASIVA MUDALIAR AND FIFTY-ONE OTHERS (DEFENDANTS
NOS. 2—23, 25—27, 29—54, AND LEGAL REPRESENTATIVE OF THE
TWENTY-THIRD DEFENDANT), RESPONDENTS.*

Mutt—Improper alienation of mutt properties by the head of the mutt—Suit by disciples under Order I, rule 8, Civil Procedure Code (Act V of 1908) to set aside the alienation and for possession to be given to the head of the mutt for the time being, whether maintainable—Limitation—Limitation Act (IX of 1908), arts. 120, 134 and 144, applicability of.

The disciples of a mutt have sufficient 'interest' within Order I, rule 8 of the Civil Procedure Code to maintain a representative suit not only for a declaration of the invalidity of an improper alienation of the mutt properties by the head of the mutt, but also for a decree directing possession to be given to the head of the mutt for the time being. It is immaterial whether the head of the mutt be a trustee or only a life-tenant. The suit being one for possession, the article of the Limitation Act applicable is not 120, but article 134 or 144, according as the head of the mutt is a trustee or only a life-tenant; and the right to sue for possession arises from the date of the alienation or when possession begins to be adverse. Possession which is adverse to the institution is equally adverse to the plaintiffs who sue on its behalf.

APPEAL against the decree of V. K. DESIKACHARIYAR, the Subordinate Judge of Tinnevely, in Original Suit No. 36 of 1913.

Two disciples of the Dharmapuram Mutt sued on behalf of themselves and other disciples under Order I, rule 8, Civil Procedure Code, to set aside a sale of the mutt properties made by the head of the mutt, viz., first defendant's predecessor, on 12th July 1901 in favour of the other defendants as being improper, and prayed for possession of the alienated properties to be given to the first defendant as the then head of the mutt.

* Appeal No. 399 of 1915.

In the course of the suit the first defendant died and the plaintiff CHIDAMBARANATHA THAMBIRAN was amended by adding a prayer that the first plaintiff who succeeded him as head of the mutt be given possession. The suit was brought on 11th July 1913, more than six years but within twelve years from the date of the alienation. The defendants pleaded *inter alia* that the plaintiffs had no right to sue under Order I, rule 8, Civil Procedure Code, that the head of the mutt was not in the position of a trustee, that if he was a trustee the suit was bad for want of sanction under section 92, Civil Procedure Code, that the suit brought for possession to be given, not to any of the plaintiffs but to somebody else, was not maintainable and that the suit was barred by limitation. The Subordinate Judge who tried the suit dismissed it holding that the plaintiffs were not entitled to sue for possession, that they were not competent to ask for possession to be given to the first defendant, that mutt properties as such are not trust properties, that the suit was not barred for want of sanction under section 92, Civil Procedure Code, and that the suit was barred under article 120 of the Limitation Act. The plaintiffs appealed.

Hon. Mr. S. Srinivasa Ayyangar, the Advocate-General, with T. Narasimha Ayyangar and V. Raghavachariyar for the first appellant.—Whether the head of a mutt is a trustee or is considered to have only a life-interest, the disciples of the mutt are entitled under Order I, rule 8, Civil Procedure Code, as persons interested in the mutt, to bring a suit on behalf of the mutt. It is not necessary to ask for the removal of the head of the mutt; see *Subramanian Chettiar v. Rajeswara Dorai*(1). Plaintiffs as disciples and beneficiaries can ask for possession to be given to the head of the mutt for the time being: *Subramania Iyer v. Nagarathna Naicker*(2), *Miyaji alias Mahomed Ghouse Sahib v. Sheik Ahmed Sahib*(3), *Arunachellam Chettiar v. Velappa Thambiran*(4), *Kazi Hassan v. Sagun Balkrishna*(5), *Seton on Decrees*, volume 2, page 1255, *Gandy v. Gandy*(6), *Sharp v. San Paulo Railway Co.*(7), *Dance v. Goldingham*(8), *Yeatman*

(1) (1909) I.L.R., 32 Mad., 490 at p. 507.

(2) (1909) 20 M.L.J., 151. (3) (1908) I.L.R., 31 Mad., 212.

(4) (1915) 28 M.L.J., 410. (5) (1900) I.L.R., 24 Bom., 170.

(6) (1883) 30 Ch.D., 57 at pp. 64, 69 and 72.

(7) (1873) 8 Ch. App., 597 at pp. 600 and 610.

(8) (1873) 8 Ch. App., 903 at pp. 905 and 911.

CHIDAMBARA-NATHA THAMBIRAN v. NALLASIVA MUDALIAR. *Yeatman*(1), *Meldrum v. Scorer*(2) and *Beningfield v. Baxter*(3), *Consett v. Bell*(4). If a trustee does not do his duty, beneficiaries can sue to enforce execution of the trust. This suit is for the execution of the trust: See sections 59 and 63 of the Indian Trust Act. Section 10 and article 134 of the Indian Limitation Act show that such a suit can be brought. This is a suit for possession, to whomsoever possession is prayed to be given, whether to plaintiff or somebody else as trustee. Hence article 120 of the Limitation Act will not apply; but article 134 or 144 will apply. The words 'conveyed or bequeathed in trust' in article 134, will cover cases where properties vest in the head of a mutt. We must presume a conveyance at some time or other. Accretions to the trust from the original funds must also be taken to be for the trust. Article 134 was applied in *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav*(5). The head of a mutt is a trustee: *Ram Parkash Das v. Anand Das*(6) and *Balu-swamy Iyer v. Venkitaswamy Naicken*(7). If he is not a trustee, he has a life interest, in which case article 144 will apply: *Muthusamier v. Sree Sreemethanithi Swamiyar*(8). Though the possession of the alienee may be adverse to the trustee, it cannot be deemed to be adverse to the beneficiary. Beneficiaries do not claim 'from' or 'through' the trustee; see the definition of 'plaintiff' in section 2 of the Indian Limitation Act.

Hon. Mr. T. Rangachariyar for the respondents Nos. 14 and 15.—Plaintiffs are mere disciples with no proprietary right in the property sued for; so they cannot sue for possession. They can sue only for a declaration as to invalidity of the alienation or for a direction to the trustee to sue: see sections 60, 61 and 63 of the Indian Trusts Act; *Chattappa Nambiar v. Koman*(9) and *Kamaraju v. Asanali Sheriff*(10). *Subramanian Chettiar v. Rajeswara Dorai*(11) ignores section 63 of the Indian Trusts Act. Only a person having title can sue for possession.

(1) (1877) 7 Ch.D., 210.

(2) (1887) 56 L.T. (N.S.), 471 at p. 474.

(3) (1886) 12 A.C., 167 at p. 168.

(4) (1842) 1 Y. & C.C.C., 569, 62 E.R., 1020.

(5) (1897) I.L.R., 24 Cal., 418. (6) (1916) I.L.R., 43 Cal., 707 (P.C.).

(7) (1917) 32 M.L.J., 24.

(8) (1915) I.L.R., 38 Mad., 356 at p. 361.

(9) (1914) 2 L.W., 61.

(10) (1900) I.L.R., 23 Mad., 99.

(11) (1909) I.L.R., 32 Mad., 490 at p. 507.

Dasandhay v. Muhammad Abu Nasar(1), *Srinivasa Chariar v. Chidambara-Natha Thambiran*(2) and *Strickland v. Weldon*(3). *Jagardindra Nath Roy v. Hemanta Kumari Debi*(4) shows that trustees alone can bring a suit; hence worshippers cannot. Neither article 144 nor 134 is applicable. Article 134 does not apply, for it cannot be said in this case that the property was by any one conveyed in trust to a former head of the mutt. The article cannot apply for this is not a suit for possession to the plaintiff: *Sajedur Rajah Chowdhuri v. Gour Mohun Das Baishnav*(5). Article 120 is the proper article applicable under such circumstances: *Venkatachella Reddiar v. The Collector of Trichinopoly*(6), *Kidambi Ragava Chariar v. Tirumalai Asari Nallur Ragavachariar*(7) and *Govindaswami Pillai v. Dakshinamurthi Poosari*(8). The first plaintiff sued originally as a beneficiary but in the course of the suit he became the head of the mutt and as he elected to continue the suit only as beneficiary possession cannot be given to him. When he became the head of the mutt during the course of the suit, more than 12 years had elapsed from the date of alienation; hence he is barred by limitation; see first part of section 22 of the Limitation Act.

[SESHAGIRI AYYAR, J., referred to *Hossainara Begam v. Rahimannessa Begam*(9) to the contrary.]

If there is a change of capacity, limitation applies: *Arunachella Ambalam v. Orr*(10), *Sheik Meera Sahib and Co. v. Sheik Nama*(11) and *Jagabandhu Biswas v. Srinath Chatterjee*(12). If the first plaintiff now claims as owner, I have not been given opportunity to contest his right to succeed.

Hon. Mr. S. Srinivasa Ayyangar, the Advocate-General, replied.

A. Krishnaswami Ayyar and S. Aravamudu Ayyangar for the fourteenth respondent.

C. Krishnamachariyar for other respondents.

WALLIS, C.J.—This is a suit brought by the two plaintiffs WALLIS, C.J. with leave under Order I, rule 8 of the Code of Civil Procedure

(1) (1911) I.L.R., 33 All., 660 at p. 664.

(2) (1900) I.L.R., 23 Mad., 28. (3) (1885) 28 Ch.D., 426 at p. 430.

(4) (1905) I.L.R., 32 Cal., 129 (P.C.).

(5) (1897) I.L.R., 24 Cal., 418.

(6) (1915) I.L.R., 38 Mad., 1064.

(7) (1903) I.L.R., 26 Mad., 113.

(8) (1912) I.L.R., 35 Mad., 92.

(9) (1911) I.L.R., 38 Cal., 342.

(10) (1917) I.L.R., 40 Mad., 722.

(11) (1913) 25 M.L.J., 259.

(12) (1913) 13 I.C., 392.

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1908, as representing themselves and other Tambirans and disciples of the suit mutt to declare certain alienations made by the Mahant, invalid and have the property alienated handed over to the Mahant, the first defendant. The Mahant having died during the pendency of the suit and been succeeded by the first plaintiff, the plaint was amended accordingly and now prays for possession to be given to the first plaintiff.

The Subordinate Judge has held that mutt properties as such are not trust properties, and that consequently the suit is not barred under section 92, Civil Procedure Code; but he has also held that the plaintiffs are not entitled to sue for possession to be given to the first defendant and that the suit must be treated as one for a declaration and is barred under article 120 of the Limitation Act.

If the suit properties were held by the Pandarasannadhi on trust, I think the Subordinate Judge was wrong in holding that the claim for possession was not maintainable and that the suit was barred under article 120 of the Limitation Act.

As regards the first point, it seems to me that the present suit which is brought on behalf of all the beneficiaries stands in some respects on the same footing as an information filed by the Attorney-General in England on the information of relators to recover charitable property improperly alienated by the trustees. This was the regular method of recovering charity property improperly alienated, and it has been explained that in such a proceeding the beneficiaries are the persons on whose behalf the information is brought and that the function of the Attorney-General representing the Crown as *parens patriae* is simply to bring the case to the attention of the Court and ask it to provide for the due execution of the trust by securing for it the properties that belong to it. On such information the Court of Chancery recovered the property so alienated by cancelling the conveyance and directing possession to be given up to the trustees who ex-hypothesi did not formally occupy the position of plaintiffs in the suit; *St. Mary Magdalen, Oxford v. Attorney-General*(1) and *Attorney-General v. Flint*(2); and in the former case, it was held that the claim for relief was barred by limitation

(1) (1857) 6 H.L.C., 189; s.c., 10 E.R., 1267.

(2) (1841) 4 Hare, 147.

in the same manner as if the beneficiaries on whose behalf the information was filed had themselves been plaintiffs.

The case was argued on the footing that the Mahant was in the position of a trustee. If this be so, there is no reason why the plaintiffs should not be treated in this country as performing the same function as the Attorney-General on an information and asking the Court to undertake the execution of the trust, and to recover possession of the suit properties which have been improperly alienated, such possession being given to the trustee as the person entitled to it on behalf of the institution. But, even if the Mahant be not in the position of a trustee, a question it is unnecessary to consider, I think, that the plaintiffs as held in *Govindan Nair v. Achutha Menon*(1) have sufficient interest in the institution to entitle them in India to sue under Order I, rule 8, Civil Procedure Code, in respect of an alleged wrongful alienation of mutt property, and that, if they are allowed to sue there is no sufficient reason under our procedure for not granting them their full relief by ordering the property to be delivered to the present Mahant or to a receiver.

As regards limitation if the plaintiffs have a right to sue, it arose at the time of the alienation or later and is not barred under article 144 or under article 134, if that is the article applicable; and, I think, the possession of the alienee must be regarded as adverse to the institution and to the plaintiffs who claim on its behalf. I would therefore reverse the decree and remand the suit for disposal according to law.

SESHAGIRI AYYAR, J.—The properties in suit were purchased by a pandarasannadhi of the Dharmapuram adheenam in the year 1869. Another pandarasannadhi sold them to the various contesting defendants in July 1901. The plaintiffs are the Tambirans of the mutt. They obtained leave under Order I, rule 8 of the Code of Civil Procedure, 1908, to institute a suit on behalf of all the persons interested in the mutt. Their case was that the properties belonged to the mutt, and that their alienation in 1901 was invalid. They prayed for a declaration that the alienation was not binding on the mutt and for possession being delivered to the first defendant, who was at the time of the suit,

(1) (1915) 28 M.L.J., 810.

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the pandarasannadhi. Since then, the first defendant has died and the first plaintiff has succeeded him in the office. The plaint was thereafter amended to the effect that the first plaintiff should be given possession on behalf of the mutt. There has been some dispute as to the scope of this amendment and of the undertaking given by the plaintiffs at the time. Although the language of the petition for amendment is not very clear it seems to me that all that was agreed upon was that the parties should proceed on the footing that the name of the first plaintiff was to be substituted for that of the deceased first defendant.

The alienee defendants raised various pleas. The Subordinate Judge disposed of the case on the pleadings. His conclusions were that the plaintiffs were not entitled to sue for possession, that they were not competent to ask that possession should be given to the first defendant and that the suit was barred by limitation. These findings were given on issues Nos. 1, 9 and 16 and the suit was dismissed. The plaintiffs have appealed.

The question which was debated with great ability at the Bar mainly related to the right of the plaintiffs to ask for possession in favour of the first defendant, the head of the mutt.

The plaintiffs by obtaining the leave already referred to represent the whole body of the worshippers. They may be said to be the beneficiaries. There is no doubt that the legal owner of the properties is the pandarasannadhi. Ordinarily he alone should sue for the possession and for other reliefs in respect of them. The general right of the beneficiaries is to see that there is no violation of the trust, and, if the trustee does not discharge his duties properly, to apply for his removal and for the appointment of a new trustee. These are the ordinary remedies; but circumstances may arise which may estop the trustee from suing to recover possession, and the beneficiaries may not desire that he should be removed from his office. In such cases, it is in the interests of the mutt that the *cesti qui trustent* should have the right to move the Court to deprive the wrong-doer of his possession and to vest it in the trustee.

The authorities in England, as I shall show presently, have recognized this right. The principle upon which the English Courts have acted is that,

“it is a rule in equity which admits of no exception that a Court of Equity never wants a trustee.”

Once the Court is apprised that there has been a violation of the trust, it acts on the maxim that a trust shall never fail for want of a trustee. It is obvious that such a resort to the extraordinary powers of the Court should be made under exceptional circumstances. The authorities have laid down the limitations under which alone the beneficiaries would be permitted to sue for possession; but the rule stands good that under proper safeguards, the *cesti qui trustent* have the right to invoke the aid of the Court to deprive the trespasser of his wrongful possession and to vest possession in the trustee.

Both the learned Advocate-General and Mr. T. Ranga Achariyar relied upon sections 59 and 63 of the Indian Trusts Act. These provisions only relate to private trusts, but the underlying principles are applicable to public and charitable trusts as well. Section 59 of the Trust Act lays down that

“where for any other reason the execution of a trust by a trustee is impracticable, the beneficiary may institute a suit for the execution of the trust.”

An inadvertent ratification by the trustee in office of an alienation by his predecessor would be covered by clause

“the execution of a trust by a trustee is impracticable.”

This would let in the beneficiary. No doubt, he can only claim that the trust should be executed. That is to say he can ask that the trust be administered. It would be in the discretion of the Court when it is seized of the trust either to direct the existing trustee to carry out the terms, or to appoint a new trustee in that behalf, or to entrust the management to an interim receiver. By giving any of these directions, the Court would be executing the trust. There is no machinery in this country, for the Court itself administering to its fullest extent the trust until the objects of the trust and the fund are exhausted. Consequently, the Court often appoints a receiver until the right to the trusteeship is settled. Section 63 is a very important provision. Mr. T. Rangachariyar contended that this section expressly limits the right of the beneficiary to a bare declaration, and that consequently he is not entitled to ask for possession. I do not think that the word *declaration* should be given such a narrow interpretation. Even in a suit for possession, there must be an antecedent declaration. I am inclined to think that the legislature did not intend to prevent a beneficiary from suing for

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CHIDAMBARA- possession in favour of the trustee. The beneficiary is only
NATHA entitled to a declaration in his own right, but that would not
THAMBIRAN prevent him from asking that the declaration be followed up by
v. giving possession to the trustee. However that may be, section 63
NALLASIVA is not in terms applicable to charitable trusts and consequently
MUDALIAR. its language is not conclusive of the rights of a public trustee.
If this section is read along with section 10 of the Limitation
Act, it is clear that wherever trust property has gone into the
hands of a stranger, the beneficiary can take all the necessary
steps to place it in the hands of person who can legally
administer the trust.

As regards decided cases, the learned vakil for the appellant
relied strongly on *Sharp v. San Paulo Railway Co.*(1). It was
decided in 1873. The decision was that individual beneficiaries
were not entitled to claim their share of a debt from the debtor.
Lord Justice JAMES pointed out that a bare allegation 'that the
trustee would not sue' cannot give a right of action to the
beneficiary. Then the remedies open under such circumstances
are pointed out. This is not a pronouncement that where a
trustee *could not sue* (not *would not sue*) the beneficiaries are not
entitled to claim that possession should be given to him. The
same learned Lord Justice a few months later held that a bene-
ficiary can sue for an injunction that a contract of the trustee
should not be completed; *Dance v. Goldingham*(2). If a claim for
an injunction is competent, I fail to see why a suit for possession
should not be. The decision in *Gandy v. Gandy*(3) is exactly in
point. In that case the trustees refused to be made co-plaintiffs
with the beneficiaries. Lord Justice COTTON negatived the con-
tention that the only remedy possessed by the beneficiaries is to
sue for the removal of the trustee and said

"that where a covenant is entered into with one person for
the benefit of another, then, if the covenantee will not sue, the person
beneficially interested may sue in equity."

LINDLEY, L.J., and BOWEN, L.J., concurred in this view.
Yeatman v. Yeatman(4) and *Beningfield v. Baxter*(5) are to the
same effect: see also observations of Lord HOBHOUSE in *The*
Heirs of Hiddingh v. De Villiers Denysen(6). The latest case

(1) (1873) 8 Ch. App., 527.

(3) (1855) 30 Ch.D., 57.

(5) (1856) 12 A.C., 167.

(2) (1873) 8 Ch. App., 902.

(4) (1877) 7 Ch.D., 210.

(6) (1887) 12 A.C., 624 at p. 641.

on the subject is *Meldrum v. Scorer*(1). Mr. Justice KAY reviewed
all the earlier authorities and said:

"Therefore, in this case, I have first to see whether there are
real grounds for the trustee not suing. I have to ascertain whether
there has been simply a refusal on his part or whether it is a case in
which the circumstances are such as to render it an inconvenient or
ineffectual course that he should sue."

It is clear from this dictum that it is a question in each case
whether the beneficiary should be allowed to ask for the reliefs
which prima facie should be claimed only by the trustee. The
learned Advocate-General drew our attention to the nature of
the relief claimed by the beneficiaries in *Consett v. Bell*(2) as
showing that a claim that the trustee should be put in possession
is within their rights. In none of the above cases was any
decree passed giving the trustee possession at once. That is so,
because the Chancery Court itself administered the estate and was
not overanxious to part with its control over the trust. The
peculiar jurisdiction exercised by the Court of Chancery is thus
stated by WILMOT, C.J., in *Attorney-General v. Lady Downing*(3):

"The person who creates a trust means it should at all events be
executed. The individuals named as trustees are only the nominal
instruments to execute that intention, and if they fail, either by
death, or by being under disability, or by refusing to act, the con-
stitution has provided a trustee . . . Where no trustees are
appointed at all, this Court assumes the office . . . There is some
personality in every choice of trustees and if the trust cannot be
executed through the medium which was in the primary view of
the testator, it must be executed through the medium which the
constitution has substituted in its place."

The same conditions do not apply in India although the
Courts here have the same general right of supervision over
trusts and trustees. In *Perry on Trusts*, after examining the
English and the American authorities the law is thus sum-
marized:

"If a *cestui que trust* desires to bring a suit against a stranger,
he should apply to the trustee to allow his name to be used as co-
plaintiff, and the trustee is bound to comply, on being indemnified
against the costs. If the trustee refuses improperly, he may be made
a defendant."

(1) (1887) 56 L.T. (N.S.), 471.

(3) (1767) Wilm., 24.

(2) (1842) 1 Y. & C.C.C., 569.

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This is exactly what has been done in the present case.

As regards Indian decisions, *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav*(1) is directly in point. In Madras, it was held in *Padmanabha Chettiar v. Williams*(2) that the proper procedure is to apply either for the removal of the trustee or to have a receiver appointed. It does not appear whether in that case possession was asked to be given to the trustee. The same remarks apply to *Kamaraju v. Asanali Sheriff*(3). There is an observation in this case that if a representative suit were brought, the result might be different. I do not think that these two cases have laid down anything more than that a few among the beneficiaries are not entitled to sue for possession being given to themselves on behalf of the trust. If they negative the right of the beneficiaries, under certain circumstances to ask for possession being given to the trustee defendant I respectfully decline to accept them as good law. The decision in *Chettappa Nambiar v. Koman*(4) does not affect the present case. To that case, the trustee was not a party, nor did the plaintiffs ask that possession should be given to them. On the other hand, *Subramania Iyer v. Nagarathna Naicker*(5) is in point. In a later case *Subramanian Chettiar v. Raja Rajeswara Dorai*(6), after full argument on the question the right of the beneficiary to claim that possession should be given to the trustee was expressly upheld. When the case was taken before the Judicial Committee in *Subramanian Chettiar v. Raja Rajeswara Dorai*(7), the eminent equity lawyer who appeared for the appellant apparently did not consider the question arguable. Although *Miyaji alias Mahomed Ghouse Sahib v. Sheik Ahmed Sahib*(8) proceeds on the construction of section 14 of Act XX of 1863, the judgment shows that where a trustee is made a defendant, possession can be given to him in a case instituted by the beneficiaries. I am therefore of opinion that the Subordinate Judge is wrong in his view that under no circumstances can the beneficiaries sue that possession should be given to the lawful trustee.

(1) (1897) I.L.R., 24 Cal., 418.

(2) (1900) I.L.R., 23 Mad., 239. (3) (1930) I.L.R., 23 Mad., 99.

(4) (1914) 2 L.W., 61. (5) (1903) 20 M.L.J., 151.

(6) (1909) I.L.R., 32 Mad., 490 at p. 507.

(7) (1915) I.L.R., 39 Mad., 115 (P.C.). (8) (1908) I.L.R., 31 Mad., 212.

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On the question of limitation, Mr. Ranga Achariyar contended that article 120 of the Limitation applies to the case. I am unable to agree. It may be that before article 134 of the Limitation Act is held applicable, more facts and more of the history of the institution of which the plaintiffs are the disciples may have to be ascertained.

The allegations in the plaint state that the properties in suit appertain to the trust. The learned Advocate-General argued that the words "bequeathed in trust" contemplate an original entrustment and that if the properties can be shown to have been acquired from the income of the trust property, the acquisitions would be included in it. There is great force in this contention. It is not necessary to decide this question at this stage of the case, nor the other question whether a *matathipathi* is not a trustee. In my opinion article 144 of the Limitation Act directly applies to this case. The suit is for possession of immoveable property and consequently the first column applies. The learned vakil for the appellant contended that the third column is inapplicable, as the possession of the alienees is not adverse to the plaintiffs, the beneficiaries, but only to the trustee. Authorities were quoted to show that the beneficiaries have not the same character as the trustees. I do not think it necessary to pronounce any opinion on this question as the word *plaintiff* in column 3 would include the beneficiary plaintiff according to the definition of that expression in the Limitation Act.

The beneficiaries sue only in the right of the trustee. They are only the aliases for the trustees. Under the common law of England, the beneficiaries were compellable to use the name of the trustee as plaintiff. Consequently the beneficiaries derive their right to sue *through* the trustee. It is his action that they are prosecuting. In this view, what is adverse to the trustee is also adverse to the persons who derive their right to sue through him. Article 144, therefore, applies and there is no necessity for seeking the aid of the residuary article 120 in this case. The suit is not barred by limitation.

Another aspect of the question of limitation relates to the character in which the trustee held the properties. The dictum of MILLER, J., in *Muthuswamier v. Sree Sreemethanithi Swamiyar*(1) that the alienation may be binding on the alienating

(1) (1915) I.L.R., 38 Mad., 356.

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trustee during his life-time opens up a question which requires investigation. The learned Judge, as I understand him, did not lay down that such a proposition is applicable to all trust properties. It may be that his view may have to be reconsidered after the facts have been ascertained. At this stage, I do not think it advisable to say more on that question.

For the above reasons, I would reverse the judgment of the Subordinate Judge and remand the case to him for disposal. Costs will abide the result.

N.R.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice and Mr. Justice
Kumaraswami Sastriyar.*

1917,
August, 6
and 28.

VINJAMAMPATI PEDA VENKANNA AND ANOTHER
(DEFENDANTS NOS. 2 AND 4), APPELLANTS,

v.

VADLAMANNATI SREENIVASA DEEKSHATULU
(PLAINTIFF), RESPONDENT.*

Hindu Law—Promissory note executed by father before partition—Renewal of the note by father after partition—Son's liability on such note—Pious obligation to discharge father's debts, extent of.

A Hindu son is not liable during his father's lifetime on a promissory note executed by his father after partition in renewal of a note executed by the father before partition.

The recent decision of the Judicial Committee in *Sahu Ram Chandra v. Bhup Sing* (1917) L.R., 44 I.A., 126, does not overrule the long line of decisions as to the right of the creditor of a Hindu father to sue the father and the sons for an antecedent debt incurred by the father for purposes neither illegal nor immoral and to attach and to bring to sale the interest of the sons as well as of the father in execution of the decree in such a suit.

Per KUMARASWAMI SASTRIYAR, J.—The decision in *Sahu Ram Chandra v. Bhup Sing* (1917) L.R., 44 I.A., 126, makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son assuming that it arises at all during the lifetime of the father, arises only if the father's share or his self-acquisitions are insufficient to meet the debts.

* Second Appeal No. 339 of 1916.

SECOND APPEAL against the decree of J. C. FERNANDEZ, the District Judge of Guntur, in Appeal No. 8 of 1915, preferred against the decree of V. PURNAYYA, the Additional District Munsif of Bapatla, in Original Suit No. 170 of 1913.

The plaintiff-respondent sued to recover money due on a promissory note executed by the father of the appellants. The suit promissory note was executed by the father in renewal of a prior promissory note executed by him before partition. The Court of First Instance gave a decree against the father alone and exonerated the sons from liability. On appeal by the respondent against such exoneration, the lower Appellate Court modified the decree by making the appellants liable for the suit-debt to the extent which fell to their share on partition. The appellants preferred this Second Appeal against the decree of the lower Appellate Court.

M. O. Parthasarathi Ayyangar for the appellants.

A. Krishnaswami Ayyar for the respondent.

WALLIS, C.J.—The question in this Second Appeal is whether WALLIS, C.J. a son can be made liable, during his father's life-time, as held by the District Judge, on a promissory note executed by his father after partition in renewal of a note executed by the father before partition. One of the contentions raised by Mr. Parthasarathi for the appellant is that since the recent decision of the Judicial Committee in *Sahu Ram Chandra v. Bhup Sing* (1) payment of the father's debts cannot be enforced by suit against the sons during the father's life-time. This is a most important question because, if the contention is right, the recent decision involves the overruling of what has long been treated in this and other High Courts as a settled rule of every day application, and it is therefore incumbent upon us to satisfy ourselves that this result is really involved in the recent decision.

Now there are two distinct and closely connected things, one, the father's power to bind the sons' shares by alienations during his life-time for debts not incurred for necessary purposes and not tainted with immorality, and the other, the creditor's remedies by suit in respect of such debts against the sons' shares; and this distinction is observed in the well-known passage of Lord Hobhouse's judgment in *Mussamat Nanomi Babuasin v.*

(1) (1917) L.R., 44 I.A., 126.

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Modun Mohun(1) which is quoted in the recent decision. That decision relates to the first question, viz., whether the father's power of alienation to satisfy the class of debts already mentioned could only be exercised where the debt was antecedent or extended to alienations for present debts as well, and does not of itself affect the other question as to the extent of the creditors' remedies by suit against the sons' shares. It is said however that the reasoning of the judgment is consistent with the Indian rulings as to the creditors' remedies against the son during the father's life-time, and the passage on which most reliance is placed is as follows:—

"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing."

Now it may be said that the reasoning in this passage applies equally whether the debt for which the alienation is made by the father is an antecedent debt or a present debt and that it involves a departure from the decisions in *Girdharee Lall v. Kantoo Lall*(2), *Suraj Bansi Koer v. Sheo Proshad Singh*(3), *Mussamut Nanomi Babuasin v. Modun Mohun*(1), and other decisions of their Lordships in which the father's right to alienate for antecedent debts was rested on the pious obligations of the sons to pay them. Their Lordships, however, considered that the rule as to alienations for an antecedent debt was too firmly established to be disturbed, and treated it as an exception from a general and sound principle not to be extended and to be very carefully guarded. They proceeded to say that much, if not all, the law upon the subject had arisen from the necessity of protecting the rights of third persons, say the purchasers of the property who have taken their title for onerous consideration and in good

(1) (1885) L.R., 13 I.A., 1.
(2) (1874) L.R., 1 I.A., 321.

(3) (1879) L.R., 6 I.A., 88.

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faith, and quoted with approval a passage from the judgment of Sir JOHN STANLEY, C.J., which thus interpreted the observations in *Suraj Bansi Koer v. Sheo Proshad Singh*(1). They then set out the well-known passage from Lord HOBHOUSE's judgment in *Mussamut Nanomi Babuasin v. Modun Mohun*(2), which contains the express statement that the sons cannot set up their rights against the remedies of the creditors for debts not tainted with immorality, and observed that it lent no countenance to the idea that the joint family estate could be effectively sold or charged except where the sale or charge has been made in order to discharge an obligation, not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. It is important to note that their Lordships, perhaps advisedly, did not say here that the joint family estate cannot be sold by the Court in satisfaction of an antecedent debt, or comment on the very general words as to the extent of the creditor's remedies to which so much importance has been attached by all the Courts in India. They then observed that they had set forth the limits to the exception because they formed a guide to the settlement of the conflict of authority in India on the subject of antecedent debt; and after mentioning the case in which the conflict arose they again adopted as the true rule the statement of Sir JOHN STANLEY as to alienation by the father for an antecedent debt.

There is no reference to the subject of the creditor's right by suit to bring the son's interest to sale for an antecedent debt or to the Indian decisions affirming that right; and the question is whether these decisions which proceed upon the authority of their Lordships' earlier decisions should now be overruled because, it is said, the reasoning in the recent judgment is in favour of allowing the sons to resist a sale of their shares. As to this, Lord HALSBURY's well-known observations in *Quinn v. Leatham*(3), that a case is only an authority for what it decides, and not for every proposition that may seem to follow logically from it, appears to me to apply with special force. That the Indian Courts have interpreted the earlier decisions ending with

(1) (1879) L.R., 6 I.A., 88 at p. 101.

(2) (1885) L.R., 13 I.A., 1.

(3) (1901) A.C., 495 at p. 506.

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Mussamut Nanomi Babuasin v. Modun Mohun(1), in which last case it is stated that the sons cannot set up their rights against his creditors' remedies for their debts if not tainted with immorality, as authorizing suits for such debts against the son as well as father may be seen, as regards Calcutta, from the Full Bench decision in *Luchmun Dass v. Giridhur Chowdhry*(2) and the judgment of MOOKERJEE and HOLMWOOD, JJ., in *Kishun Pershad Chowdhry v. Tipan Pershad Singh*(3) where the other decisions are dealt with. In Bombay the point was expressly decided in *Jagabhai Lalubhai v. Bhukandas Jaggivandas*(4), after the decision in *Mussamut Nanomi Babuasin v. Modun Mohun*(1), and that decision is followed in *Umed Hathising v. Goman Bhaiji*(5). In Allahabad there is an express decision of a Full Bench in *Karan Singh v. Bhup Singh*(6), and this decision to which Sir JOHN STANLEY, C.J., was a party was referred to by him in his judgment in *Chandra Deo Singh v. Mata Prasad*(7) which is repeatedly referred to with approval by their Lordships in the recent case.

As regards our own Court, the case is, if anything stronger, because it has expressly based the creditor's right to bring to sale the sons' shares for an antecedent debt on the father's right to sell the sons' shares for such a debt, a right which is expressly recognized. In the leading case in *Ponnappa Pillai v. Pappuwayyanganar*(8) which overruled the earlier decisions of this Court in deference to *Girdharee Lall v. Kantoo Lall*(9) and *Suraj Bansi Koer v. Sheo Proshad Singh*(10) Sir CHARLES TURNER, C.J., in a judgment approved by the Privy Council in *Muttayan Chettiar v. Sangili Vira Pandia Chinnatambiar*(11), observed at page 64 that, when it is decided that for the discharge of debts other than debts incurred for immoral purposes a father can make a valid alienation of ancestral property so as to bind his sons' interest, it is a corollary that the interest of the sons as well as of the father may be attached and sold in execution for such a debt. Again in the Full Bench decision in *Ramasami Nadan v. Ulaganatha Goundan*(12) which

(1) (1885) L.R., 13 I.A., 1.

(3) (1907) I.L.R., 31 Calo., 735.

(5) (1896) I.L.R., 20 Bom., 385.

(7) (1909) I.L.R., 31 All., 178.

(9) (1874) L.R., 1 I.A., 321.

(11) (1882) L.R., 9 I.A., 128.

(2) (1880) I.L.R., 5 Calo., 855 (F.B.).

(4) (1887) I.L.R., 11 Bom., 37.

(6) (1905) I.L.R., 27 All., 16.

(8) (1881) I.L.R., 4 Mad., 1 (F.B.).

(10) (1879) L.R., 6 I.A., 88.

(12) (1899) I.L.R., 22 Mad., 49.

has been treated till now as finally setting the question in this Presidency, SHEPHARD, O.C.J., observed at page 61 :

"Since 1874, the decisions of the Judicial Committee are consistent in holding that, as the sons' liability may be enforced through the medium of a sale of the ancestral property executed by the father, so it may be enforced by a sale in execution of a decree against the father, and that in neither case can the son recover the property except by proving that the debts were of a kind for which he would not be liable."

BENSON, J., also proceeded on the authority of the Privy Council decisions. SUBRAHMANYA AYYAR, J., went somewhat further, and held in an elaborate judgment that under Hindu Law a son was liable for his father's debts even in the latter's lifetime, a conclusion which is perhaps hardly reconcilable with the recent decision of their Lordships. This Court has adhered to the view of TURNER, C.J., and has held in a series of cases that, as the effect of partition is to put an end to the father's right to sell the son's share for an antecedent debt, it also puts an end to the creditor's right to bring the son's share to sale during his lifetime, at any rate where the partition has not been effected to defeat and delay creditors : *Krishnasami Konan v. Ramasami Ayyar*(1), *Ralkna Naidu v. Aiyanaachariar*(2) and *Kameswaramma v. Venkatasubba Row*(3).

In these circumstances, and as it appears to me that the creditor's right to bring the sons' shares to sale for an antecedent debt and the long line of decisions which support it were not considered by their Lordships in the recent case, I think it should not be treated as overruling them, and that, if we are to depart from what has been the settled law of this and other High Courts for so many years, it should be in deference to a clear expression of their Lordships' opinion with reference to this particular question, and not on any inference from the reasons given by their Lordships in settling a conflict in the Indian Courts on another point.

While we overrule Mr. Parthasarathi's first contention, he is entitled, as appears from what I have already said, to succeed on the ground that the suit was filed by the creditor after partition, to say nothing of the further ground that the father had

(1) (1899) I.L.R., 22 Mad., 519.

(2) (1908) 13 M.L.J., 599.

(3) (1915) I.L.R., 38 Mad., 1120.

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no authority from the son to renew the note after partition. The appeal is allowed, and the decree of the District Munsif restored with costs here and in the lower Appellate Court.

KUMARASWAMI SASTRIYAR, J.—I have had the advantage of reading the judgment of my Lord and agree in holding that the Second Appeal should be allowed not on the broad question raised by Mr. Parthasarathi Ayyangar as to the non-liability of a son to pay his father's debts during the father's lifetime, a conclusion which according to appellant's counsel is the logical result of the recent decision of their Lordships of the Privy Council in *Sahu Ram Chandra v. Bhup Singh*(1) but on the narrower one that a son is not after partition liable to be proceeded against in respect of a simple personal debt incurred by the father before partition whatever his rights may have been if they had continued joint.

It has been contended by Mr. Krishnaswami Ayyar that the pious duty which lay on the son to discharge his father's debts is under Hindu Law irrespective of the possession of any assets or joint family properties and that consequently it is unaffected by any partition and attaches so long at least as there is any property which was once joint property in existence in the son's hands, the change in the character of the property created by the partition being unaffected by an obligation which arose irrespective of the possession of any assets.

Whatever may be the strict rule of Hindu Law as to the extent of the pious obligation it has been now well settled that it is circumscribed by the possession of assets or joint family property and that it does not attach to the son's self-acquisitions. So far as the creditor of the father is concerned all that he can do is to avail himself of any remedy that may be open to the father and work it out either by suit or in execution proceedings and if the father has lost his power of dealing with the son's interests owing to a *bona fide* partition between them, the creditor can be in no better position. The effect of a *bona fide* partition is *prima facie* to secure to each of the parties absolute control over the properties that fall to his share unfettered by any liabilities which at the date are not charged upon them. The personal debts of each member are payable only out of his share and the transaction is one in the nature of a conveyance

(1) (1917) L.R., 44 I.A., 126.

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by one party to the other of the property that falls to him. There is nothing in Hindu Law to prevent a father from taking certain properties absolutely or receiving certain benefits and releasing the son from the duty cast upon him by Hindu Law to pay his debts and so long as the transaction is *bona fide* a simple creditor can have no right to object to a transaction which both the father and son were competent to enter into.

In *Krishnasami Konan v. Ramasami Ayyar*(1) it was held that after a *bona fide* partition between a father and son it was not open to the creditor at least during the father's lifetime to proceed in execution against the son's share in respect of a decree obtained against the father. In *Rathna Naidu v. Aiyanaachariar*(2) it was held following the above case that a Hindu father has no power to mortgage the share got by the son on partition even though the mortgage was in respect of a debt that was contracted before partition. In *Kameswaramma v. Venkata Subba Rao*(3) WALLIS, C.J., after reviewing the authorities followed the decision in *Krishnasami Konan v. Ramasami Ayyar*(1) and held that a creditor had no right to proceed against the son's properties. With reference to *Ramachandra Padayachi v. Kondayya Chetti*(4) cited by the respondent's *vakil* it is distinguishable as the debt sued on arose out of a joint family business carried on by the father and son before partition and the liability of the son rested not merely on pious obligation to pay a debt incurred without any family necessity or for the family benefit but on contract, every member being liable on the contract entered into in respect of a joint family trade at least to the extent of the joint family assets as the profits of the trade would in the ordinary course be shared by all the members.

In the case of renewal by the father alone after partition of a note executed before partition the case is much stronger as I can see no equity in allowing a Hindu father to renew and keep alive a debt (increased by the addition of interest and principal at each renewal) so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must in my opinion be treated as a new obligation incurred after partition. It has been argued that in the present case the

(1) (1889) I L.R., 22 Mad., 519.
(3) (1915) I.L.R., 38 Mad., 1120.

(2) (1908) 18 M.L.J., 599.
(4) (1901) I.L.R., 24 Mad., 555.

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creditor took the note without notice of the partition. I do not think this will make any difference so far as the son's rights are concerned. The pious duty creates no charge on the son's share prior to partition, the presumed agency of the father ceases on partition and as the creditor can only work out the father's rights at the date of the suit he can have no right if that right is lost owing to a *bona fide* partition.

Turning to the broader question raised I do not think that we can in effect overrule a series of decisions and disturb the settled state of the law mainly based on the previous decisions of the Privy Council without some more definite pronouncement of their Lordships in a case in which the question is directly raised.

In *Sahu Ram Chandra v. Bhup Singh*(1) their Lordships of the Privy Council while upholding the father's power of alienation either by an absolute sale or a mortgage of joint property *in order to satisfy an antecedent debt* meet the contention that so long as there is a pious duty the distinction between antecedent and contemporaneous debts is immaterial with the following remarks:—

"While the father, however, remains in life, the attempt to affect the sons' and grand-sons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged"

It has been argued that this involves two propositions: namely, (1) that the pious obligation does not arise till the death of the father and (2) that it is only enforceable to the extent of the portion of the debt which cannot be met out of the share or assets of the father. Pushed to its logical conclusion the observations above cited do no doubt, while preserving (1) to the father the right to deal with his son's shares by sale or mortgage so long as it is for the purpose of discharging an antecedent debt, (2) to a mortgagee for an antecedent debt the right to proceed against the son's share and (3) to a purchaser

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to whom property is sold to satisfy an antecedent debt the right over the entire property including the son's share, negative the right of a simple creditor or a transferee not for an antecedent debt to proceed against the son's share during the life time of the father or in other words subordinates the rights of the creditor of the father whose debt is not for the family benefit to the Mitakshara rights of the sons in respect of their undivided share and puts him *qua* such debts in the same position as if he was the creditor of any other member of a joint Mitakshara family. The result is to overrule a series of decisions referred by the Chief Justice in his judgment of this and the other High Courts extending over several years and to restore the state of the law in this Presidency to what it was before the Full Bench decision in *Ponnappa Pillai v. Pappuvayyanganar*(1).

I do not think that we can do this without a further pronouncement by their Lordships as to the effect of their observations on the cases relating to the creditor's remedies during the lifetime of the father.

It has been settled by a series of decisions commencing from *Ponnappa Pillai v. Pappuvayyanganar*(1) on the authority of the decisions of the Privy Council in *Girdharilall v. Kantoo Lall*(2) and *Mussamut Nanomi Babuasin v. Modun Mohun*(3) that a creditor of the father whose debt has not been incurred for an illegal or immoral purpose can in execution of his decree against the father bring to sale the interest both of the father and his sons in joint family property and that it is open to the creditor to join the father and sons in a suit and obtain a decree declaring the liability of the interest of the sons in the joint property to satisfy the debt, the only defence open to the sons being that the debt was contracted for illegal or immoral purposes. The *ratio decidendi* was that as the father had power to dispose of his son's share to satisfy a debt neither illegal nor immoral the creditor had the right to sell in execution what the father could have done by alienations *inter vivos*. Nothing can be clearer than the observation in *Mussamut Nanomi Babuasin v. Modun Mohun*(3), to the effect that the sons

(1) (1881) I.L.R., 4 Mad., 1 (F.B.).

(2) (1874) L.R., 1 I.A., 321.

(3) (1885) L.R., 13 I.A., 1.

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cannot set up their rights against the creditor's remedies for their father's debts if not tainted with immorality.

While the decisions recognized alienations for antecedent debts on a different category and denied the power of the father to sell or mortgage joint family properties except for an antecedent debt and excluded the loan secured by a mortgage or the purchase money got from the vendee from the category of antecedent debts, the result of the ruling of the Privy Council in *Mussamut Nanomi Babuasin v. Modun Mohun*(1) as understood by all the Courts was simply to alter the form of the creditor's remedy. He was entitled to treat the balance due on his mortgage after selling the father's share as a simple debt due by the father and so liable to be paid by the sons by reason of their pious duty. It was similarly open to him in cases of sales to sue the father as for failure of consideration in case the sons succeeded on getting their share excluded from liability and to proceed against the sons for the damages payable by their father who sold more than he was entitled to.

In the case of simple debts or suits on the personal covenant to pay by the father in mortgages the sons were held to have no defence to the suit unless they showed that the debt was illegal or immoral, no question of antecedent debt arising on a suit to recover a simple debt. The following observations in *Surja-prasad v. Golab Chund*(2) where the debt secured was on the one hand not antecedent and on the other not illegal or immoral indicate the position of the parties in such cases :—

"The plaintiff seeks to enforce the mortgage security in this case, and he is bound to show that the mortgage is binding upon the defendant. Having regard to the rulings both of the Privy Council and this Court, he could do so by showing that the debts for which the mortgage was given were 'antecedent debts' that is to say, antecedent to the transaction in question, but we are unable to find upon the evidence such as it is that this was so. If then the mortgage is not binding upon the defendant, the question is whether the plaintiff is entitled to a decree declaring that the money covered by the bond may be realized out of the whole of the ancestral estate, the debt not being proved to have been incurred for immoral or illegal purposes, and it being antecedent to the suit. If the plaintiff had brought his suit within six years from the time when the

(1) (1885) L.R., 13 I.A., 11.

(2) (1900) I.L.R., 27 Cal., 762.

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bond fell due, there could be no doubt that he would be entitled to the relief which was declared as the proper relief to be granted to a party in the position of the plaintiff in *Luchmun Dass v. Giridhar Chowdry*(1) decided by a Full Bench of this Court and *Khalilul Rahman v. Gobind Pershad*(2)."

These observations have to be borne in mind when we have to consider the remark of the Privy Council in *Sahu Ram Chandra v. Bhup Singh*(3) to the effect

"that except under the mortgage all other remedies have long ago disappeared."

In *Sahu Ram Chandra v. Bhup Singh*(3) the question directly before their Lordships was whether a mortgage for an antecedent debt was binding on the sons and this question was answered in the affirmative and so far the decision confirmed the view taken in all the High Courts. The decision in *Mussamut Nanomi Babuasin v. Modan Mohun*(4) which has been treated by Courts in India as the basis for allowing the creditor to sue the sons in their father's lifetime for their father's debt on the ground that he was entitled to do by suit and execution proceedings thereunder what the father could have done of his own volition though referred to by their Lordships as establishing the son's liability for mortgages or alienations created to pay off antecedent debts was not explained as being limited to such cases. So far as I can see the attention of their Lordships was not called to the remedies of a simple creditor as enunciated by the decisions of the various High Courts. The passages in the Hindu Texts and commentaries (which I shall refer to later on) which show that the pious obligation of the son was not purely a post mortem obligation but one which would under certain circumstances arise during the life of the father were not brought to the notice of their Lordships. The passage in their judgment to the effect that the case was free from complications because

"except under the mortgage all other remedies have long ago disappeared, and the appellants rear it up and claim under it now, there being no right in them to invoke the doctrine of the pious obligation to discharge the debt incurred by Bhup Singh, because that debt as such cannot be successfully sued for"

(1) (1880) I.L.R., 5 Cal., 855 (F.B.).
(3) (1917) L.R., 44 I.A., 126.

(2) (1893) I.L.R., 20 Cal., 323.
(4) (1835) I.L.R., 13 I.A., 1.

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indicates that their Lordships had in view the cases where a suit on the debt evidenced by a mortgage not illegal or immoral would lie against the sons even though the mortgage was not for an antecedent debt: *Surjaprasad v. Golab Chand*(1), and other cases. If there was no pious obligation at all during the father's lifetime and the father was in the position of any other co-parcener it is difficult to see how any suit would lie against the sons except for debts incurred for necessary family purposes and it would be perfectly immaterial to the sons whether the debt is barred or not.

In *Sripat Singh v. Tagore*(2), where their Lordships had to consider the effect of a sale of joint family properties in execution of the decree obtained on a simple debt incurred by father alone observe :

"The grounds for that action were these: The property in question was joint property, governed by the Mitakshara Law. By that law a judgment against the father of the family cannot be executed against the whole of the joint family property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

They also observe that the creditor had the *undoubted right* to bring the property to sale except where the sons show that the debt was illegal or immoral.

While I am not prepared to hold that the decision in *Sahu Ram Chandra v. Bhup Singh*(3), must be taken to overrule by implication the whole current of authorities during the past 35 years and to restore the state of the law to what it was prior to the year 1881, I am of opinion that the decision makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son only arises when the assets of the father are insufficient assuming that it arises at all during the lifetime of the father. In other words the pious duty is limited to the debts which the father is unable to satisfy out of his share or his self-acquired properties. This limitation introduced by the Privy Council is, if I may say so with respect,

(1) (1900) I.L.R., 27 Cal., 782.

(2) (1916) L.R., 44 I.A., 1.

(3) (1917) L.R., 44 I.A., 126.

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entirely in accordance with Hindu Smritis and safeguards the spiritual interest of the father and the temporal interests of his sons. According to the notions of Smriti writers it is regarded as sinful to remain in debt and a debtor's salvation is deeply imperilled if he dies indebted. According to Vrihaspati a person who does not repay his debt "will be born in his creditor's house as a slave or servant or woman or a quadruped." According to other writers a person dying in debt goes to hell. A duty is therefore cast upon every person to discharge debts incurred by him. The liability of the son to come to the help of his father is only stated to arise when the father is, owing to misfortune, unable to pay his debts. Yagnavalkya says :

"If a father has gone abroad or died or been subdued by calamity his debts shall be paid by his sons and grandsons, on their denial the creditor must prove the debt by witnesses."—Chapter 2, sloka 51.

Vignaneswara in the Mitakshara commenting on the sloka observes :

"If the father not having paid the debt due has died or has gone to a distant country or is overpowered by incurable disease *et cetera*, then the debts contracted by him must be paid by his son or grandson even in the absence of the father's property. Thereon this is the order—on the father's default it is the son, on the son's default it is the grandson (who should pay). Therefore by a son born giving up his self-interest should the father be carefully released from debt so that he may not go to hell."

In the Smriti Chandrika reference is made to the sloka of Katyayana to the effect that

"Even though the father be living if he is afflicted by disease or has gone to sojourn away from his own country the debt contracted by the father should be paid by the sons after the twentieth year"

and so the text of Vrihaspati that

"Even when the father is alive if he be afflicted with disease such as consumption, leprosy or if he be born a blind person, then the sons should pay the debt when it has been proved."

The lawgivers while casting on the son the duty to pay the debts which the father was owing to misfortune unable to pay also enjoins the father not to get into debt as he thereby becomes 'an enemy to his son.' It is clear that whatever may be the pious duty of the son after the father's death the duty in the father's lifetime is only to pay if the father is unable to do so.

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To this extent I think Courts can safely safeguard the interests of the sons in respect of a liability based simply on their pious duty. Any further extension of the immunity of the son cannot, I think, be made in the state of the authorities as they stand at present. Till the decision in *Girdhari Lall v. Kantoo Lall*(1), the view taken by Courts in this Presidency was that the son was not during his father's lifetime liable under any circumstances to pay his father's personal debts. The contrary view has been taken since 1881 when the majority of the Judges in the Full Bench in *Ponnappa Pillai v. Pappuray-yangar*(2) followed what they thought to be the obvious result of the decision in *Girdhari Lall v. Kantoo Lall*(1). I think a clear pronouncement of their Lordships of the Privy Council reversing the whole current of decisions of all the High Courts and restoring the state of the law as it stood before the decision in *Girdhari Lall v. Kantoo Lall*(1), is necessary before we can push certain observations of their Lordships in *Sahu Ram Chandra v. Bhup Singh*(3) to what it is contended is their logical conclusion.

The power given to a creditor to work out the rights which a Hindu father has to require his son to pay his debts has its foundation not on any Hindu Law texts (attachment and sale in execution of decrees being unknown to the text writers) but on principles of modern jurisprudence. The question in these cases is (to quote the words of Sir JAMES COLVILLE in *Lakshman Dada Naik v. Ramachandra Dada Naik*(4):

"Not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence"

I agree that the appeal should be allowed with costs in this and the lower Courts.

S.V.

(1) (1874) L.R., 1 I.A., 321.

(3) (1917) 44 I.A., 126.

(2) (1881) I.L.R., 4 Mad. 1 (F.B.).

(4) (1880) L.R., 7 I.A., 195.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ayling, Mr. Justice Seshagiri Ayyar
and Mr. Justice Bakewell.

KASARIBADA VENKATACHALAPATI RAO (APPELLANT,
DECREE-HOLDER), APPELLANT,

v.

MADDIPATLA KAMESWARAMMA alias KAMAKSHAMMA
(SECOND RESPONDENT—JUDGMENT-DEBTOR'S LEGAL REPRESENTATIVE),
RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Stay of execution by an Appellate Court—Order for execution by Court of first instance in ignorance of order of stay—Order for execution, validity of.

Held by the Full Bench:—Where subsequent to an interim order for stay of execution made by an Appellate Court without notice to the decree-holder but before its communication to the Court of first instance, an order of attachment is made by the latter Court, the order of attachment is not void and ineffectual as having been made without jurisdiction, but is legally valid.

The order is effective only from the time it is communicated to the first Court.

Muthukumarasami Rowther Minda Nayinar v. Kuppasami Aiyangar (1910) I.L.R., 33 Mad., 74 and *Bessesswari Chowdhurany v. Hurro Sundar Mosumdar* (1892) 1 C.W.N., 228, followed.

Hukum Chand Boid v. Kamalanand Singh (1906) I.L.R., 33 Calc., 927, not followed.

Ramanathan v. Arunachellam (1915) I.L.R., 38 Mad., 766, overruled.

APPEAL against the Appellate Order of P. N. SATAGORA NAYUDU, the Temporary Subordinate Judge of Kistna, in Appeal No. 118 of 1915, preferred against the order of C. VARADARAJULU PANTULU, the District Munsif of Narasapur, in Civil Miscellaneous Petition No. 1950 of 1914 in Original Suit No. 38 of 1912.

The facts are given in the ORDER OF REFERENCE.

V. Ramasam for the appellant.

P. Narayanamurti for the respondent.

This Appeal coming on for hearing in the first instance before ABDUR RAHIM and BAKEWELL, JJ., the following ORDER OF REFERENCE TO A FULL BENCH was made by:—

* Appeal Against Appellate Order No. 128 of 1916 (F.B.).

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ABDUR RAHIM, J.—In this case the appellant decree-holder obtained an order of attachment of certain properties of the judgment-debtor on the 14th March, 1914 and attachment was actually carried out on the 17th March. It appears that the judgment-debtor who had filed an appeal against the decree made an application for stay of execution and obtained an interim order staying execution till the disposal of the appeal, on the 18th March, 1914. This order was finally vacated on the 15th April, the judgment-debtor having failed to furnish security as required by the Appellate Court. In the meantime, that is, after the order for interim stay was passed, and before that order was set aside, the judgment-debtor sold the property to a third person. The question that we have been asked to consider in the appeal is whether the order of attachment of the 14th March has any effect so as to affect the alienation subsequently made by the judgment-debtor or whether the attachment must be held to be *ultra vires* and ineffectual because of the fact that the Appellate Court had made an interim order of stay previous to the date of attachment, though it was not communicated to the Court that passed the order of attachment and the decree-holder had no knowledge of it at the time he made the application.

The question, so far as the principle involved is concerned, was decided by a bench of this Court in *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(1) where it was laid down accepting the view of the law laid down by the Calcutta High Court in *Bessesswari Chowdhurany v. Hurro Sundar Mozumdar*(2) that an order of the Appellate Court granting interim stay does not operate so as to suspend proceedings in execution before the first Court before the date of its communication to the latter Court. The learned Judges had before them another ruling of the Calcutta High Court in *Hukum Chand Boid v. Kamalanand Singh*(3) which was to the contrary effect, but they preferred the view expressed in *Bessesswari Chowdhurany v. Hurro Sundar Mozumdar*(2). In a subsequent case in this Court reported in *Ramanathan v. Arunachellam*(4), the same question came up for consideration before Mr. Justice SADASIVA AYYAR and Mr. Justice SPENCER. Mr. Justice SADASIVA AYYAR

(1) (1910) I.L.R., 33 Mad., 74.
(3) (1906) I.L.R., 33 Calc., 927.

(2) (1892) 1 C.W.N., 226.
(4) (1915) I.L.R., 38 Mad., 766.

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expressly dissented from the decision in *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(1) and Mr. Justice SPENCER also seemed to be inclined to the same opinion though he thought that *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(1) might be distinguished from the case which he had to deal with. We are inclined to agree with the earlier ruling of this Court in *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(1). We think that it is ordinarily the duty of a division bench to follow on a pure question of law a previous ruling of another division bench unless it is of opinion that that ruling is wrong in which case the proper course is to refer the question to a full bench so that the law on the point may be conclusively ascertained so far as this High Court is concerned. Having regard, however, to the fact that dissent has been expressed by Mr. Justice SADASIVA AYYAR and also by Mr. Justice SPENCER from the view of the law expressed in *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(1), it is necessary that the question involved which is one of importance should be settled by a Full Bench.

The Court which passed the decree has full jurisdiction to proceed with its execution until its hands are stayed by the order of the Appellate Court, and it is difficult to see how that Court, if a proper application for execution is made to it, could refuse the application until the order of the Appellate Court granting stay of execution has been communicated to it. There can be no doubt that an order for prohibitory injunction, so far as it affects the question of validity of any act of the party against whom it is made is concerned, does not come into operation until it is communicated to him. The Civil Procedure Code expressly lays down that the mere preferring of an appeal will not operate to stay execution. It seems to follow that until the first Court receives the order of the Appellate Court staying execution, it is bound to proceed to execute the decree on proper application being made to it by the judgment-creditor. It is then difficult to conceive how an order, which the Court of first instance was bound by law to pass, could be said to be made without authority. The grounds of convenience seem also to

(1) (1910) I.L.R., 33 Mad., 74.

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preponderate against the opposite view. The question which we refer to the Full Bench is :—

“Where subsequent to an interim order for stay of execution made by the Appellate Court without notice to the decree-holder but before its communication to the Court of first instance, an order for attachment has been made by the latter Court, is the order of attachment void and ineffectual as having been made without jurisdiction?”

ON THIS REFERENCE,

V. Ramesam for the appellant.—An order of attachment made by a Court of first instance in ignorance of an order of stay by an Appellate Court is not a nullity and it is good until it is set aside: Halsbury's Laws of England, volume 14, page 30, section 63. (He was stopped.)

P. Narayanamurti for the respondent.—The order of the first Court is a nullity and it need not be set aside; *Ramathan v. Arunachellam*(1). In the case of an injunction the order is addressed to a party, but in the case of a stay the order is not addressed to anybody: *Hukum Chand Boid v. Kamalanand Singh*(2), *Ex parte Hookey*(3), Spelling on Injunctions, volume I, article 177, *Mian Jan v. Man Singh*(4) and Halsbury's Laws of England, volume 14, page 29.

Their Lordships delivered the following OPINIONS :—

AYLING, J.—With all respect to the views of the learned Judges in *Hukum Chand Boid v. Kamalanand Singh*(2) I prefer to follow the reasoning of an earlier Bench of the same Court, *Bessessuari Chowdhurany v. Hurro Sundar Mozumdar*(5) which has been adopted by this Court in *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(6). I regard an order of an Appellate Court staying execution as in the nature of a prohibitory order to the Lower Court which becomes effective only on communication. Till it is communicated steps in execution taken by the Lower Court must be treated as legally valid.

I would answer the reference in the negative.

(1) (1915) I.L.R., 38 Mad., 766.
(2) (1906) I.L.R., 33 Cal., 927 at pp. 934 and 943.
(3) (1862) 31 L.J., Ch., 429; s.c. 45 E.R., 1261.
(4) (1880) I.L.R., 2 All., 686. (5) (1892) 1 C.W.N., 226.
(6) (1910) I.L.R., 33 Mad., 74.

SESHAGIRI AYYAR, J.—Notwithstanding the high regard I entertain for the opinions of the two learned Judges who decided *Hukum Chand Boid v. Kamalanand Singh*(1) and to the opinion of SADASIVA AYYAR, J., I am unable to agree with their conclusions. In my opinion, sufficient attention has not been paid by these learned Judges to the provisions of Order XLI, rule 5. The legislature has enacted by that rule that the Court of first instance still retains jurisdiction to order execution notwithstanding the fact that an appeal has been preferred against its decision. That power can only be taken away by some communication made to it by the Court to which it is subordinate and in which an appeal has been preferred. A Court exercising jurisdiction which is conferred on it in express terms cannot be regarded as having been deprived of it unless the superior authority informs it that that has been done. This principle of jurisprudence should not be departed from unless there is any legislative provision to the contrary.

As regards the citation of the American authorities, I wish to point out that it appears from what is said in Spelling on Injunctions, volume II, section 1713, that the preferring of an appeal operates in some of the States to suspend the powers of the Court below. In that view, it may be justifiable to hold that the lower Court need not be informed of the action taken by the Court of Appeal.

I agree in holding that *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(2) was rightly decided. My answer to the reference is in the negative.

RAKEWELL, J.—I agree with Mr. Justice AYLING.

BAKEWE L. J.

N.R.

(1) (1906) I.L.R., 33 Cal., 927 at pp. 938 and 943.
(2) (1910) I.L.R., 33 Mad., 74.

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APPELLATE CRIMINAL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling
and Mr. Justice Kumaraswami Sastriyar.

S. VULLAPPA AND FOUR OTHERS, ACCUSED,

v.

S. BHEEMA ROW—COMPLAINANT.*

1917,
August, 28,
September,
21, October,
8 and
November, 9.

Penal Code (Act XLV of 1860), ss. 441 and 448—Criminal trespass—Finding that the trespass was committed with one of the intents specified in the section, whether necessary—Knowledge of the consequences of the trespass, whether sufficient to inculpate.

Held by the Full Bench (AYLING, J., differing):—Trespass is an offence under section 441, Indian Penal Code, only if it is committed with one of the intents specified in the section and proof that a trespass committed with some other object was known to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction under section 448, Indian Penal Code.

Distinction between 'intention' and "knowledge of likelihood," pointed out.

Queen-Empress v. Rayapalayachi (1896) I.L.R., 19 Mad., 240, followed.

Emperor v. Lakshman (1902) I.L.R., 26 Bom., 558, and the view of BENSON, J., in *Sellamuthu Servaigaran v. Pallamuthu Karuppan* (1912) I.L.R., 35 Mad., 186, not followed.

Per AYLING, J.—A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intent to insult or annoy within section 441, Indian Penal Code: but where the trespasser knows that his trespass is practically certain in the natural course of events to cause insult or annoyance, it is open to the Court to infer an intent to insult or annoy. It is a question of fact whether this presumption of intent is displaced by proof of any independent object of the trespass.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure (Act V of 1898) by W. W. PHILLIPS, the Sessions Judge of Bellary.

The facts are given in the first paragraph of the ORDER OF REFERENCE OF ABDUR RAHIM, J.

K. Koti Reddi for the accused.

Dr. S. Swaminadhan for the complainant.

E. R. Osborne, Acting Public Prosecutor, for the Crown.

* Criminal Revision Case No. 194 of 1917 (F.B.).

This case came on for hearing in the first instance before ABDUR RAHIM and OLDFIELD, JJ., who made the following ORDERS OF REFERENCE TO A FULL BENCH:—

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ABDUR RAHIM, J.—The second accused's son, a young boy, having stolen some jewels belonging to his father, told him that he had given them to the Head Master of his school, the complainant, who kept them in a box in his house. Thereupon the second accused with his friends, the other four accused in the case, went into the complainant's house, and in spite of the latter's protest and remonstrances insisted on searching, and did in fact search, the house. But nothing was found. The complainant naturally felt insulted and annoyed at the high-handed conduct of the accused and lodged a complaint before the Magistrate. The trial Magistrate found that the accused knew that the consequences of their action would be to annoy or insult the complainant. The appellate Magistrate being of opinion that that finding was not sufficient to bring the case within section 448, Indian Penal Code, as the primary intention of the accused was not to insult or annoy the complainant, set aside the conviction and sentence. The Sessions Judge wants us to revise the case, for he says:

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"the accused pushed their way into the complainant's house notwithstanding his remonstrances and must have known that they were annoying the complainant by so doing and consequently must be deemed to have intended the ordinary consequences of their act."

The finding to my mind amounts to this: the accused went into the complainant's house with the intent to search for the jewels and they must be taken to have known that the search would annoy the complainant. Is that sufficient to make out a case under section 441, Indian Penal Code? I think not. The accused when insisting on searching the house had a known intent and that was to recover the jewels. It may be that at the same time they did not mind or care that their act would annoy the complainant; but they certainly did not enter into the complainant's house or remain there with the object of annoying the complainant. If it was found or could fairly be inferred that the accused had in addition to their intention to recover the jewels a further intent, namely, to insult or annoy the complainant, section 441, Indian Penal Code, would apply (see the criticism of *Madras High Court, Appellate Side, Proceedings*, 28th

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March 1871(1) in sections 577 and 578 of Mayne's Criminal Law). But that is not the case here. The framers of the Indian Penal Code have throughout borne in mind the distinction between the 'intention' or 'intent' of a person and his knowledge that a certain result is likely to follow from his act; see for instance sections 295, 299 and 304. There is a conflict of authority on the question, but the preponderance of authority seems to be in support of the view I have suggested: vide *Re Chinna Thoyi*(2) and *Re Dargaiya*(3); *In the matter of Jotharam Davay*(4); *Queen-Empress v. Rayapadayachi*(5); and *Manikka Veera Raghava Chariar v. Emperor*(6); opinion of SANKARAN NAYAR, J., in *Sellamuthu Servaigaran v. Pallamuthu Karuppan*(7); a decision of myself sitting alone in *Chinna Krishna Reddi v. Marri Poliah*(8); *In the matter of the petition of Chunder Narain v. Farquharson*(9); *Chandi Persad v. Evans*(10); *In the matter of the petition of Gobind Prasad*(11); and *Emperor v. Gaya Bhar*(12); while a different view has been expressed by BENSON, J., in *Sellamuthu Servaigaran v. Pallamuthu Karuppan*(7) followed by SADASIVA AYYAR, J., in *Somadurai Mudaliar v. Emperor*(13); and also *Emperor v. Lakshman*(14). I would therefore refer the following question to the Full Bench:—

"If a person enters into property in possession of another or remains there with an intent other than to intimidate, insult or annoy him or to commit any offence, but with the knowledge that his act is likely or certain to cause annoyance or insult to the person in possession is he guilty of an offence under section 448 of the Indian Penal Code?"

OLDFIELD, J. OLDFIELD, J.—I take the facts as stated by my learned brother, that accused entered and remained on complainant's premises with the primary intention to recover their property, which they wrongly thought was there, and with knowledge of the probability, so strong that according to ordinary standards it amounted to certainty, that their conduct would cause annoyance. The First Class Deputy Magistrate has held, and

(1) 6 M.H.C.R., App. xiv. (2) (1895) 1 Weir's Cr. R. (fourth edition), 518.

(3) (1882) 1 Weir's Cr. R. (fourth edition), 524.

(4) (1878) 1 L.R., 2 Mad., 30.

(5) (1896) 1 L.R., 19 Mad., 240.

(6) (1900) 8 M.L.T., 246.

(7) (1912) 1 L.R., 35 Mad., 183.

(8) (1912) M.W.N., 395.

(9) (1879) 1 L.R., 4 Calc., 837.

(10) (1895) 1 L.R., 22 Calc., 123.

(11) (1879) 1 L.R., 2 All., 465.

(12) (1916) 1 L.R., 38 All., 517.

(13) (1917) 9 Cr. L.R., 196.

(14) (1902) 1 L.R., 26 Bom., 558.

it is argued here, that no offence was committed because their primary intention was to recover their property.

This conclusion was based on *Queen-Empress v. Rayapadayachi*(1). But it involves the further assumption, which we have been asked explicitly to make, that section 441, Indian Penal Code, is not worded so as to include an act done with knowledge of the probability of any particular consequence and that such knowledge, whatever the degree of probability in question, is not to be taken into account in deciding whether an offence has been committed. My learned brother has referred to authorities as justifying this assumption. But of the cases from the authorized reports, with which alone I feel bound to deal, some do not, with all respect, do so. In *In the matter of Jotharam Davay*(2) and *Chandi Persad v. Evans*(3), the accused were doing what was and what they believed in good faith to be a lawful thing in a lawful way and in the absence of any finding of an intent to annoy or any probability that the complainants, presumably law-abiding persons, would suffer legitimate annoyance, no presumption that they would be annoyed could arise. Similarly in *In the matter of the petition of Gobind Prasad*(4), except that there was no finding on the immaterial point, whether the act of the accused was in fact lawful. And, to contrast these two cases with that before us, in both of them accused acted in good faith, whilst here they must have known that their conduct was against the law. In *Queen-Empress v. Rayapadayachi*(1) and *Emperor v. Gaya Bhar*(5) the existence of an intent to annoy was directly negatived in the first case at least by accused's precautions against discovery; and in both the ground of decision was the distinction 'between entertaining a certain intention and having the knowledge that one's act may possibly,' not 'may probably' or, as my learned brother apparently would hold, 'will certainly' lead to a certain result. *In the matter of the petition of Chunder Narain v. Farquharson*(6) is of little weight since the point is not discussed at length. Lastly the judgment of SANKARAN NAYAR, J., in *Sellamuthu Servaigaran v. Pallamuthu Karuppan*(7) no doubt supports the contention under discussion. But it is in conflict with the view taken by BENSON, J., in the

(1) (1896) 1 L.R., 19 Mad., 240.

(2) (1878) 1 L.R., 2 Mad., 30.

(3) (1895) 1 L.R., 22 Calc., 123.

(4) (1878) 1 L.R., 2 All., 465.

(5) (1916) 1 L.R., 38 All., 517.

(6) (1879) 1 L.R., 4 Calc., 837.

(7) (1912) 1 L.R., 35 Mad., 183.

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VULLAPPA same case and with *Emperor v. Lakshman*(1) and *Premanund*
 BHREMA ROW, *Shaha v. Brindabun Chung*(2).

OLDFIELD, J. The opinion of BENSON, J., is, it may be respectfully suggested, in accordance with general principles. It is true that the Penal Code distinguishes, when it is necessary to do so, between 'intention' and 'knowledge' and does not treat the one as invariable accompaniment of the other. But it is only necessary to compare sections 299 and 304 (3) and (4) in order to see that knowledge of a probability is treated as equivalent to intention, when the probability is of more than a particular strength; that is, when the consequence, on which the character of the act in question depends, is known to be that, which will follow in the natural course. This seems to me consistent with the decision in *Queen-Empress v. Royapadayachi*(3) and other similar cases, in which the annoyance alleged to be the consequence of the accused's act was, owing to precautions taken by him, or for other reasons, regarded as no more than possible. Here however the accused must, as persons of ordinary sense, have known that their conduct would in the natural course cause legitimate annoyance inevitably; and I would therefore hold that annoyance was their intention. I add that the contrary view would make any immediate intention, which the accused might allege as entertained, whether or no in good faith, the measure of their responsibility and authorize an unlimited extension of the right of self-help, which would be disastrous to security.

With these observations I concur in the reference proposed by my learned brother and with the form, in which he has framed the question to be referred, on the understanding that the intent referred to in it is the primary or immediate one, which the accused may entertain.

ON THIS REFERENCE—

E. R. Osborne, Acting Public Prosecutor, for the Crown.—The view taken by ABDUR RAHIM, J., should be adopted. Mere knowledge on the part of the accused that his trespass committed with some ulterior object is likely or certain to insult or annoy the occupier is not sufficient to constitute the offence. The word 'knowingly' which is to be found in several other sections of the

(1) (1902) I.L.R., 28 Bom., 558.

(2) (1895) I.L.R., 22 Calc., 994.

(3) (1896) I.L.R., 19 Mad., 240.

Code is not found in section 441. An intention to insult or annoy must be specifically found. In addition to the cases cited in the Orders of Reference, he referred to *In re Venkataramanujia Reddy*(1), *Emperor v. Mulla*(2), *In re Ratna Mudali*(3), *Golap Pandey v. Boddam*(4) and *Balmakund Ram v. Ghansamram*(5).

S. Ranganatha Ayyar for Dr. Swaminadhan for the complainant.—If the natural consequence of the act is to annoy, then annoyance is 'intended'. In the Penal Code 'intention' and 'knowledge' are used as equivalent terms—*vide* the definition of 'voluntarily' in section 39. If in spite of protest as in this case, an accused persists and enters, 'intention to annoy' is certainly to be gathered though there might also be some ulterior motive or intention. The existence of one intention does not displace the existence of another.

K. Keti Reddi for the accused.—I adopt the arguments of the Public Prosecutor. The mere fact that the accused knew that annoyance *might* or *would* be caused by the trespass cannot necessarily lead to the conclusion that annoyance was 'intended.' For the distinction between 'knowledge' and 'intention'—see Markby's Elements of Law, section 217. 'Intent' is stronger than 'knowledge.' It is the accused's intent and not the consequence of his act, e.g., annoyance to the complainant which is the criterion—see *Jhulan Sain v. Emperor*(6).

The Court expressed the following OPINIONS:—

WALLIS, C.J.—The question in this case is, what is the meaning of 'with intent to annoy' in section 441 of the Indian Penal Code. In his History of the Criminal Law, Volume 2, page 100, Sir James Stephen gives the following definition of 'intention':—

"The direction of conduct towards the object chosen is called the intention or aim (the metaphor involved in the word is obviously taken from the aiming with a bow and arrow)",

and he distinguishes the aim or intention of an act from the motive or reason which actuated the person doing it. At the same time he admits (page 110) that intention is frequently

(1) (1909) 6 M.L.T., 262.

(3) (1887) I.L.R., 10 Mad., 126.

(5) (1896) I.L.R., 22 Calc., 391.

(2) (1915) I.L.R., 37 All., 395 at p. 398.

(4) (1889) I.L.R., 16 Calc., 715.

(6) (1913) I.L.R., 40 Calc., 548.

VULLAPPA used and understood as being synonymous with motive, and
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"two common fallacies, namely, the confusion between motive and intention, and the tendency to deny an immediate intention because of the existence, real or supposed of some ulterior intention. For instance, it will often be argued that a person ought to be acquitted of wounding a police man with intent to do him grievous bodily harm, because his intention was not to hurt the police man but only to escape from his pursuit. This particular argument was so common that to inflict grievous bodily harm with intent to resist lawful apprehension is now a specific statutory offence."

That is to say, the legislature in England has now solved the difficulty by making the intent to resist lawful apprehension the gist of the offence. If we are to apply these tests to the present case, there can be no doubt that the accused must be taken to have intended to annoy the complainant when he trespassed on his house in spite of his protests even though his ulterior intention was to search for his own jewels which he believed to be hidden there. On the other hand, it is clear that this was not the view of the meaning of 'intent' taken by Macaulay and the other Indian Law Commissioners in the draft Penal Code. They regarded the maxim that everyone must be taken to intend the natural consequences of his acts as a fiction which should not be recognized in the Penal Code. Their treatment of this question elicited many criticisms which were met in paragraph 100 of the first report on the Penal Code by the Indian Law Commissioners.

"The Commissioners saw clearly the difference between 'intent' and 'knowledge of likelihood' and meant to express it distinctly in order to avoid the necessity of fiction in laying a charge as for example by imputing 'intent' constructively when the circumstances imply only 'a knowledge of likelihood' advisedly intending as they did that there should be no distinction in general, in respect of penal consequences between cases in which a man causes an effect which is an offence designedly, and cases in which he causes it by doing what 'he knows is likely to cause it.' Advisedly intending this in general they worded the enactment so that the charge may be always expressed according to the truth" (The Indian Penal Code as originally framed, Madras Higginbotham & Co., page 215).

Their view was, in the language of the Commissioners, that there should in general be no distinction in respect of penal consequences between cases in which a man causes an effect which is an offence designedly and cases in which he causes it by doing

what he knows is likely to cause it, but that it should expressly be made punishable to do the act with knowledge of the likelihood as they call it. An examination of the Indian Penal Code as finally passed into law shows that it was framed on these lines. The maxim that everyone must be taken to intend the natural consequences of his acts is incorporated in the definition of 'voluntarily' in section 39, and thus made applicable in every section where that word is used. More generally doing the act with a criminal knowledge or a criminal intent is expressly made punishable. Section 35 speaks of 'an act which is criminal only by reason of its being done with a criminal knowledge or intention' and the distinction is observed in sections 87 to 89, 166 and 167, 191, 295, 297, 299, 350, 366, 367, 425, 499, 504 and 505, in all of which doing the act with intent and doing the act with a knowledge of the consequences are both made punishable. The same result is effected by the addition of the explanation to section 188. In section 350 in particular it is made punishable to use force "intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used." The contrast with the language of section 441 is very suggestive.

In these circumstances, when in the isolated section 441 doing the act with the specified intent is alone made punishable, the inference appears to be that the legislature did not intend that in this section doing the act with a knowledge of its consequences should be punishable. The only other section resembling this which I have noted on a cursory examination of the Code is section 201, and the omission as regards section 441 may be explained by the fact that trespassing with intent to annoy was a new offence unknown in English law. This is the view on which *Queen-Empress v. Rayapadayachi*(1) was decided and I think it should be followed in preference to *Emperor v. Lakshman*(2) and the judgment of BENSON, J., in *Sellamuthu Serrai-garan v. Pallamuthu Karuppan*(3).

I will only add that the decision in my opinion does not involve any risk to the public security. A man who forces his

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(1) (1896) I.L.R., 19 Mad., 240.

(2) (1902) I.L.R., 26 Bom., 558.

(3) (1912) I.L.R., 35 Mad., 186.

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way into another's house against his will commits a civil trespass for which he may be made answerable in substantial damages. Further, the owner of the house may obstruct his entry and even, I think, use reasonable force to remove him without committing the offence of wrongful restraint punishable under section 341; and any active resistance to such obstruction would amount to the use of criminal force punishable under section 350, as under that section it is sufficient if the accused knows that the use of such force is likely to cause annoyance to the person to whom it is used; and any preparation for the use of such force will constitute an assault punishable under section 351. I would answer the question in the negative. It must of course be a question of fact in each case whether the intent was to annoy or not.

AYLING, J. — AYLING, J. — With all respect, I find it impossible to answer the question referred to us with a simple affirmative or negative. That a mere knowledge that the entry is likely to cause insult or annoyance cannot be taken to be equivalent to an intent to insult or annoy must, I think, be conceded: a comparison of section 441, Indian Penal Code, with the other sections of the Code referred to by the learned Chief Justice makes this clear. Where the legislature has in so many instances specifically placed a knowledge that a certain result is likely to follow from the act on the same footing as an intent to cause that result, it can hardly be contended that the two are synonymous.

On the other hand it seems to me necessary to bear in mind that a person's object (to use a non-contentious word) in entering on another person's property may be two-fold: and that, while intent must in most cases be a matter of inference, there are degrees of probability ranging up to practical certainty, from the stronger of which an inference of intent may not improperly be drawn (vide the distinction emphasized in *Emperor v. Lakshman*(1). The reference deals with *certainty* as well as *likelihood* of causing annoyance.

The practical difficulty however seems to me to lie less in the degrees that intervene between likelihood and certainty than in the question of the extent to which one motive displaces another or should be treated to the exclusion of another as influencing a man's act.

(1) (1902) L.L.R., 26 Bom., 558.

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Suppose *A* enters the dining-room of *B*, a total stranger, during a dinner party. Annoyance to *B* is so certain that in the absence of special circumstances or any evidence tending to suggest an independent motive for the intrusion, a Court might, I think, fairly infer that *A*'s intent was to annoy *B* and nothing else.

Now suppose it is shown that *A*, on entering, meant

(1) to convey warning to one of *B*'s guests in a matter of life and death;

(2) to gratify his curiosity by looking at a picture in *B*'s dining room.

Is *A*'s action to be treated as equally criminal or non-criminal in each of these cases?

I think not, and it seems to me that in every such case, where a specific intent other than one to insult or annoy is set up, the Court must determine whether the motive involved in it is sufficiently strong to displace the intent of annoyance which would otherwise be inferred. The existence of an independent motive for the entry does not in all cases preclude the consideration of an intent to annoy inferable from the practical certainty that annoyance would be caused.

In case 1, I should hold that the intruder's intent (in the sense contemplated by section 441, Indian Penal Code) is not to annoy and that he has committed no offence.

The principle of section 81, Indian Penal Code, might be applied and it might be held that the danger to be averted by the warning far outweighed the annoyance caused to the owner of the house: or it might be held that the urgency of the matter precluded the intruder from realizing, as he must be presumed to do in ordinary circumstances, the certainty of annoyance.

In case 2 the motive put forward by the intruder is so trivial, that neither line of reasoning can be adopted. In effect it is as if he said to the owner of the house: "I know my entry will annoy you, but I want to see your picture, and I mean to do so even at the cost of annoying you, I don't wish to annoy you, but I propose to gratify my curiosity whether I annoy you or not."

In this case, I do not think the intent inferable from the known certainty of annoyance is displaced by the trivial intent

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set up by the intruder : and I should be inclined to hold that the offence of criminal trespass had been committed.

If it be held otherwise it would follow that against such an entry there would be no right of private defence. For the trespass would not be criminal, and section 97, Indian Penal Code, only gives a right of private defence of property against a criminal trespass. It is true that this difficulty is to some extent modified as pointed out in the concluding portions of the judgment of the learned Chief Justice, which I have had the advantage of perusing. Obstructions of an intruder's entry would doubtless not amount to wrongful restraint under section 341, Indian Penal Code, and might be resorted to by the owner or occupier without infringement of the law. But I am not clear how far his rights would extend against an intruder who had already effected his entry ; or whether he would be legally justified in using reasonable force to expel him. I cannot therefore altogether dismiss this aspect of the case, in endeavouring to ascertain the intention of the legislature in regard to section 441, Indian Penal Code. If my reading of the latter is incorrect, it seems worthy of consideration whether section 97, Indian Penal Code, does not need amendment. I would therefore answer the reference as follows :—

A mere knowledge that the trespass is likely to cause insult or annoyance to the owner of the property does not amount to an intent, to insult or annoy within the meaning of section 441, Indian Penal Code ; but where the trespasser knows that his trespass is practically certain in the natural course of events to cause insult or annoyance to the owner of the property, it is open to the Court to infer an intent to insult or annoy. It is a question of fact whether this presumption of intent is displaced by proof of any independent object of the trespass.

KUMARASWAMI SASTRIYAR, J.—The question referred to us for decision is whether an accused's knowledge that his act is likely or certain to cause annoyance or insult to the person in possession, would, if his intention was other than one to intimidate insult or annoy, render him guilty of an offence under section 448 of the Indian Penal Code.

Though there is a conflict of decisions on the question, the preponderance of authority is in favour of the view taken by ABDUR RAHIM, J., one of the referring Judges, that it is not

sufficient to prove that the person charged under section 448 must have known or had reason to believe that his act would cause insult or annoyance to the person in possession. The question is not free from difficulty, but I am of opinion that the reference should be answered in the negative.

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It is clear from a perusal of the various sections of the Indian Penal Code that a difference is drawn between 'intention' and 'knowledge of consequences' and that the Code takes notice of actual and not presumed intention in determining criminality though in determining what a man's actual intention was courts can raise all fair inferences that can be drawn from his acts. When an act is made an offence by reason of its having been committed with a specified intention the intention has to be found as a matter of fact upon evidence which justifies the inference that the accused had the intention required to render his action criminal.

When proof of intention is necessary it is clear that unless the accused admits that his intention was such as would render him guilty of the offence charged, intention, which is a psychological fact, can only be proved by having regard to the nature of the act he commits and a criminal intent is often presumed from acts which are reasonably susceptible of but one interpretation. The rule of law that a man must be taken to intend the natural consequences of his act is really a rule of evidence. The court is not bound to accept the statement of the accused as to his intention but may find from the facts what his intention was and in order to arrive at a conclusion may hold that when a man uses means which at the time he used them he knew or had reason to believe to be likely to cause a result his intention was to cause the 'result'.

When however the court on the materials before it comes to the conclusion that a person had a specified intention when he did an act which is not the intention required to make his act an offence under section 441 the mere fact that he would have known that certain consequences would happen if he had paused to consider would in my opinion be insufficient.

The view taken by the framers of the Act has been pointed out by the Chief Justice in his judgment and I think that in construing section 441 it must not be forgotten that wherever the Penal Code wants to make a man liable for knowledge of

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consequences it expressly says so. As pointed out by Sir William Markby (Elements of Law, paragraph 222) expectation that a consequence would follow or a knowledge that it is likely to follow without any desire that it should follow is an attitude of mind which is distinct from intention and the framers of the Act clearly kept the two distinct and treat knowledge as a state of mind differing from intention. In some sections, e.g., 118 to 120, 153, 154, 217, 293, etc., the words used are 'intending or knowing it to be likely.' In others only 'intention' is referred to, e.g., 124, 140, 174 to 176, 193, 211, 509, etc. In some sections the word used is 'knows,' e.g., 127, 130, 183, 196, 260, etc. In some sections the words are 'knowing' or 'having reason to believe' or 'believing,' e.g., 136, 181 to 183, 201 to 203, 499, etc. In certain sections the words are 'reason to believe,' e.g., 155, 156, and in others 'for the purpose of,' e.g., 189, 190. In section 293 the words used are 'deliberate intention'.

I think the correct view has been taken in *Queen-Empress v. Rayapudayachi*(1). Though the facts show that the accused wanted to conceal his presence in the house, the judgment proceeds on the broad ground that "section 441 is so worded as to show that the act must be done with 'intent' and does not, as other sections do (e.g., section 425), embrace the case of an act done with 'knowledge of the likelihood of a given consequence'." To introduce the rule that knowledge of consequences is equivalent to an intention when the probability of consequences following is of more than a particular strength would, in my opinion, introduce, into the section, which, as pointed out by STRAIGHT, J., in *In the matter of the petition of Gobind Prasad*(2) enough, further difficulties.

N.R.

(1) (1896) I L.R., 19 Mad., 240.

(2) (1879) I.L.R., 2 All., 465.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ayling, Mr. Justice Seshagiri Ayyar and
Mr. Justice Bakewell.

KOPPARTHI LINGAYYA AND THREE OTHERS (PETITIONERS,
CREDITORS), APPELLANTS,

1917,
April, 19 and
24 and
September,
18, 19 and
26.

ARAVETI CHINNA NARAYANA AND EIGHT OTHERS
(RESPONDENTS), RESPONDENTS.*

*Limitation Act (IX of 1908), sec. 29 (1) (b), 'affect' in, meaning of—Applicability
of the Act to: affect periods of limitation prescribed by Provincial Insolvency
Act (III of 1907).*

Held by the Full Bench, that recourse cannot be had to the general provisions of the Limitation Act (IX of 1908) in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act (III of 1907), as such recourse would affect the specially prescribed period of limitation, within section 29 (i) (b) of the Limitation Act.

Abu Backer Sahib v. The Secretary of State for India (1911) I.L.R., 34 Mad., 505 (F.B.), followed.

APPEAL against the Order of J. W. HUGHES, the District Judge of Cuddapah, in Insolvency Petition No. 9 of 1915.

The facts are given in the first two paragraphs of the ORDER OF REFERENCE.

C. A. Seshagiri Sastriyar for the appellants.

Dr. S. Swaminathan for the fifth respondent.

P. Somasundaram for V. Subrahmanyam Pantulu for respondents Nos. 4 and 9.

V. S. Narasimhachariyar for respondents Nos. 1, 7 and 8.

The other respondents were not represented.

This appeal came on for hearing in the first instance before SPENCER and SRINIVASA AYYANGAR, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH:—This is an appeal against an order of the District Judge of Cuddapah passed under section 15 of the Provincial Insolvency Act dismissing an application made by creditors to declare the respondents insolvent. The learned Judge dismissed the application on

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the ground that the act of insolvency complained of occurred more than three months before the presentation of the petition, the last date for presentation having fallen in the period during which the Court was closed for vacation. He held that the petition could not be presented on the reopening day as section 4 of the Indian Limitation Act was not applicable, and that section 10 of the General Clauses Act could not save the petitioners, as a question of limitation was involved.

The appeal against the District Judge's order, for which section 46 of the Act provides, has not been presented within ninety days of the order. Unless the time occupied in obtaining a copy of the order appealed against be excluded under section 12 or section 5 of the Indian Limitation Act, this appeal must be rejected.

The question for our decision therefore is whether sections 4, 5 or 12 of the Indian Limitation Act are applicable to proceedings under the Provincial Insolvency Act.

The latest decision of this Court on the point is *Sivaramayya v. Bhujanga Rao*(1) wherein OLDFIELD, J., expressed his opinion that section 12 (2) of the Indian Limitation Act could not be applied to proceedings under the Provincial Insolvency Act. The learned Judge was inclined to think that section 5, being one of the general provisions of the Act and not altering or affecting any period of limitation within the meaning of section 29 (1) (b), might be applicable, but he felt himself bound to follow the decisions in *Veeramma v. Abbiah*(2) and *Appa Rau Sanayi Aswa Rau v. Krishnamurthi*(3). SADASIVA AYYAR, J., who sat with him, considered that section 5 was applicable. He distinguished *Veeramma v. Abbiah*(2), dissented from *Appa Rau Sanayi Aswa Rau v. Krishnamurthi*(3) and followed *Nijabutoolla v. Wazir Ali*(4), *Reference under Forest Act V of 1882*(5) and *Seshama v. Sankara*(6). Both learned Judges agreed to cut the Gordian knot under the exceptional circumstances of that case by treating the time-barred appeal as a revision petition and dealing with it under section 15 of the Charter Act, a course which can be taken only when the High Court in the exercise of

(1) (1916) I.L.R., 39 Mad., 593.

(3) (1897) I.L.R., 20 Mad., 249.

(5) (1887) I.L.R., 10 Mad., 210.

(2) (1895) I.L.R., 18 Mad., 99 (F.B.).

(4) (1882) I.L.R., 8 Calc., 910.

(6) (1889) I.L.R., 12 Mad., 1.

its power of superintendence considers that a Subordinate Court has failed to do its duty : [*vide Abdullah v. Salaru*(1).]

The present appeal purports to have been brought under section 15 of the Charter Act, as well as under section 46, clause (2) of Act III of 1907, but the circumstances are not such as to warrant our proceeding under the Charter.

Duraiswami Iyengar v. Meenakshi Sundara Iyer(2) to which OLDFIELD, J., was again a party, is a direct decision that section 12 of the Indian Limitation Act is not applicable to applications under the Provincial Insolvency Act, and was followed by the same learned Judge in *Trasi Deva Rao v. Parameshwaraya*(3), in respect to another section, namely section 14 of the Indian Limitation Act, with the remark that the whole of that Act is inapplicable to proceedings under the Provincial Insolvency Act.

In none of the above cases was the decision in *Srinivasa Ayyangar v. The Secretary of State for India*(4) considered. That was a case wherein BENSON and SUNDARA AYYAR, JJ., after a very full consideration of the law on the subject, applied section 15 of the Indian Limitation Act to a suit instituted under section 59 of the Revenue Recovery Act (II of 1964). They held (we think rightly) that the special period for bringing suits under that Act was governed by the provision in section 59, which allows six months' time, rather than by any article in the schedules to the Indian Limitation Act, but that the general provisions in the body of the Act were intended to be applicable, in the absence of anything to the contrary, to proceedings under special or local laws. In so doing, they followed the authority of a Bench of this Court in *Seshama v. Sankara*(5) and of a Full Bench in *Venkata v. Chengadu*(6).

The Full Bench decision in *Abu Backer Sahib v. The Secretary of State for India*(7), which formed the basis for the decision in *Duraiswami Iyengar v. Meenakshi Sundara Iyer*(2) was to the effect that appeals under section 10 of the Madras Forest Act (V of 1882) are independent of the general provisions of the Indian Limitation Act.

(1) (1899) I.L.R., 18 All., 4.

(2) (1914) 16 M.L.T., 246.

(3) (1910) I.L.R., 39 Mad., 74.

(4) (1916) I.L.R., 38 Mad., 92.

(5) (1889) I.L.R., 12 Mad., 1.

(6) (1889) I.L.R., 12 Mad., 168 at p. 169 (F.B.).

(7) (1911) I.L.R., 34 Mad., 505 (F.B.).

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The rights conferred by sections 10 and 14 of the Madras Forest Act to appeal against decisions of Forest Settlement Officers upon claims to have certain rights recognized at the time of afforestation, to a District Court and to a Forest Court respectively are evidently rights of a very special nature. As pointed out by the Chief Justice, the vesting of a power to extend time for appealing in the hands of the Governor in Council is in itself an indication that the Courts were not intended to exercise a similar power under the Indian Limitation Act in regard to these so-called appeals.

The cases in *Veeramma v. Abbiah*(1) and *Appa Rau Sanayi Aswa Rau v. Krishnamurthi*(2), related to the applicability of the provisions of the Indian Limitation Act to acts done in relation to the Indian Registration Act. *Sivarama Patter Kariakkar v. Krishna Aiyar*(3), which followed these two decisions, held that independently of the Indian Limitation Act, section 10 of the General Clauses Act would operate to make a presentation on the first day after the Court reopened, though after the time allowed in the Registration Act, a good presentation. So too in *Messrs. Arbuthnot and Co. v. Subpathy Mudaliar*(4), an appeal presented under the Indian Insolvency Act on the reopening day, when the last day for filing it fell on a holiday, was admitted.

In *Veeramma v. Abbiah*(1) and *Appa Rau Sanayi Aswa Rau v. Krishnamurthi*(2), as in other decisions, it has always been held that what must be looked to in deciding whether the Indian Limitation Act can be applied to a special or local law is the question whether the particular Act is or is not self-contained and complete in itself.

It has been settled by a course of decisions that the Madras Forest Act and the Indian Registration Act are special Acts complete in themselves, and we do not here propose to question the reasoning by which that result has been arrived at.

But sections 6 and 47 of the Provincial Insolvency Act show that that enactment is at least not independent of the rules of Civil Procedure followed in the trial of regular suits and appeals under the Civil Procedure Code.

(1) (1895) I.L.R., 18 Mad., 99 (F.B.).

(3) (1914) 26 M.L.J., 307.

(2) (1897) I.L.R., 20 Mad., 249.

(4) (1912) 23 M.L.J., 221.

We also think that the analogy of the Madras Forest Act did not justify the assumption in *Duraiswami Iyengar v. Meenakshisundara Iyer*(1), that the general provisions of the Indian Limitation Act were not applicable to the Provincial Insolvency Act on the strength of *Abu Backer Sahib v. The Secretary of State for India*(2).

In our opinion the correct view is that taken by the Allahabad High Court in *Dropadi v. Hira Lal*(3), where the matter has been fully discussed by a Full Bench.

We consider that *Duraiswami Iyengar v. Meenakshisundara Iyer*(1), and *Trusi Deva Rao v. Parameshwaraya*(4), were wrongly decided, and that the dictum of O'DFIELD, J., in *Sivaramayya v. Bhujanga Rao*(5), as to the applicability of sections 5 and 12 of the Limitation Act to proceedings under the Provincial Insolvency Act was also incorrect. But as there is so much divergence of opinion on the point, we refer to a Full Bench the question—

“Whether recourse can be had to the general provisions of Act IX of 1908 in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act (III of 1907).”

ON THIS REFERENCE,

A. Krishnaswami Ayyar with C. A. Seshagiri Sastriyar for the appellant.—Recourse can be had to the provisions of the Limitation Act. Section 46, Provincial Insolvency Act, prescribes that the procedure is that prescribed in the Civil Procedure Code, which by Order XLI requires that an appeal shall be accompanied by a copy of the first Court's order; otherwise the appeal will be rejected. The Provincial Insolvency Act is not in itself a complete Code as to procedure. The Limitation Act is a consolidating and amending Act. Section 29 thereof only says that the periods prescribed by any special or local laws shall not be altered. It does not say that its other provisions, such as the mode of computation, etc., do not apply. The presentation of an appeal without a copy of the decree appealed against is not a valid presentation; *Abdul Hakim Chowdhury v. Hem Chandra Das*(6).

(1) (1914) 16 M.L.T., 246.

(3) (1912) I.L.R., 34 All., 496.

(5) (1916) I.L.R., 39 Mad., 593.

(2) (1911) I.L.R., 34 Mad., 505 (F.B.).

(4) (1916) I.L.R., 39 Mad., 74.

(6) (1915) I.L.R., 42 Cal., 433.

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[BAKEWELL, J.—The word is not only 'alter' but 'affect'. Your argument would affect the special period prescribed.]

Section 6 of the Limitation Act refers specifically to the first schedule and section 12 deals only with *computation* of the time. 'Affecting' refers to changing the suits from one category to another as was attempted to be done in *The Secretary of State for India v. Assan*(1). The cases under the Forest Act are distinguishable on the ground that the Forest Act does not require a copy of the original decree to be filed with the appeal: see *Srinivasa Ayyangar v. Secretary of State*(2).

[Court.—The meaning given to the word 'affect' in *Abu Backer Sahib v. The Secretary of State for India*(3) is against you.]

That case turned on the fact of its being a case under the Forest Act and no reference is made in it to *Venkata v. Chengadu*(4), a previous Full Bench decision of this Court, or to *Kullayappa v. Lakshmiipathi*(5), *Iswara Patter v. Karuppan*(6). Reference was made to *Veeramma v. Abbiah*(7) and *Haji Ismail Sait v. Trustees of the Harbour, Madras*(8). If ninety days be strictly insisted on, then it is possible that the Court will not be able to give a copy of the decree within the ninety days and thus the right of appeal given by section 46 may be made useless. The first question as to whether the original petition was filed in time need not be argued now.

Dr. S. Swaminadhan for the fifth respondent was not called upon.

P. Somasundaram for V. Subrahmanyam Pantulu for respondents Nos. 4 and 9.

V. S. Narasimha Acharya for respondents Nos. 1, 7 and 8.

The other respondents were not represented.

The Court expressed the following OPINIONS:—

AYLING, J.

AYLING, J.—The question propounded for our decision is—

Whether recourse can be had to the general provisions of Act IX of 1908 in dealing with the admission of petitions and appeals

(1) (1916) I.L.R., 39 Mad., 727 (F.B.). (2) (1915) I.L.R., 38 Mad., 92 at p. 96.

(3) (1911) I.L.R., 34 Mad., 505 (F.B.).

(4) (1889) I.L.R., 12 Mad., 168 at p. 171 (F.B.).

(5) (1889) I.L.R., 12 Mad., 467 at pp. 470 and 471.

(6) (1893) 3 M.L.J., 255.

(7) (1895) I.L.R., 18 Mad., 99 at pp. 103 and 109 (F.B.).

(8) 1900 I.L.R., 23 Mad., 389.

presented after the time prescribed under the provisions of the Provincial Insolvency Act III of 1907?

The obstacle to the application of these general provisions is section 29 of the same Act which says:—

"Nothing in this Act shall . . . affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India."

The meaning of this section has been considered by a Full Bench of this Court in *Abu Backer Sahib v. The Secretary of State for India*(1), and in my opinion that judgment effectively answers the question before us. In place of section 29 of Act IX of 1908 and the Provincial Insolvency Act, the learned Judges were dealing with section 6 of Act XV of 1877 (the previous Limitation Act).

The learned vakil for appellants has in fact been forced to argue that the decision in *Abu Backer Sahib v. The Secretary of State for India*(1) was wrong and requires reconsideration. How far we are entitled to question the correctness of a considered ruling of a Full Bench of equal numerical strength is a matter into which I do not propose to enter: for I entirely and respectfully concur in the ruling now called in question. It is a pure question of interpretation of a statute. The juxtaposition of the words 'affect' and 'alter' compel us to give an independent meaning to the word 'affect'; and I cannot understand how the application of the general provisions extending in certain circumstances the period fixed by law can be held not to 'affect' that period.

The cases mainly relied on by appellants' vakil are *Venkata v. Chengadu*(2) and *Srinivasa Ayyangar v. Secretary of State*(3). In the latter case the two learned Judges were inclined to question the correctness, or rather the general applicability, of the decision in *Abu Backer Sahib v. The Secretary of State for India*(1), largely because the Full Bench ruling in *Venkata v. Chengadu*(2) had not been considered; but they deemed it unnecessary to decide whether section 29, Indian Limitation Act, rendered the general sections of the Limitation Act inapplicable to special and local Acts generally. They

(1) (1911) I.L.R., 34 Mad., 505 (F.B.). (2) (1889) I.L.R., 12 Mad., 168 (F.B.).

(3) (1915) I.L.R., 38 Mad., 92.

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disposed of the case before them with an eye solely to the peculiar features of the Act with which they were dealing—Act II of 1864: and I need hardly point out even if the two were mutually destructive, the authority of this ruling cannot be held to counterpoise the Full Bench decision.

The decision in *Venkata v. Chengadu*(1) was that of a Bench of four Judges, the main judgment being that of MUTTUSAMI AYYAR, J.; the question referred for their decision did not relate to the applicability of the general sections of the Limitation Act, or the interpretation of section 6 of the same (corresponding to section 29 of the present Act); but to whether the provisions of the Limitation Act (article 95, Schedule II) or section 59 of Act II of 1864 should be followed in computing the period of limitation. No doubt MUTTUSWAMI AYYAR, J., expressed the opinion, with the concurrence of KERNAN, J., that section 6 of the Limitation Act did not bar the application of the general sections. *Kullayappa v. Lakshmipathi*(2) is another pronouncement of the same two learned Judges to the same effect. But the other two Judges, who were parties to *Kullayappa v. Lakshmipathi*(2) (PARKER and WILKINSON, JJ.), expressed no opinion on the point; and this is remarked by BENSON and SUNDARA AYYAR, JJ., in their judgment in *Srinivasa Ayyangar v. Secretary of State*(3). The decision in *Kullayappa v. Lakshmipathi*(2) is certainly not entitled to be treated as a Full Bench decision on the question now before us.

Veeramma v. Abbiah(4) is another Full Bench case in which MUTTUSWAMI AYYAR and SHEPHERD, JJ., expressed contrary views as to the effect of section 6 of Act XV of 1877. COLLINS, C.J., does not refer to the section; but, by implication, he would seem to have favoured SHEPHERD, J.'s view.

I can find nothing in these cases, which would induce me to differ from the view of the learned Judges in *Abu Backer Sahib v. The Secretary of State for India*(5).

It has been suggested that in the case of an appeal to a District Court (with which we are not concerned here) the period allowed by section 47 (4), Provincial Insolvency Act (thirty days),

(1) (1889) I.L.R., 12 Mad., 168 (F.B.). (2) (1889) I.L.R., 12 Mad., 467.
(3) (1915) I.L.R., 38 Mad., 92. (4) (1895) I.L.R., 18 Mad., 99 (F.B.).
(5) (1911) I.L.R., 34 Mad., 505 (F.B.).

is so short that it might be impossible to procure a copy of the order in time for presentation with the appeal, as required by Order XLI, rule 1 (*mutatis mutandis*), and that in such a case a Court could not be asked to enforce the limitation clause, section 46 (4). That is not the case here: and we are not called on to say what a Court should do, if such facts were established. The possibility of such a difficult case may be a ground for legislation, or, possibly, the provision of a remedy in the rules and orders under the Civil Procedure Code. But we have merely to interpret the law as it stands: and I feel no hesitation in answering the Reference in the negative.

SESHAGIRI AYYAR, J.—Both sides are agreed that the only question to be considered in this Reference is whether the time taken up for obtaining copies of the order appealed against should be deducted in computing the period of limitation fixed by section 46, clause (4) of the Provincial Insolvency Act. The decision of the question turns largely upon the interpretation to be placed upon section 29 of the Indian Limitation Act. A very learned argument was addressed to us by Mr. A. Krishnaswami Ayyar upon the meaning to be attached to the word 'affect' in clause (1) (b) of that section. Apart from authority, if I were deciding this question for the first time, I would have respectfully concurred in the view taken by three learned Judges of this Court including the present CHIEF JUSTICE in *Abu Backer Sahib v. The Secretary of State for India*(1). The word 'alter' would apply directly to similar provisions in the Limitation Act, if any, giving an extended period to suits or appeals of the nature provided for in the Special Act. The word 'affect' is more comprehensive. Whenever by a process of computation or exclusion or deduction the special period fixed by the enactment is indirectly extended or cut down, it must be taken that that period has been *affected*. The illustration which Mr. Krishnaswami Ayyar suggested would also be connoted by the term 'affect'; for example, there may be a special period compelling a party to take steps to set aside the order of a Special Officer under the Boundaries Act. When a party instead of adopting that course wants to avail himself of the general period of limitation prescribed for a declaration of title

(1) (1911) I.L.R., 34 Mad., 505 (F.B.).

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in article 120 of the Limitation Act, the relief granted to him would indirectly affect the period of limitation prescribed in the special law. The decision of the Full Bench in *The Secretary of State for India v. Assan*(1) is an illustration of this mode of affecting the period of limitation fixed in a special Act. But, I am not prepared to agree with the learned vakil that this category of cases exhausts the significance of the word 'affect.' Nor am I prepared to accede to the contention that a computation of period of limitation which in effect extends the time fixed does not affect the period of limitation. In my opinion, wherever an attempt is made to construe a special period fixed by an enactment with reference to the general provisions of the Limitation Act contained in sections 5 to 18, the effect of such a process would be to affect the period of limitation prescribed by the local Act. Therefore my reading of the section apart from authority is in accordance with the pronouncement in *Abu Backer Sahib v. The Secretary of State for India*(2). But the matter has been complicated a great deal by other decisions to which I shall presently very briefly refer.

Before dealing with the cases quoted at the Bar, I may dispose of one aspect of the case which was very strongly pressed upon us by Mr. Krishnaswami Ayyar. He did not dispute the proposition that where a special Act is self-contained the general provisions of the Limitation Act should not be imported into the consideration of questions arising under the former Act. Upon this point we have the judgment of the Judicial Committee in *Mohummud Buhadoor Khan v. The Collector of Bareilly*(3), that to Acts of a special kind which are self-contained, the general provisions of the Limitation Act should not be annexed. Sir ARTHUR COLLINS, C.J., and MUTTUSWAMI AYYAR, J., followed this decision in *Veeramma v. Abbiah*(4). There are other decisions to the same effect; and therefore it may be taken as settled that where the Code is complete in itself the general provisions of the Limitation Act commencing from sections 5 to 18 should not be read as forming part of that Code. In the present case it was contended that the Provincial Insolvency Act is not a Code complete in itself. I think this contention is well founded.

(1) (1916) I.L.R., 39 Mad., 727 (F.B.).
(3) (1874) 1 I.A., 167.

(2) (1911) I.L.R., 34 Mad., 505 (F.B.).
(4) (1895) I.L.R., 18 Mad., 99 (F.B.).

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We have only to refer to sections 6 and 47 to show that the Civil Procedure Code was intended to be largely utilized in regard to proceedings under the Act. Therefore the Act has to be supplemented by the importation of the general rules of procedure as to suits.

One special matter affecting limitation may also be pointed out, and that is, by section 47 of the Provincial Insolvency Act, the procedure to be followed in presenting appeals under that Act are to be the same as in the case of appeals under the Civil Procedure Code. As the learned vakil pointed out, under the Civil Procedure Code an appeal can be filed only if the memorandum is accompanied by copies of the decree and of the judgment. It is well recognized that an appeal filed without these annexures must be regarded as no presentation in the eye of law: see *Chamela Kuar v. Amir Khan*(1) and *Abdul Hakim Chowdhury v. Hem Chandra Das*(2). It therefore follows that under the Provincial Insolvency Act, it is incumbent upon the party preferring an appeal that he should file copies of the order or judgment appealed against. It is not disputed that in a considerable number of cases such a copy may not be obtainable within the thirty days allowed for presenting an appeal to the First Appellate Court. It was not therefore unreasonably suggested that the legislature could not have intended that the period of thirty days fixed by section 46, clause (4), should be inclusive of the period for obtaining copies of the order appealed against. The result of such a construction would be to deny the right of appeal in many cases. If it were shown in the present case that an application was made immediately after the order was passed and that more than ninety days had elapsed before the copies were obtained I would have hesitated a great deal before coming to the conclusion that the party is not entitled to prefer the appeal after obtaining the copies, because to hold otherwise would be to deny the right of appeal given by the section. However, it has not been shown that in this particular case the copies were not granted expeditiously.

Apart from this particular aspect of the case, the general question now remains whether by virtue of the fact that the

(1) (1894) I.L.R., 16 All., 77.

(2) (1915) I.L.R., 42 Cal., 433.

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Provincial Insolvency Act is not self-contained we are at liberty to introduce into the construction of section 46, clause (4), the general provisions of the Limitation Act. In *Venkata v. Chengalulu*(1) a Bench of four Judges had to consider this question with reference to section 18 of the Limitation Act. That was a case under the Revenue Recovery Act. Two Judges, KERNAN, J., and MUTTUSWAMI AYYAR, J., held that section 18 was applicable to the Revenue Recovery Act. Justices PARKER and WILKINSON expressed no definite opinion on the question. In *Seshama v. Sunkara*(2), COLLINS, C.J., and MUTTUSWAMI AYYAR, J., in dealing with a case under the Madras Boundary Act XXVIII of 1860 held that section 14 of the Limitation Act was applicable to the special period fixed in that Act. In *Kullayappa v. Lakshmi-pathi*(3), KERNAN and MUTTUSWAMI AYYAR, JJ., applied section 14 of the Limitation Act to a case arising under the Rent Recovery Act. In *Iswara Patter v. Karuppan*(4), COLLINS, C.J., and DAVIES, J., applied section 18 of the Limitation Act to a case arising under the Revenue Recovery Act. In *Veeramma v. Abbiah*(5), which was a case under the Registration Act all the three learned Judges who took part in it, viz., COLLINS, C.J., MUTTUSWAMI, AYYAR, J., and SHEPHARD, J., held that the Act was complete in itself and that consequently there was no occasion for invoking the aid of the general provisions of the Limitation Act. The CHIEF JUSTICE and Justice MUTTUSWAMI AYYAR once again reiterated the proposition that if the Act was not complete in itself the general provisions of the Limitation Act may be looked into for construing a special Act. On the other hand SHEPHARD, J., gave an interpretation of the term 'affect' which subsequently found favour with the Judges who decided *Abu Backer Sahib v. The Secretary of State for India*(6). All these decisions were passed under section 6 of the Limitation Act of 1877. There was thus a considerable divergence of opinion regarding the interpretation to be placed upon the word 'affect' at least in Madras, and yet when the new Limitation Act of 1908 was passed, the legislature did not choose to give an authoritative interpretation of the term. My mind has been exercised considerably as to

(1) (1889) I.L.R., 12 Mad., 163 (F.B.). (2) (1889) I.L.R., 12 Mad., 1.
(3) (1889) I.L.R., 12 Mad., 487. (4) (1893) 3 M.L.J., 255.
(5) (1895) I.L.R., 18 Mad., 99 (F.B.). (6) (1911) I.L.R., 34 Mad., 505 (F.B.).

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whether the legislature intended to adopt the interpretation placed upon the term by COLLINS, C.J., MUTTUSWAMI AYYAR, J., KERNAN, J., and DAVIES, J., or whether it preferred the interpretations placed upon the word by SHEPHARD, J. The opinion of ARNOLD WHITE, C.J., MILLER, J., and WALLIS, J., was not given until after the new Act was passed although they had to construe the language of section 6 of the Act. The view taken by SHEPHARD, J., is shared by a very large number of Judges in the other High Courts, and as that view is in consonance with the natural interpretation to be placed upon the word 'affect' I prefer to hold with the Judges who decided *Abu Backer Sahib v. The Secretary of State for India*(1), that even in cases where the Act is not complete in itself, if by importing the general provisions of the Limitation Act the period fixed in a special Act is likely to be enlarged either by the process of computation in obtaining copies or by excluding the period during which a fraud was practised or during which another litigation was proceeding in a different Court, still the period of limitation would be 'affected'.

It seems to me that this is eminently a matter in which the legislature should interfere. I fail to see why litigants preferring appeals under special Acts should not have the same privilege of extension provided by the general provisions of the Limitation Act as they have in cases directly coming under the Civil Procedure Code. There is no conceivable reason for putting one class of litigants under a disability of this kind. I may also be permitted to suggest that until the legislature intervenes to amend the Limitation Act, our High Court should amend the rule in Order XLI by saying that the presentation of an appeal in cases under the Insolvency Act need not be accompanied by copies of the order, decree or judgment appealed against. My answer is in the negative.

BAKEWELL, J.—I agree with ~~the~~ Justice AYLING.

BAKEWELL, J.

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(1) (1911) I.L.R., 34 Mad., 505.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling.

NATUTHODI KUNHI MOIDIN (ACCUSED), PETITIONER,

v.

P. R. CHAMU NAIR (COMPLAINANT), RESPONDENT.*

1917,
September,
17 and 21,
and
October, 2
and 12.

Workman's Breach of Contract Act (XIII of 1859)—Scope of the Act—'Workman', meaning of—Status of accused, proof of—Duty of complainant to prove—Absence of proof.

The accused received an advance of Rs. 2,500 and contracted to supply coolies to a rubber estate. Under the contract, he was to receive a commission of 10 per cent on the wages of the Kol maistris and coolies and an additional Rs. 25 a month, if he resided on the estate. Having failed to fulfil his contract, he was proceeded against under the Workman's Breach of Contract Act.

On a difference of opinion between SADASIVA AYYAR and PHILLIPS, JJ., as to whether the accused was a 'workman' within the meaning of the Act.

Held, by AYLING, J., agreeing with SADASIVA AYYAR, J.:

(1) That the accused was not a "workman" within the meaning of the Act, and

(2) That the word 'workman' means a person who engages in manual labour of some kind, whether skilled or unskilled.

Gilby v. Subbu (1884) I.L.R., 7 Mad., 100, *Caluram v. Chengappa* (1890) I.L.R., 13 Mad., 351, *Mamubeari, In re* (1914) 27 M.L.J., 392 and *Re Rosario Quadros* (1915) I.L.R., 38 Mad., 551, followed.

Rowson v. Hanuma Mestri (1877) I.L.R., 1 Mad., 280 and *High Court Proceedings, dated 13th July 1867*. (1867) 3 M.H.C. App. xxv, disapproved.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of T. A. NARAYANA AYYAR, the acting Stationary Second Class Magistrate of Manjir in Ernad taluk, in Miscellaneous Case No. 193 of 1916.

The accused entered into an agreement with the complainant to supply coolies for work on a rubber estate. The material terms of the agreement, dated 10th March, 1916, were as follows:—

"That in consideration of the sum of rupees two thousand and five hundred this day advanced, the said N. Kunhi Moidin does hereby agree to supply 170 coolies for tapping for a period of ten months from April 15th to February 15th to work permanently every day except in case of illness or reasonable excuse or permis-

* Criminal Revision Case No. 332 of 1917 (Criminal Revision Petition No. 2c2 of 1917).

sion of superintendent for absence, failing which the said N. Kunhi Moidin Maistry agrees to pay to the estate a penalty of annas two, pies six for each and every coolie so absenting himself as aforesaid.

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"The said N. Kunhi Moidin and his coolies to receive in remuneration as follows:—

"For an able bodied man annas five a day, for an able bodied youth or woman annas three a day, for an able bodied boy annas two a day, for him a monthly salary of rupees twenty-five provided he resides on the estate, for tapping maistris, one Kol maistri and for every sixteen coolies at the rate of annas seven, pies six per diem, for Estate, Field or other works one Kol maistri at six annas per day for every twenty-five coolies and to Kunhi Moidin commission at the rate of 10 per cent to be paid on the wages of his Kol maistris and coolies, always provided that he and his Kol maistris and coolies shall perform works to the satisfaction of the manager or his assistants."

The accused made default in supplying coolies regularly for work as agreed and did not repay the balance of the advance after deducting the amount which was discharged by service.

The complainant filed a complaint in the Stationary Magistrate's Court of Ernad taluk, praying that a warrant might be issued for the arrest of the accused under the Workman's Breach of Contract Act (XIII of 1859) and that the amount might be realized from him. No evidence was adduced by the complainant to prove that the accused was to do any manual work under the contract; the accused had not taken any specific objection before the Magistrate that he could not be proceeded against under the Act. The Magistrate passed an order under section 2 of the Act against the accused directing him to repay the balance within six months. The accused filed a Criminal Revision Petition to the High Court.

B. Pocker for the petitioner.

D. Chamier for the respondent.

E. R. Osborne, the Acting Public Prosecutor, for the Crown.

The case was originally heard by SADASIVA AYYAR and PHILLIPS, JJ., who differed in opinion in the following judgments:—

SADASIVA AYYAR, J.—I am clear that the words 'workman' and 'labourer' in Act XIII of 1859 (which does not define these terms) are used in the ordinary popular sense. 'Labourer'

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KUNHI MOIDIN v. CHAMU NAIR. SADASIVA AYTAR, J. means 'man doing for wages work that requires strength or patience rather than skill or training' and 'workman' means 'operative, man hired to do manual labour.' (See the Concise Oxford Dictionary.)

It seems to me that the petitioner who was entrusted with such a large sum of money as Rs. 2,500 as advance and who was considered to possess the influence, tact and skill necessary to bring and keep on the estate 170 ordinary coolies and 80 coolies skilled in tapping for rubber cannot be presumed to be a workman or labourer. He was to be given 10 per cent commission on the wages of his Kol maistris and coolies and he was to be given a further sum of Rs. 25 a month if he chose to reside on the estate. The promise to pay Rs. 25 a month to induce him to reside in the estate was (according to what I consider the natural and reasonable construction of the agreement) evidently in order that the estate might have the benefit of his continual supervision of his coolies on the very spot and it does not show that he was himself a workman or labourer or that it was intended that he should employ himself as such during his residence on the estate.

The Sub-Magistrate has passed his order in a very summary manner. While the agreement states that the petitioner was to supply 170 ordinary coolies and 80 tapping coolies, the Magistrate refers only to the latter 80 coolies; the complaint and the sworn statement of complainant do not allege that the petitioner is a workman or labourer, the Magistrate does not state in his order that the petitioner is a workman or labourer (admittedly he is not an 'artificer') and on the petitioner's bare admission that he had executed the contract, received the advance and failed to have the work completed, an order was made under section 2 of Act XIII of 1859. There is nothing to show that the petitioner was asked to state his defence whether on the law or on the facts. I would therefore set aside the order as the complaint does not state that the petitioner is a workman or labourer, as the Magistrate has not found that the petitioner is a workman or labourer and as there is no legal evidence on the record to prove that he is one.

PHILLIPS, J. PHILLIPS, J.—The Magistrate has dealt with this case as one falling under section 2 of Act XIII of 1859, but petitioner now contends that he was wrong. His two chief grounds of contention

are: (1) that petitioner did not contract to do any work but only to supply coolies and (2) that petitioner is not a workman, labourer or artificer within the meaning of the Act. It has been held by this Court that when a workman contracts to get work done by coolies, he comes within the provisions of the Act even though he does not actually work himself: *High Court Proceedings, dated 13th July 1867*(1); *High Court Proceedings No. 1510 of 20th July 1877*(2) and *High Court Proceedings No. 628 of 23rd February 1896*(3) and *Ramasami v. Kandasami*(4). In the present case the contract was clearly one to get work performed and not merely one to supply labour, and therefore comes within the Act.

As regards the second point we have really no direct evidence of petitioner's status. No doubt to bring him within the Act petitioner must be a labourer, workman or artificer. The word 'workman' has a very wide meaning and is defined in the Century Dictionary as (1) a man who is employed in manual labour whether skilled or unskilled and (2) one who works in any department of physical or mental labour. Even under the Workman's Compensation Act the word has a very wide meaning—vide Stroud's Judicial Dictionary. In *Mamubeari, In re*(5) the question was considered and it was held that 'conveying clay' would be work within the meaning of Act XIII of 1859 provided the personal labour of the person undertaking the conveyance is intended to be utilized. *Gilby v. Subbu*(6) may be distinguished on the ground that in that case there was a distinct finding of fact that the contractor was not a workman. In the present case it is clear from the contract that petitioner was to do some kind of work, for he is to be paid Rs. 25 per mensem as remuneration and an additional commission provided he 'works' satisfactorily. His work might merely consist in supervision, but in any case he had some work to do. The provision in the contract that he was to live on the estate shows that he was expected to do some work in connexion with the contract which was a contract for the performance of manual labour. This being so it would appear that he was a workman within the meaning of the Act, and as he did not raise

(1) (1867) 3 M.H.C.R., App. xxv; s.c., 1 Weir's Cr. R. 675.

(2) (1877) I.L.R., 1 Mad., 280; s.c., 1 Weir's Cr. R., 675.

(3) 1 Weir's Cr. R., 676.

(4) (1885) I.L.R., 2 Mad., 379.

(5) (1914) 27 M.L.J., 392.

(6) (1884) I.L.R., 7 Mad., 100.

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PHILLIPS, J. this point in the lower Court I do not think he can now be allowed an opportunity of showing that he was not to do any work under the contract and was not a workman. I would therefore dismiss this petition.

B. Pocker for the petitioner.

Dr. K. Pandalai for the respondent.

E. R. Osborne, the Acting Public Prosecutor, for the Crown.

This petition again coming on for hearing under section 429 of the Code of Criminal Procedure, the following ORDER of the Court was made by

AYLING, J. **AYLING, J.**—I agree with **PHILLIPS, J.**, that the contract was one, not merely to supply labour, but to get work performed by workmen or labourers, and, to that extent, comes within the scope of Act XIII of 1859. But it is further necessary (vide section 1) that any person against whom the Act is sought to be enforced should be himself 'an artificer, workman or labourer'; and this is a point, on which not only is there no finding by the Magistrate but which has apparently escaped his attention altogether.

This status of the accused person is an integral part of the case which the complainant has to establish; and if there is no evidence, the Magistrate's order cannot stand, no matter whether the accused did, or did not, raise the point before him.

With all respect, I cannot agree with my learned brother **PHILLIPS, J.**, in holding (as I think he does) that the evidence on record is sufficient to establish that the present petitioner (accused) is a workman within the meaning of the Act. The secondary definition of 'workman' quoted by him from the Century Dictionary 'one who works in any department of physical or mental labour' cannot in my opinion be applied here. It is broad enough to include anyone but an absolute idler, and would cover many classes who have been specifically held not to come under the Act, e.g., horsekeepers, cooks, temple servants and cartmen—vide *Re Sullimon Khan*(1), *Re Murugan*(2), *Re Muthu Pandiya Gurukkal*(3) and *High Court Proceedings No. 1427 of 13th July, 1877*(4). In a recent case, **MILLER, J.**, held that a musician in a band was not a workman—vide *Re*

(1) (1883) 1 Weir's Cr. R., 688.

(3) (1902) 1 Weir's Cr. R., 689.

(2) (1890) 1 Weir's Cr. R., 689.

(4) (1877) 1 Weir's Cr. R., 890.

Rosario Quadros(1). Of course all these are very different from plantation coolies; but the cases are good authority for holding that the word 'workman' cannot be understood in this sense. The position of the word 'workman' sandwiched in between 'artificer' and 'labourer' is most significant, and I am inclined to agree with petitioner's vakil that the words were purposely used in the order in which they appear in order to indicate a descending scale from skilled to unskilled labour. A perusal of the preamble of the Act, which was passed primarily in the interests of manufacturers, tradesmen and others in the Presidency towns goes to strengthen this impression. I think the word 'workman' must be understood as connoting manual labour of some kind, whether skilled or unskilled.

Then it is argued that as the coolies and tapping coolies by whom petitioner contracted to get work done were undoubtedly workmen, he also must be regarded as a workman, on the ground that he was employed to supervise them. It is not suggested that he had any other work to do beyond supervision of the most general description. There is a separate provision for 'Kol maistris'—one for every 16, or 25 coolies according to the nature of the work. Even this general supervision by petitioner is no essential part of the contract. There is no provision requiring that he should live on the estate; it is simply provided that, *if he does*, he is to get Rs. 25 a month. His work even as a general supervisor is purely optional, and there is nothing to show that he did any or cared to avail himself of the clause in question. Even apart from this and assuming that his working as a supervisor over the coolies supplied by him was a part of his undertaking, I should find the greatest difficulty in the way of holding that a supervisor over 250 coolies, regarding whose labour he has contracted, is a 'workman' within the meaning of the Act. A man, who does work of an intellectual nature in connexion with a contract involving manual labour, cannot, I think, simply for that reason, be viewed as a manual labourer, and the word 'workman' must be understood in the same sense wherever it occurs in the Act. That personal (in the sense of manual) labour by the defendant-contractor is essential to the enforcement of the Act seems to me to be recognized in *Gilby v. Subbu*(2) and *Caluram v. Chengappa*(3) as well as in a recent

(1) (1915) I.L.R., 38 Mad., 551.

(2) (1884) I.L.R., 7 Mad., 100.

(3) (1890) I.L.R., 13 Mad., 351.

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case to which I was a party [*Mamubeari, In re*(1)] while in another reported case [*Ramasami v. Kandasami*(2)] it is made clear that the defaulting contractor was a person of the coolie class who bound himself to render personal labour, if the advance was not worked out by the coolies whom he contracted to supply.

I find two early cases, *High Court Appellate Side Proceedings* 13th July 1867(3) and *Rowson v. Hanama Mestri*(4) in which the enforcement of the Act was certainly allowed without, so far as appears, any consideration of this point—merely on the ground that the contract was one to get work performed. But it seems to me more likely that the point was one to which the attention of the learned Judges was not directed, rather than one which they considered immaterial. There is nothing in these judgments to suggest that they adopted the reasoning referred to above. All the later cases tend in the contrary direction, and they seem to me to be in accord with the wording of the Act.

After careful consideration I can only concur in the conclusion of SADASIVA AYYAR, J., and direct that the order be set aside.

Attorneys for the respondent—*Messrs. King and Partridge.*

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Kumaraswami Sasriyar.

DORAISWAMI AYYAR AND FIVE OTHERS (PLAINTIFFS),
APPELLANTS,

v.

T. SUBRAMANIA AYYAR AND TWO OTHERS (DEFENDANTS),
RESPONDENTS.*

Res judicata—*Civil Procedure Code* (Act V of 1908), sec. 11, expl. V, sec. 47 and O. XX, r. 12—*Previous suit for land and past and future profits—Decree for land and past profits and no decision as to future profits—Second suit for future profits, maintainability of.*

Held by the Full Bench (AYLING, J., *contra*):—When in a suit for possession and past and future mesne profits the Court gives a decree for mesne profits

(1) (1914) 27 M.L.J., 392.

(2) (1885) I.L.R., 8 Mad., 379.

(3) (1867) 3 M.H.C.R., App. xxv.

(4) (1877) I L.R., 1 Mad., 280.

* Second Appeal No. 100 of 1916 (Full Bench).

down to the date of suit and says nothing about subsequent mesne profits, a fresh suit to recover them is not barred under section 11, Civil Procedure Code.

Ramaswami Iyer v. Sri Rangaraja Iyengar (1915) 2 L.W., 8, overruled.

Kuppusamy Aiyar v. Venkataramier (1905) 15 M.L.J., 462, applied.

SECOND APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Tanjore, in Appeal No. 680 of 1914 preferred against the decree of C. GOVINDAN NAYAR, the District Munsif of Tiruvadi, in Original Suit No. 20 of 1914.

The necessary facts are given in the first paragraph of the ORDER OF REFERENCE.

C. V. Anantakrishna Ayyar for the appellants.

S. T. Srinivasa Gopalachariyar for the respondents.

This Second Appeal came on for hearing in the first instance before SADASIVA AYYAR and SPENCER, JJ., who made the following:—

ORDER OF REFERENCE TO A FULL BENCH.—This is a suit for mesne profits. The plaintiffs brought a previous suit (Original Suit No. 288 of 1909) for partition of family property including a prayer for mesne profits.

They obtained a decree directing a division to be made into five equal shares and awarding Rs. 108 for past mesne profits. The judgment was silent on the subject of future mesne profits.

In the present suit the District Munsif gave the plaintiffs a decree for the recovery of Rs. 254-8-0 mesne profits accruing after the institution of Original Suit No. 288 of 1909; but on appeal, the Subordinate Judge dismissed the suit with the remark that, although his decision might seem hard, he was bound by the ruling in *Ramaswami Iyer v. Sri Rangaraja Iyengar*(1), to hold that no separate suit could be brought for mesne profits claimed in a previous suit as the matter was *res judicata* by reason of the former decision.

Under the Code of 1882 it was well settled by a Full Bench decision of this Court—*Kuppusamy Aiyer v. Venkataramier*(2)—that such a suit would lie. The same principle was upheld in Calcutta in *Mon Mohun Sirkar v. The Secretary of State for India in Council*(3) (see the observations of AMEER ALI, J., at pages

(1) (1915) 2 L.W., 8.

(2) (1905) 15 M.L.J., 462.

(3) (1890) I.L.R., 17 Calc., 968.

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970 and 971 on the discretionary form of section 211 of the Code of Civil Procedure, 1882). It was also decided by another Full Bench that claims for possession and claims for mesne profits form separate causes of action under the old Code and under the new Code: vide *Ponnammal v. Ramamirda Aiyar*(1).

The learned Judges who decided *Ramaswami Iyer v. Sri Rangaraja Iyengar*(2) base their opinion on the change of language in the Code of 1908. They say that in this Code, section 211 of the Code of 1882 disappears altogether, and, as Order XX, rule 12, now reads, it is made equally a matter of discretion with Courts to direct an enquiry into future mesne profits as it is to pass a decree for possession or for future mesne profits.

With due respect to those learned Judges, we are unable to see that there has been any substantial change of language. Section 211 has not disappeared, but combined with section 212 it has been recast into Order XX, rule 12.

Section 211 declared "the Court may provide in the decree" for the payment of future mesne profits. Order XX, rule 12 (1) (c), declares that "the Court may pass a decree . . . directing an enquiry as to rent or" future mesne profits.

Section 212 permitted the Court either to determine the amount of past mesne profits by the decree itself or to pass a decree for the property and direct an enquiry into the amount of mesne profits. Order XX, rule 12 (1) (a) and (b) is to the same effect. The only essential difference in procedure is that under the new Code mesne profits are not to be left to be determined in execution.

A more important change and one to which the judgment in *Ramaswami Iyer v. Sri Rangaraja Iyengar*(2) contains no allusion, is the omission of the proviso to section 244 from section 47 of the new Code. This ran as follows:—

"Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein where such profits are not dealt with by such decree."

It may be that these words were omitted because they were considered superfluous. Similarly a provision that a claim for the recovery of land and a claim for mesne profits from such land

(1) (1915) I.L.R., 38 Mad., 829 (F.B.).

(2) (1915) 2 L.W., 8.

should be deemed to be distinct causes of action, found place in the Code of 1859 but dropped out of the Code of 1882 for the reason that it became superfluous, as explained in *Ponnammal v. Ramamirda Aiyar*(1), but this did not prevent the Court from arriving at a conclusion that such claims constitute separate causes of action in the present state of the law.

The use of the word 'may' in Order XX, rule 12, like the same word in the old section 211, seems to indicate that it is discretionary with the Court to award future mesne profits. The plaintiff could not insist on their being granted to him because at the date of the first suit the cause of action for mesne profits is not completed. In this connection the use of the word 'shall' in Order XX, rule 16, which deals with suits for accounts may be compared with the use of the word 'may' in Order XX, rule 12.

As regards the question of *res judicata*, section 11, explanation 5, declares that any relief claimed in the plaint, which is not expressly granted by the decree, shall be, for the purposes of this section, deemed to have been refused. But if mesne profits were claimed in the first suit and through mistake or oversight they were neither granted nor refused, the section will not prevent a second suit being instituted for their recovery, when the relief claimed in the plaint is a relief which the Court was not bound to grant if the defence failed. This is made clear in *Kuppusamy Aiyer v. Venkataramier*(2).

Ramaswami Iyer v. Sri Rangaraja Iyengar(3) has since been followed in C.R.P. No. 858 of 1913 (unreported), but one of the two learned Judges who decided it was a party one and a half months later to *Thirvasi v. Arumugam*(4), which followed *Kuppusamy Aiyer v. Venkataramier*(2), without referring to the more recent decision under the Code of 1908. The other learned Judge was a party to the Full Bench in *Ponnammal v. Ramamirda Aiyar*(1), which proceeds on considerations not easily reconcilable with those upon which *Ramaswami Iyer v. Sri Rangaraja Iyengar*(3) was decided.

We are inclined to the opinion that *Ramaswami Iyer v. Sri Rangaraja Iyengar*(3) was wrongly decided and requires reconsideration and as the question involved is of considerable

(1) (1915) I.L.R., 38 Mad., 829 (F.B.).

(3) (1915) 2 L.W., 8.

(2) (1905) 15 M.L.J., 462.

(4) (1915) M.W.N., 170.

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DORAI SWAMI v. SUBRAMANIA. importance and of frequent occurrence, we refer to the decision of a Full Bench the question:

SADASIIVA AYYAR AND SPENCER, JJ. "Whether after a suit for possession of lands and mesne profits past and future has been brought and decided and a decree has been obtained for possession and past mesne profits without the claim to future mesne profits being decided, a second suit will lie to recover mesne profits from the institution of the first suit till delivery of possession."

ON THIS REFERENCE

C. V. Anantakrishna Ayyar for the appellants.—The present suit is not *res judicata*: compare *Kuppusamy Aiyar v. Venkataramier*(1). In this respect there is no change between the old and the new Civil Procedure Codes. Claim for future mesne profits is not 'relief' within section 11(5), Civil Procedure Code. It is not part of 'the cause of action.' 'Future mesne profits' need not be valued for purposes of Court Fees Act: see also *Ponnammal v. Ramamirda Aiyar*(2). *Ramaswami Iyer v. Sri Rangaraja Iyengar*(3) is wrong. See sections 211 and 244, Civil Procedure Code of 1882 and Order XX, rule 12. What was left to be done in execution by section 244 of the old Civil Procedure Code is now left to be done before the final decree under Order XX, rule 12 of the new Civil Procedure Code, in the form of a preliminary decree. The word 'may' in Order XX, rule 12, Civil Procedure Code, is used only to enable a Court to pass a preliminary decree for future mesne profits also if it is so inclined. Compare Order XX, rule 16, Civil Procedure Code, which says that a Court shall pass a preliminary decree in a suit for accounts; see *Ram Dayal v. Madan Mohan Lal*(4) and *Mon Mohun Sirkar v. The Secretary of State for India in Council*(5). Compare section 34, Civil Procedure Code and *Seth Gokul Dass Gopal Dass v. Murli and Zalim*(6).

S. T. Srinivasa Gopalachariyar for the respondent.—*Ramaswami Iyer v. Sri Rangaraja Iyengar*(3) is right and the present suit is *res judicata*. Future mesne profits are put

(1) (1905) 15 M.L.J., 462.

(2) (1915) 1 L.R., 38 Mad., 829 (F.B.).

(3) (1915) 2 L.W., 8.

(4) (1899) 1 L.R., 21 All., 425 at 1433 (F.B.).

(5) (1890) 1 L.R., 17 Cal., 968.

(6) (1878) 1 L.R., 3 Cal., 602 at p. 609 (P.C.).

by the new Code on the same footing as past profits. Even if *Kuppusamy Aiyar v. Venkataramier*(1) was right, the new Code has made certain changes under which it must now be held that it is wrong. The changes are provided by Order XX, rule 12. Future mesne profits can now be included in the preliminary decree. Under the new Code the grant of future mesne profits is not a matter of discretion with the Court. A plaintiff is not compelled to join a claim for past or future mesne profits with a suit for land but he has got an option. But once he exercises his option and sues for future mesne profits also, section 11, Civil Procedure Code, comes into operation: *vide* Order X, rule 4, Civil Procedure Code. If the principle of *res judicata* applies when future mesne profits are expressly granted or expressly refused, it must equally apply where the decree is silent about it. 'Shall be deemed to have refused' mean shall be deemed to have been heard and refused; *Bayyan Naidu v. Suryanarayana*(2), *Fakharuddin Mahomed Ahsan v. Official Trustee of Bengal*(3). If silence in a previous decree as to past profits acts as *res judicata*, similar must be the result in the case of future mesne profits; see Woodroffe's Civil Procedure Code, page 880.

The Court expressed the following OPINIONS:—

WALLIS, C.J.—I agree with the referring Judges. Explanation V to section 11 of the present Code of Civil Procedure is in exactly the same terms as the corresponding explanation III to section 13 in the Code of 1882. Under the Code of 1882 it was held by a Full Bench of this Court in *Kuppusamy Aiyar v. Venkataramier*(1), in conformity with the decisions of other High Courts, that the word 'relief' in the explanation means relief arising out of a cause of action which had accrued at the date of suit and on which the suit was brought, and did not include relief such as mesne profits accruing after the date of suit as to which no cause of action had then arisen, but which the Court was nevertheless expressly empowered to grant. The explanation having been reproduced in exactly the same words, the presumption is that it was intended to have precisely the same effect. I do not find any sufficient

(1) (1905) 15 M.L.J., 462.

(2) (1914) 1 L.R., 37 Mad., 70 (F.B.).

(3) (1882) 1 L.R., 8 Cal., 178 (P.C.).

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indication to rebut this presumption in the fact that sections 211 and 212 of the old Code were amalgamated to form Order XX, rule 12. The change introduced by the new rule is that the award of mesne profits in all cases is to be by preliminary decree, and that when ascertained they are to be embodied in a final decree, whereas under sections 211 and 212 they were to be ascertained in execution. This change does not appear to me to affect the construction of explanation V to section 11, nor do I think is effected by the omission in section 47 of the new Code of the proviso to the corresponding section 244 of the old Code. I answer the question in the affirmative.

AYLING, J.

AYLING, J.—I regret that I am unable to concur. The point referred is identical with that considered by HANNAY, J., and myself in *Ramaswami Iyer v. Sri Rangaraja Iyengar* (1), and with all respects after hearing it reargued, I remain of the same opinion.

I would answer the question in the negative.

KUMARASWAMI SASTRIYAR, J.—The question referred to us for decision is

"Whether after a suit for possession for lands and mesne profits past and future has been brought and decided and a decree has been obtained for possession and past mesne profits without the claim to future mesne profits being decided, a second suit will lie to recover mesne profits from the institution of the first suit till delivery of possession."

I agree with the CHIEF JUSTICE whose Judgment I have had the advantage of perusing and with SADASIVA AYYAR and SPENCER, J.J., the referring Judges, that the question should be answered in the affirmative.

As there has been no adjudication as to future mesne profits the second suit can only be barred if it can be brought under explanation V to section 11, Civil Procedure Code, 1908. It is now well settled that the word 'relief' in explanation V means a relief which the plaintiff can claim as a matter of right in respect of a cause of action which has accrued to him at the date of suit and that relief in respect of future mesne profits is not claimable as a matter of right no cause of action accruing to the plaintiff at the date of suit in respect of the future injury

(1) (1915) 2 L.W., 8.

he might suffer if the defendant continues to be in wrongful possession in spite of the suit and that explanation III of section 13 of the Code of 1882 which is the same as explanation V of section 11 of the Code of 1908 will not bar a second suit. *Mon Mohun Sirkar v. The Secretary of State for India in Council* (1), *Jiban Das Oswal v. Durga Pershad Adhikari* (2), *Bhivray v. Sitaram* (3), *Ram Dayal v. Madan Mohan Lal* (4) and *Kuppusamy Aiyar v. Venkataramier* (5).

There is nothing in the present Code that alters the nature of the claim for future mesne profits. It is still a claim in respect of a cause of action that has not accrued to the plaintiff at the date of suit and it cannot be contended after the recent decision of the Full Bench in *Ponnammal v. Ramamirida Aiyar* (6), that if the plaintiff had omitted to ask for the relief in his plaint a separate suit would be barred.

The main contention for the respondents is that Order XX, rule 12, has now rendered it obligatory on the Court to pass a decree as to mesne profits from date of suit to date of delivery of possession if the plaintiff makes out a claim for such relief and that consequently the decisions under the Code of 1882 have no application.

I do not think that the Code of 1908 which enacts as Order XX, rule 12, what was contained in sections 211 and 212 of the Code of 1882 has made any material alteration in the nature of the claim as to future mesne profits. Rule 12 provides that the Court may pass: (1) a decree for possession of the property, (2) a decree for rent or mesne profits up to suit or direct an inquiry as to the same and may (3) direct an inquiry as to future mesne profits. It provides for a final decree being passed after the inquiry directed is made and the liability ascertained. So far as clause (c) of Order XX, rule 12, is concerned the power of the Court is still discretionary as all the Order does is to provide that the Court may pass a decree directing an inquiry as to rent or mesne profits from the institution of the suit till the period provided for by clauses (i), (ii) and (iii). It has been argued that even as regards clauses (a) and (b) the word used is 'may' and not 'shall' though the Court is

(1) (1890) I.L.R., 17 Cal., 968.
(3) (1895) I.L.R., 19 Bom., 532.
(5) (1905) 15 M.L.J., 462.

(2) (1894) I.L.R., 21 Cal., 252.
(4) (1899) I.L.R., 21 All., 425 (F.B.).
(6) (1915) I.L.R., 38 Mad., 829 (F.B.).

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bound to pass a decree in terms of clauses (a) and (b) if plaintiff's claim is established. Section 212 of the old Code provides that the Court may either determine the amount by the decree itself or may pass a decree for the property and direct an inquiry into mesne profits and dispose of the same on further orders and the legislature in including in one section what was embodied in two by using the word 'may' which occurred in both the sections cannot be said to have introduced any new principle as regards future mesne profits. When different claims are dealt within one rule under various sub-sections the fact that the word 'may' should be construed as 'shall' in respect of one of the sub-sections owing to nature of the claim which it deals with, does not necessarily mean that the word cannot be construed in its ordinary sense as regards other clauses. With all respect I am unable to agree with the decision in *Ramaswami Iyer v. Sri Rangaraja Iyengar*(1), that the grouping out one section of past and future mesne profits affects the nature of future mesne profits so as to attract to it the provisions of explanation V to section 11. The omission of the proviso to section 244 in section 47 of the Code of 1908 is due to the fact that under the Code of 1908 the determination of questions as to mesne profits was to be in the suit itself and not subsequent to decree in execution proceedings. Under the scheme of the present Code there is no necessity for any such proviso to section 47 which corresponds to section 244 of the old Code.

There being in my opinion no material difference between section 211 of the old Code and rule 12, clause (c) of Order XX of the present Code, there is no reason for departing from the decisions of this and the other High Courts as to the second suit not being barred by explanation V of section 11 of the Code.

N.R.

(1) (1915) 2 L.W., 8.

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<i>Taylor v. Bowers</i> (1876) 1 Q.B.D., 291, followed ...	197
<i>Zamora, The</i> (1916) 2 A.C., 77, followed ...	225

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 18 (b) AND (d)—*Natural justice*, meaning of the term—*Wrong view as to legal liability or onus, whether renders foreign judgment one not given on the merits.*] A wrong view as to the legal liability of a party or as to onus does not render a foreign judgment one not given on the merits within the meaning of section 18 (b) of the Civil Procedure Code. The term 'natural justice' in section 13 (d) of the Code of Civil Procedure with reference to foreign judgments refers rather to the form of procedure than to the merits of the case. *Crawley v. Isaacs* (1867) 16 L.T. (N.S.), 529, followed. *Liverpool Marine Credit Co. v. Hunter* (1868) L.R., 3 Ch. App., 479, applied and followed. *Imrie v. Castrique* (1860) 8 C.B. (N.S.), 405; s.c., 141 E.R., 1222 and *Scott v. Pilkington* (1862) 2 B. & S., 11; s.c., 121 E.R., 978, referred to.

Rama Shenoi v. Hallagna ... (1918) I.L.R., 41 Mad., 205

—, SEC. 36 :—See GUARDIANS AND WARDS

ACT (VIII OF 1890), SEC. 34.

—, SEC. 64, EXPL., effect of—*Attachment of land by one decree-holder—Application for rateable distribution by other decree-holders—Satisfaction of attaching decree-holder's decree by subsequent private alienation of the land attached—The other decree-holders cannot impeach the alienation.*] Where a decree-holder attached land in execution of his decree and the other decree-holders applied for rateable distribution without attaching the land in execution of their decrees and subsequently the judgment-debtor alienated the land and paid off the attaching decree-holder. Held by the Full Bench, that the other decree-holders were not entitled to question the alienation under section 64 of the Civil Procedure Code. *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (1917) I.L.R., 44 Cal., 662 (P.O.), relied on. Effect of Explanation to section 64, Civil Procedure Code, considered.

Annamalai Chettiar v. Palamalai Pillai ... (1918) I.L.R., 41 Mad. (F.B.), 265

—, O. III, R. 1 AND O. IX, R. 12.—*Order of Court directing a party to appear in person—Refusal of the party to comply with the order—Order of Court declaring him ex parte, legality of.*] A Court is empowered, under Order III, rule 1, of the Civil Procedure Code, to direct

the appearance in Court of a party in person and if the party so directed refuses to appear, the Court may declare him *ex parte* even though he has engaged a pleader who is prepared to appear for him in the case. *Satu v. Hanmantrao* (1899) I.L.R., 23 Bom., 318, dissented from.

Vaiguntathammal v. Valliamman ... (1918) I.L.R., 41 Mad., 256

CIVIL PROCEDURE CODE (ACT V OF 1908), O. IX, R. 13—Order XVII, rules 2 and 3, scope of.—Decree *ex parte*—Defendant absent at adjourned hearing after taking adjournment for letting evidence.] Where, at the close of the plaintiff's case, an adjournment was granted to the defendant to enable him to produce his evidence and he failed to appear at the adjourned hearing, and the Court proceeded to pass a decree against him. *Held* by the Full Bench, that the case came within Order XVII, rule 2, and the decree could be set aside under Order IX, rule 13. *Per* SADASIVA AYYAR and KUMARASWAMI SASTRIYAR, JJ.—Rules 2 and 3 of Order XVII, Civil Procedure Code, are mutually exclusive: rule 2 applies to all cases of absence of parties whether time was granted or not to do any of the acts mentioned in rule 3 of the Order, while rule 3 applies only to cases where parties are present and commit default of the kind mentioned in the rule. *Per* WALLIS, C.J.—Rules 2 and 3 of Order XVII are not mutually exclusive. Rule 3 may be applied even in the absence of the defendant, but the decree will none the less, be *ex parte* and liable to be set aside. *Chandramathi Ammal v. Narayanasami Aiyar* (1910) I.L.R., 33 Mad., 241, followed. *Naganada Aiyar v. Krishnamurti Aiyar* (1911) I.L.R., 34 Mad., 97, overruled.

Pichamma v. Sreeramulu ... (1918) I.L.R., 41 Mad. (F.B.), 286

—, O. XVII, RR. 2 AND 3:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. IX, R. 13.

—, O. XXI, R. 2, CL. (1):—See EXECUTION PETITION.

—, O. XXIII, R. 3, AND SEC. 96, CL. (3)—Compromise—Power of vakil to enter into—Construction of vakalat—Recording of compromise—Duty of Court to inquire—Decree in terms of compromise—Appeal, when allowed.] A vakalat containing a provision authorizing the vakil "to present if necessary petitions for razinama for withdrawal and for referring to arbitration and to sign the razinama, etc., petitions," does not give authority to the vakil to enter into a compromise without reference to his clients. An appeal lies against a decree passed in accordance with a compromise, where the authority to enter into it, is impeached. *Ayyagiri Veerasalingam v. Koovur Basivi Reddi* (1915) 27 M.L.J., 173, followed. *Jagapati Mudaliar v. Ekambara Mudaliar* (1898) I.L.R., 21 Mad., 274 and *Raghoji Rao v. Lakshman Rao Sahib* (1912) 22 M.L.J., 381, referred to. Duty of Courts to scrutinize compromises before recording them pointed out.

Thenal Ammal v. Sokkammal ... (1918) I.L.R., 41 Mad., 233

—, O. XXXIX, R. 2:—See INJUNCTION.

COMPROMISE, power of vakil to enter into:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R. 3, AND SEC. 96, CL. (5).

—, recording of—Duty of Court to inquire into:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R. 3, AND SEC. 96, CL. (5).

CONTRACT—Breach of—Suit for damages—Contract after outbreak of war to supply enemy goods out of stock in a particular ship—Royal Proclamation, prohibiting contract as illegal, effect of—Capture and condemnation of steamer and goods by Prize Court, effect of, on contract—Purchase of goods from Prize Court by defendant and bringing goods to place of performance by other steamers, effect of—Contract to supply goods of a certain description and quality—Supply of inferior goods, effect of.] A contract made on the 25th August 1914, after the outbreak of war with Germany on the 4th August 1914, to supply German dyes expected to arrive by certain steamers believed to have started on their voyage from Germany before the war, is unenforceable, if under the contract the defendant was not to be liable in case of non-arrival of the steamers at certain ports on account of the state of war and the ship and the dyes therein were as a fact seized during the voyage and condemned as prize by a Prize Court. *Held* further, (a) that the effect of the Royal Proclamation of 9th September 1914, prohibiting trading with the enemy and in enemy goods as illegal, was to render the further performance of the contract illegal and to put an end to the contract; (b) that the condemnation of the goods by the Prize Court related back to the date of seizure and divested the owners of the goods as from the date of seizure; (c) that the fact that the defendants for their own convenience bought the goods from the Prize Court and brought them to the place of performance is immaterial as the goods ceased to be goods consigned to the defendants; and (d) that a contract to supply dyes of 40 per cent strength on arrival of certain steamers is not enforceable when the steamers arrive with dyes of inferior description and quality, viz., 16 per cent strength. *Hale v. Rowson* (1858) 27 L.J., C.P., 189, distinguished. *Arnhold Karberg & Co. v. Blythe Green Jourdain & Co.* (1916) 1 K.B., 495, *The Odessa* (1916) A.C., 158 and *The Zamora* (1916) 2 A.C., 77, followed.

Abdul Razack v. Khandi Row ... (1918) I.L.R., 41 Mad., 235

CONTRACT ACT (IX OF 1872), SS. 23 AND 65.—Marriage brokerage agreement—Money paid under, when recoverable—Principle of English Law, applicability of—Transfer, ostensible or real, whether a proper test.] A marriage brokerage agreement is unlawful and void *ab initio* and brokerage paid thereunder is recoverable if the agreement or a substantial part of it is not performed. Such an agreement does not fall within section 65 of the Contract Act and the rule to be applied is the rule of English Law. *Taylor v. Bowers* (1876) 1 Q.B.D., 291, *Kearley v. Thomson* (1890) 24 Q.B.D., 742, *Barclay v. Pearson* (1898) 2 Ch., 154 and *Petherperumal Chetty v. Muniandy Servat* (1908) I.L.R., 35 Cal., 551 (P.C.), referred to. *Ledu Coachman v. Hiralai Bose* (1916) I.L.R., 43 Cal., 115, dissented from. The rule applies whether the transfer of the property under the agreement was merely ostensible or real. *In re Great Berlin Steamboat Company* (1884) 28 Ch. D., 616, followed.

Srinivasa v. Sessa ... (1918) I.L.R., 41 Mad., 197

CRIMINAL PROCEDURE CODE (ACT V OF 1908), SS. 107, 192 AND 523.—Previous proceedings under section 107 and prosecution under the Penal Code—Discharge—Subsequent proceedings under section 107 on the same facts, if maintainable—Jurisdiction of Magistrates—Transfer by District Magistrate to a

Magistrate without local jurisdiction before issue of notice to accused—(Order of such Magistrate, validity of—Notice to accused, vague—Effect of notice.) A Magistrate is not entitled to institute proceedings under section 107 of the Criminal Procedure Code upon facts and information which have already been the subject of enquiry under that section or in connexion with charges under the Penal Code brought against persons who have been discharged in those proceedings. A District Magistrate cannot be said to have taken cognizance of a case under section 107, in which he has not issued notice to the accused to show cause why they should not be proceeded against, and has no power under section 192 of the Criminal Procedure Code to transfer such a case to another Magistrate. A District Magistrate has no power under section 528 of the Criminal Procedure Code to make over the initiation of proceedings in a case under section 107 of the Criminal Procedure Code to a Magistrate who has no local jurisdiction in the matter. A Magistrate who has no local jurisdiction to initiate proceedings in a matter under section 107, Criminal Procedure Code, acquires none by the transfer of a case to him from a Magistrate who has jurisdiction but has not taken proceedings, and his proceedings are void and should be quashed. Proceedings under section 107 of the Criminal Procedure Code should be quashed if the notice issued to the accused under that section is so vague as not to give the accused particulars of the offences charged. *Nirbeekar Chandra Mukerjee v. The Emperor* (1909) 13 C.W.N., 580, *Surjya Kanta Roy Chowdhry v. Emperor* (1904) I.L.R., 31 Cal., 350 and *King-Emperor v. Munna* (1902) I.L.R., 24 All., 151, followed.

Konda Reddy v. King-Emperor ... (1918) I.L.R., 41 Mad., 246

EXECUTION PETITION, prayer therein for attachment—Attachment ordered—Failure to pay batta—Presumed oral application at the hearing of the petition to issue warrant of attachment—Whether such application is step in aid of execution—Part-payment entered in the petition—Civil Procedure Code (Act V of 1908), O. XXI, r. 2, cl. 1, whether certificate of payment proved—Limitation Act (IX of 1908), sec. 20, saving of limitation.]—Where an assignee of a decree filed a petition for execution on the 18th July 1911 and an order of attachment was made on the day of hearing, the 12th August 1911, and the petition was subsequently dismissed on the 26th August 1911 on his failure to pay batta within the time allowed, and a fresh application was filed on the 10th August 1914, *Held*, that, though in the above circumstances, the Court might presume that the decree-holder made an oral application on the day of hearing to proceed with the execution such application was not a step in aid of execution and that the second application filed more than three years after the date of the first was barred by limitation. *Held* also, that the part-payment of a decree amount entered in an execution petition, presented within three years from the date of such alleged payment amounts, if the fact of payment is proved, to a certificate of payment under Order XXI, rule 2 of the Code of Civil Procedure, and will operate to save limitation under section 20 of the Limitation Act. *Rajam Aiyar v. Anantharatnam Aiyar* (1915)

29 M.L.J., 689 and *Lakhi Narain v. Pelamani Dasi* (1914) 20 C.L.J., 181, referred to.

Masilamani Mudaliar v. Sethuswami Ayyar ... (1918) I.L.R., 41 Mad., 251

GUARDIANS AND WARDS ACT (VIII OF 1890), SEC. 34.—Civil Procedure Code (Act V of 1908), sec. 36—Order—Decree—Marriage expenses of person dependent on the ward—Order against guardian—Ward attaining majority—Discharge of guardian—Application for execution against ward after majority—Jurisdiction of Court to order execution—Omission to object before attachment—Waiver—Estoppel.] An order under section 34 of the Guardians and Wards Act directing a guardian to pay a sum of money out of his ward's estate for the marriage expenses of a person dependent on his ward is neither a decree nor an order executable as a decree under the Civil Procedure Code, and cannot be enforced against the ward after he has attained majority and the guardian has been discharged. There being an initial want of jurisdiction in the Court to execute such an order, the omission of the ward to object, after notice, to an order for attachment of his property, does not estop him from objecting to the jurisdiction of the Court to sell the property after attachment. *Somakka v. Hamiah* (1913) I.L.R., 38 Mad., 39, referred to.

Parvathammal v. Chokkalinga Chetty ... (1918) I.L.R., 41 Mad., 241

INJUNCTION—Temporary injunction in mandatory form—Power of Indian Courts to grant under Order XXXIX, rule 2, Civil Procedure Code (Act V of 1908). Courts in India can under Order XXXIX, rule 2, Civil Procedure Code, issue temporary injunctions in a mandatory form. *Israfil v. Shamsur Rahman* (1914) I.L.R., 41 Cal., 486, and *Champosay Bhimji & Co. v. Jamna Flour Mills & Co.* (1914) 16 Bom. L.R., 566, referred to. The view of BEAMAN, J., in *Rasul Karim v. Pirmbhai Amirbhai* (1914) I.L.R., 38 Bom., 981, not followed.

Kandaswami v. Subramanya ... (1918) I.L.R., 41 Mad., 208

JURISDICTION of Inferior Court to set aside decree of Superior Court obtained by fraud—Reliefs that can be granted.] A District Munsif can entertain a suit for a declaration that a decree passed by a District Court was obtained by fraud when the amount decreed and the subject-matter of the suit are within his jurisdiction; but he cannot direct a retrial of the suit by the District Court. The previous suit can be revived only by an application to the District Court.

Arunachellam v. Sabapathy ... (1914) I.L.R., 41 Mad., 218

of Magistrates:—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 107, 192 AND 528.

LIMITATION ACT (IX OF 1908), SEC. 20.—See EXECUTION PETITION.

MAINTENANCE:—See MUHAMMADAN LAW.

MARRIAGE COHABITATION AGREEMENT:—See CONTRACT ACT (IX OF 1872), ss. 23 AND 65.

MORTGAGE, usufructuary:—See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 58 (a) AND (d), 67 AND 68 (e).

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- MORTGAGEE, right of, to sue for sale**—See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 58 (a) AND (d), 67 AND 68 (c).
- MORTGAGOR, failure of, to deliver possession**—See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 58 (a) AND (d), 67 AND 68 (c).
- MUHAMMADAN LAW—Shafi School—Maintenance, arrears of**—Whether recoverable in the absence of a decree or agreement to pay.] According to the Shafi School of Muhammadan Law maintenance is a debt and the wife is entitled to recover from her husband arrears of maintenance though there be no decree of Court or mutual agreement in respect of such maintenance. The distinction in this respect between Shafi and Hanafi school pointed out. Muhammadan Law Texts examined.
Muhammad Haji v. Kalimbi ... (1918) I.L.R., 41 Mad., 211
- RELIGIOUS ENDOWMENTS ACT (XX OF 1863), ss. 14 AND 18**—Leave given to four persons under section 18 of the Act—Suit by them under section 14—Death of one of the plaintiffs after suit, whether it effects abatement.] A suit instituted under section 14 of the Religious Endowments Act by four persons with the leave of the Court under section 18 of the Act does not abate on the death of one of the plaintiffs. *Venkatesha Malia v. Ramayya Hegade* (1915) I.L.R., 38 Mad., 1192, *Maddala Bagavannarayana v. Vadapalli Perumalla Charyulu* (1916) 29 M.L.J., 231, distinguished. *Ohabile Ram v. Durga Prasad* (1915) I.L.R., 37 All., 296, not approved. *Parameswaran Munsee v. Narayanan Nambodri* (1917) I.L.R., 40 Mad., 110, referred to.
Alagappa v. Muthiah ... (1918) I.L.R., 41 Mad., 237
- TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 58 (a) AND (d), 67 AND 68 (c)**—[usufructuary mortgage—Failure of mortgagor to deliver possession—Right of mortgagee to sue for sale.] Held, by the Full Bench:—Where a mortgagor fails to deliver possession to his mortgagee, the mortgage is not a usufructuary mortgage within the meaning of section 58 (d) of the Transfer of Property Act, and the mortgagee is entitled to bring a suit for sale of the mortgaged property. Sections 58 (a) and (d), 67 and 68 (c) of the Transfer of Property Act, referred to. *Ram Narayan Singh v. Adhindra Nath Mukherji* (1917) I.L.R., 44 Calc., 388 (P.C.), followed. *Arunachalam Chetti v. Ayyavayyan* (1898) I.L.R., 21 Mad., 476 (F.B.), overruled.
Subbamma v. Narayya ... (1918) I.L.R., 41 Mad., 259
- VAKIL, power of, to enter into compromise**—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R. 3 AND SEC. 86, CL. (5).

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Bakewell.

P. R. SRINIVASA AYYAR (PLAINTIFF), APPELLANT,

v.

A. SESA AYYAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Indian Contract Act (IX of 1872), ss. 23 and 65—Marriage brocage agreement—Money paid under, when recoverable—Principle of English Law, applicability of—Transfer, ostensible or real, whether a proper test.

A marriage brocage agreement is unlawful and void *ab initio* and brokerage paid thereunder is recoverable if the agreement or a substantial part of it is not performed. Such an agreement does not fall within section 65 of the Contract Act and the rule to be applied is the rule of English Law.

Taylor v. Bowers (1876) 1 Q.B.D., 291, *Kearley v. Thomson* (1890) 24 Q.B.D., 742, *Barclay v. Pearson* (1893) 2 Ch., 154, and *Petherperumal Chetty v. Muniandy Servai* (1908) I.L.R., 35 Calc., 551 (P.C.), referred to.

Ledu Coachman v. Hiralal Bose (1916) I.L.R., 45 Calc., 115, dissented from.

The rule applies whether the transfer of the property under the agreement was merely ostensible or real.

In re Great Berlin Steamboat Company (1884) 26 Ch. Div., 616, followed.

APPEAL under clause 15 of the Letters Patent against the order of BURN, J., in *Srinivasa Ayyar v. Sesa Ayyar* (1).

The plaintiff paid the defendants rupees four hundred under an agreement for the marriage of the first defendant's son (Raman) with the plaintiff's minor sister. The amount was not paid as a settlement for the bride or her issue but as remuneration to the defendants to bring about the marriage. The marriage did not take place and the plaintiff sued for recovery of the amount, and alleged that there was breach of the agreement by the defendants. The defendants contended (1) that there was no cause of action against them, as the first defendant agreed only on behalf of Raman and that the second defendant was not a party at all; (2) that the agreement was not broken by the defendants and (3) that the agreement was invalid as being contrary to public policy, and that the money advanced under it

* Letters Patent Appeal No. 233 of 1916.

(1) Civil Revision Petition No. 862 of 1915 praying the High Court to revise the decree of K. KRISHNAMA ACHARIYAR, Subordinate Judge of Madura, in Small Cause Suit No. 1314 of 1915.

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was therefore irrecoverable. The Subordinate Judge, who tried the suit on the small cause side, held that the agreement was broken by the plaintiff and that consequently he could not recover the suit amount. The plaintiff preferred a civil revision petition to the High Court which was heard by BURN, J., who dismissed the petition holding that the plaintiff could not recover the amount as he was responsible for the breach of the agreement. The learned Judge did not allow the plaintiff to raise the contention that he was entitled to recover the money as paid under an agreement which was unlawful as being opposed to public policy and expressed the opinion that section 65 of the Indian Contract Act had no application to the case. The plaintiff preferred this Letters Patent Appeal.

Dr. K. Pandalai for the appellant.

T. R. Venkatarama Sastriyar for the respondents.

OLDFIELD, J.

OLDFIELD, J.—Plaintiff, here appellant, sued defendants for Rs. 400 alleged to have been advanced to them out of Rs. 1,100, payable under an agreement as consideration for the marriage of his minor sister with Raman, the first defendant's son and the second defendant's brother. There were three defences; that (1) there was no cause of action, because the first defendant entered into the agreement only on behalf of Raman and the second defendant was not a party to it at all; (2) the agreement was not broken by defendants; (3) it was invalid, as being against public policy; and (4) the money advanced under it was therefore irrecoverable.

Of these defences, the first was not dealt with either at the trial or by the learned Judge in this court though one would have supposed that a decision regarding the existence of a cause of action would have been reached, before enquiry began into the validity of the agreement set up as constituting it or the responsibility for breaking that agreement. It is said that the plea was abandoned. But the trial was under Small Cause Procedure and no issues were framed. Raman was, according to plaintiff's second witness and first defendant, of age at the date of the agreement. The latter said that he took away the Rs. 400 paid under it. It is not the case that no evidence to support defendant's pleas was adduced; and it was admitted before us that they were relied on in this court, although the learned Judge did not mention them. It is not possible in these

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circumstances to hold that they were abandoned or that defendants cannot support the learned Judge's decision with reference to them, if they can be established and if it is not sustainable on other grounds.

The learned Subordinate Judge's finding on the second defence, that plaintiff, not defendants, broke the agreement is one of fact and must be accepted. It is, however, to be observed that coupled as it was with a plea that the agreement was unlawful and therefore unenforceable, it could justify no legal conclusion. For the plea, in effect that defendants were absolved by plaintiff's refusal to perform his part from any duty under the agreement was irreconcilable with the contention that such performance would have been in conflict with public policy. Shortly they could not complain of plaintiff's refusal to do what they alleged would have been wrong.

On the remaining question raised there is no doubt that the agreement was unlawful and therefore void. As set up in the plaint, it involved no suggestion that the money to be paid was for settlement on the bride or her issue or was anything but remuneration to defendants for bringing about the marriage; and as plaintiff's grounds of appeal Nos. 5 and 6 and first defendant's written statement (paragraph 8) and the second defendant's (paragraph 13) show, both sides are agreed that such an agreement would be unlawful. *Venkatakrishnayya v. Lakshminarayana*(1) and *Devarayan v. Muthuraman*(2). The question is then whether plaintiff is entitled to recover what he paid under such an agreement and whether defendants can retain an advantage received under it. This question was not raised in the plaint, the Subordinate Judge refusing to deal with defendant's allegation that the agreement was unlawful, because he had found in their favour as to responsibility for its breach. On this account the learned Judge held that plaintiff could not raise that contention here also expressing the opinion that his claim was unsustainable with reference to section 65 of the Indian Contract Act. That section, however, is not applicable: *Dayabhai Tribhorandas v. Lakshmidhand Panachand*(3), *Gulabchand v. Fulbai*(4) and *Ledu Coachman v.*

(1) (1909) I.L.R., 32 Mad., 185.

(3) (1885) I.L.R., 9 Bom., 358.

(2) (1914) I.L.R., 37 Mad., 393.

(4) (1909) I.L.R., 33 Bom., 411.

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Hiralal(1). The Indian Contract Act affording no direct guidance, the conclusions of the learned Judge must be tested with reference to authority.

He has supported his conclusion against the existence of any right to recover what has passed in connexion with an unlawful agreement by citation of three cases. But in one of them, *Girdhari Singh v. Neeladhar Singh*(2), it was conceded that, if the contract was contrary to public policy, the plaintiff was not entitled to recover; and the case is therefore no authority against the contention, advanced before us, that the general rule is subject to an exception in the plaintiff's favour, when no portion or when no substantial portion of the unlawful purpose has been carried out. So also the next case, *Hathu Khan v. Sewak Koer*(3), since it was one of completed performance. The third case, *Ledu Coachman v. Hiralal*(1), cannot be dismissed so shortly, since it directly negatives the contention just referred to by the statement:

"It is plain that, although where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed, if the agreement is actually criminal or immoral; where the contract is illegal because contrary to positive law, or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered or money paid on it."

The distinction drawn would appear to be between agreements contrary to law or public policy and others, which would merely have an unlawful object and would also therefore be void under section 23 of the Indian Contract Act. But there is no warrant for it in that section, since all alike are made unlawful or (with all respect) in the cases referred to by the learned Judges, who moreover take no account of other cases, in which the exception was applied without reference to the distinction proposed.

Of the cases referred to by them, *Taylor v. Chester*(4) was a case of completed performance and *Howson v. Hancock*(5) one of a claim to recover money paid on a wager, in which no further performance was possible: *Tappenden v. Randall*(6) is

(1) (1916) I.L.R., 43 Cal., 115.

(3) (1911) 15 C.W.N., 408.

(5) (1900) 8 T.R., 575.

(2) (1912) 10 A.L.J., 159.

(4) (1863) L.R., 4 Q. B., 309.

(6) (1801) 2 Bos. and P., 467.

relied on only for a dictum which apparently has not affected later decisions. So also the learned Judge's quotation from *Collins v. Blantern*(1), though it is reproduced in *Kearley v. Thomson*(2) and *Barclay v. Pearson*(3) to be referred to later. Of the Indian cases cited, *Bai Vijli v. Nansa Nagar*(4) is not of importance, since this point and the authorities regarding it were not considered. The learned Judge's reason for rejecting two decisions in the opposite sense, *Bakshi Das v. Nadu Das*(5) and *Gulabchand v. Fulbai*(6), that they relate to marriage brokerage contracts, is in any case not available to us in the present connexion.

On the other hand the exception to the general rule, based on the absence of any or of any substantial performance is clearly recognized without reference to the distinction proposed in a case later than the majority of those relied on by the learned Judges, *Taylor v. Bowers*(7) in which the object of the agreement a fraud on creditors would, if persisted in, have resulted in the frustration of the Insolvency law. Distrust of the decision in *Taylor v. Bowers*(7) was no doubt expressed in *Kearley v. Thomson*(2) but not on the ground that it overlooked the distinction drawn by the learned Judges, which was not in fact referred to, although the object of the agreement was described as to defeat justice. The principle of *Taylor v. Bowers*(7) was moreover adopted fully in *Barclay v. Pearson*(3), already referred to, though the agreement related to what was regarded as a lottery, the opinion being expressed that those who had paid money under it could recover. Of the Indian cases those must be distinguished, in which the title sued on could be established only on the foundation of the validity of the unlawful agreement as for instance in *Yeramati Krishnayya v. Chundru Papayya*(8). In *benami* cases however, for example, *Banka Behary Dass v. Raj Kumar Dass*(9) and *Govinda Kuar v. Lala Kishun Prosad*(10) the decision has always turned not on the extent to which the agreement if it were performed, would conflict with law or public policy, but on whether it was performed

(1) (1765) 2 Wilson, 341.

(3) (1893) 2 Ch., 154.

(5) (1905) 1 C.L.J., 261.

(7) (1876) 1 Q.B.D., 291.

(9) (1900) I.L.R., 27 Cal., 231.

(2) (1890) 24 Q.B.D., 742.

(4) (1888) I.L.R., 10 Bom., 152.

(6) (1909) I.L.R., 33 Bom., 411.

(8) (1897) I.L.R., 20 Mad., 326 at p. 329.

(10) (1901) I.L.R., 28 Cal., 370.

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and the unlawful purpose was effected wholly or substantially or not. The decision of the Privy Council in *Petherperumal Chetty v. Muniandy Servai*(1) may in particular be mentioned firstly because it refers to the weight of the decision in *Taylor v. Bowers*(2) as unimpaired by *Kearley v. Thomson*(3) and secondly because the contention that there had been a fraudulent arrangement to defeat creditors and a step taken to carry it out, "which would on the trial of an indictment for conspiracy have amounted to a good overt act of conspiracy," was brushed aside as irrelevant and the effecting of the contemplated fraud alone was regarded as material. Authority standing thus, it is, with all due deference, not possible to follow the decision in *Ledu Coachman v. Hiralal Bose*(4) or to confirm the decision, which is under appeal.

It is however argued by Mr. T. R. Venkatarama Sastri for defendants firstly that the exception above referred to to the general rule depends, not on whether there has been performance of the unlawful agreement but on whether the transfer of an advantage under it was merely ostensible or was intended to be real, recovery of the advantage being allowed only in the former class of cases. That is not the test recognized in the authorities already referred to or in *In re Great Berlin Steamboat Company*(5) in which the transfer was treated as irrevocable though it was clearly ostensible. It is then urged with reference to *Kearley v. Thomson*(3) that plaintiff cannot recover, because though the whole of the unlawful agreement has not been performed a substantial portion has been; and on the view already expressed a remand on this point may no doubt be fairly claimed.

The last question raised is whether plaintiff can rely on defendants' admission that the agreement was unlawful either generally or when, as in this case, he did not refer to its unlawfulness in his plaint. The answer however to the question in both forms is the same, that in the words of MELLISH, L.J., in *Taylor v. Bowers*(2) plaintiff does not

"as the rule is laid down in *Simpson v. Bloss*(6), require any aid from the illegal transaction to establish his case. He is not bringing the action for the purpose of enforcing the illegal transaction.

(1) (1908) 1 L.R., 35 Cal., 551 (P.C.). (2) (1876) 1 Q.B.D., 291.
(3) (1890) 24 Q.B.D., 742. (4) (1915) 1 L.R., 43 Cal., 115.
(5) (1884) 26 Ch.D., 616. (6) (1816) 7 Taunt, 246.

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To hold that plaintiff is entitled to recover does not carry out the illegal transaction but the effect is to put everybody in the same situation as they were before it was determined upon";

or, as the point was put by JAMES, L.J.:

"It is the defendant who has really got to show the fraud" the element vitiating the agreement in the case under consideration. . . .

"It is the defendant who has got to make out his title to the goods from the transaction, which is a fraud and which it seems he was a party to . . . and there would be no title in defendant independently of that."

To adapt these principles to the present case, the plea that the agreement is unlawful is not plaintiff's but defendant's. Defendants, as already pointed out, cannot, relying on it, also complain of plaintiff's default. They can (and this is the point at present material) rely on it, only if they further allege and prove that the unlawful agreement or a substantial part of it has been performed. On this point their written statements contained nothing; and it was, therefore, not plaintiff's but their pleading, which was defective. If the Subordinate Judge had considered the unlawfulness of the contract, plaintiff would (for all that appears) have pointed this out. The contention on his side is one purely of law, and in the circumstances there is no adequate reason for depriving him of the benefit of it.

Defendants have further proposed to support the lower Court's judgment with reference to the counterclaim made in their written statements to damages on account of loss of reputation. It has not however been shown how this claim can be sustainable as arising out of the breach of an admittedly unlawful agreement or how it can be reconcilable with defendant's denial, that they were parties to that agreement. The questions for consideration are therefore only:—

(1) Whether the plaint agreement was entered into with defendants or either of them or with Raman with or without first defendant as his agent.

(2) Whether, with reference to the authorities above referred to, the agreement or a substantial part of it was performed?

The Letters Patent Appeal must be allowed and the Subordinate Judge's decision set aside with a direction to restore the small cause suit to file and rehear it, admitting any additional

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BAKEWELL, J. evidence tendered in the light of the foregoing. Costs to date in both Courts will be costs in the cause and will be provided for in the decree to be passed.

BAKEWELL, J.—In India marriage is not generally a matter of contract between the parties thereto but is a status or condition imposed upon them by persons who are under a social duty to do so. The authorities which have been cited support, I think, the proposition that they who undertake this duty must have regard solely to the interests of their wards and must not stipulate for a profit for themselves.

The pleadings in this case are not clear but I think that the plaintiff alleges an arrangement between the parties that a marriage portion should be paid out of the estate of the deceased father of the prospective bride and that certain jewels should be presented to her by the relations of the prospective bridegroom; and, apart from other averments in the written statement of the first defendant it might be inferred that his case was that the marriage portion was to be paid to the bridegroom, the sum of Rs. 400 now claimed, being portion thereof, had been in fact paid to him and that the defendants gained no benefit from this payment because the bridegroom had been adopted into another family. I fail to see anything contrary to public policy or morality in an agreement between third parties which is intended solely for the benefit of the married couple or either of them. Having regard, however, to the defendants' admission that the agreement was illegal and that they had some interest in the sum now claimed, I do not think that it is open to the defendants at this stage to maintain that the agreement was valid.

The words 'discovered to be void' in section 65 of the Contract Act are more apt to describe an agreement which was void *ab initio* but not then known by the parties to be so, than an agreement of which the illegality must be taken to have been always known to them, and I agree that in this case it is safer to rely upon the authorities cited by my learned brother. These authorities show, I think, that in a suit for money had and received to the use of the plaintiff, the defendant may plead that it has been applied in accordance with their agreement and the plaintiff cannot reply that the agreement was illegal because he is *particeps criminis*. If the agreement is still wholly executory and no material part of the illegal purpose has been

accomplished, the defendant cannot plead that he holds the money for that purpose: [see *Barclay v. Pearson*(1), *Pether-perumal Chetty v. Muniandy Servai*(2)] and the cases there cited. These propositions apply when the parties are in *pari delicto*, and to agreements void under Civil Law; different considerations may arise in the case of an agreement to commit an offence against the Crown. I agree to the order proposed by my learned brother.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

R. S. RAMA SHENOI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

M. A. HALLAGNA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 13 (b) and (d)—*Natural justice, meaning of the term—Wrong view as to legal liability or onus, whether renders foreign judgment one not given on the merits.*

A wrong view as to the legal liability of a party or as to onus does not render a foreign judgment one not given on the merits within the meaning of section 13 (b) of the Civil Procedure Code.

The term "Natural justice" in section 13 (d) of the Code of Civil Procedure with reference to foreign judgments refers rather to the form of procedure than to the merits of the case.

Crawley v. Isaacs (1867) 16 L.T. (N.S.), 529, followed.

Liverpool Marine Credit Co. v. Hunter (1868) L.B., 3 Ch. App., 479, applied and followed.

Imrie v. Castrique (1860) 8 C.B. (N.S.), 405; s.c., 141 E.R., 1222, and *Scott v. Pilkington* (1862) 2 B. & S., 11; s.c., 121 E.R., 978, referred to.

SECOND APPEAL against the decree of G. H. B. JACKSON, the District Judge of South Malabar, in Appeal No. 528 of 1912, preferred against the decree of J. A. DE ROZARIO, the Subordinate Judge of South Malabar at Cochin, in the Original Suit No. 3 of 1913.

Appeal under Clause 15 of the Letters Patent preferred against the decision of AYLING, J.

(1) (1893) 2 Ch., 154.

(2) (1908) I.L.R., 35 Cal., 551 (P.C.).

* Second Appeal No. 2181 of 1915 and Letters Patent Appeal No. 56 of 1915.

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BAKEWELL, J.

1917,
March,
19 and 20.

RAMA SHENOI
v.
HALLAGNA. The material facts and contentions appear from the judgment.
Dr. K. Pandalai and C. V. Anantakrishna Ayyar for the appellants.

C. Madhavan Nayar for the respondents.

The following judgment of the Court was delivered by

SESHAGIRI
AYYAR, J. SESHAGIRI AYYAR, J.—A decree was obtained against the elder brother of the plaintiff in the Cochin Court. In the cause title, he was described as the manager of the joint family. Apparently the plaintiff alleged that the family property was liable for the claim as the debt was contracted for family purposes. The defendants in the Cochin Court pleaded that no decree should be passed against him as manager.

Therefore issue 7 was framed. The Cochin Judge held that the burden of proving that the defendant was not the manager and that the debt was not binding on the family lay upon him, and passed a decree against him personally against the family properties. The decree was executed against the Cochin properties and then transferred to the British Court under section 44 of the Code of Civil Procedure. In our Court, a claim was preferred by the plaintiff against the attached properties on two grounds: (a) that the defendant in the Cochin suit had become divided from the plaintiff before suit and (b) that the decree was otherwise not executable against the properties in the possession of the plaintiff. The claim was rejected. The plaintiff has brought this suit to establish his right. The Courts below have dismissed the suit. Hence this second appeal.

Dr. Pandalai for one of the brothers, the appellant in Second Appeal No. 2181 of 1915, contended that it was the duty of the Courts below to have decided whether there was a division prior to the Cochin suit and whether the brother who was sued in that Court was the manager. It is clear under rule 63 of Order XXI that the burden of proof is on the plaintiff to establish his claim. Beyond stating that he was divided, he has asked for no issue; and has adduced no evidence on the question of division or managership; the plaintiff is not therefore entitled to ask us to send the case down for a finding on that question.

The learned counsel further contended that as the Cochin Court was wrong on the question of the burden of proof the judgment must be deemed not to have been given on the merits.

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AYYAR, J. We are unable to accept this contention. In the Cochin Court the general law administered relates to Marumakkattayam tarwards and as in a suit against the karnavan as such the decree would be binding on the Anandiravans unless the latter could show that the karnavan was not acting on behalf of the tarward, the idea seems to have gained ground that in the case of suits against managers of Makkattayam families the onus is on the other members to show that the debt is not binding on them. This is not the law as it obtains in British India. It is for the creditor to prove that the debt is recoverable against the other members of the family; we may therefore take it that the Cochin Court was not right in its view of Hindu Law. Does that render the judgment one not given on the merits? We have not before us all the materials on which the Cochin judgment was based. Consequently we are unable to hold that the decision was not on the merits. The decision of the Judicial Committee in *Keymer v. Visvanatham Reddi*(1) has no bearing on the present case. There is no warrant for the proposition that a wrong view as to onus would have the effect of rendering a foreign judgment one not given on the merits.

Mr. Anantakrishna Ayyar who appeared for another brother the appellant in the connected appeal raised a more serious contention. He argued that as the Cochin Court was manifestly wrong on a point of Hindu Law, the judgment was contrary to natural justice. In this connexion we notice that the language of clause (d) of section 13 has undergone a change. In the old code the words were—

“If it is in the opinion of the Court before which it is produced contrary to Natural Justice.”

The present language in section 13 (d) is—

“Where the proceedings in which the judgment was obtained are opposed to Natural Justice.”

This change carries out the view of BRAMWELL, B., in *Crawley v. Isaacs*(2). The learned Baron there said:

“I think the term ‘Natural Justice’ which has been used in reference to foreign judgments refers rather to the form of procedure than to the merits of the particular case.” (Page 531.)

(1) (1917) I.L.R., 40 Mad., 112 (P.C.).

(2) (1867) 16 L.T. (N.S.), 529.

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—
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Ayyar, J.

Consequently the mere fact that a judgment is wrong in law is not enough. There must be something in the procedure anterior to the judgment which is repugnant to natural justice. That cannot be said of the present case. Further as pointed out by Lord CHELMSFORD in *Liverpool Marine Credit Co. v. Hunter*(1), a mere incorrect view of law by a foreign Court would not give jurisdiction to our Courts to say that the judgment is opposed to natural justice: see also per COCKBURN, J., in *Imrie v. Castrique*(2) and *Scott v. Pilkington*(3), Mr. Anantakrishna Ayyar drew our attention to *Messina v. Petrococcino*(4). In that case it was pointed out that unless there was a manifest error or fraud in the proceedings of the judgment the British Court should give effect to it. A wrong view as to onus does not render a judgment erroneous on the face of it. Moreover having regard to *Liverpool Marine Credit Co. v. Hunter*(1), we are unable to hold that a mistake as to law which is all that can be alleged against the decision in the present case, would be sufficient to vacate a foreign judgment. For these reasons, we think the decision of the Courts below is right and we dismiss the second appeal with costs. The Letters Patent Appeal follows.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Srinivasa Ayyangar.

1917,
March, 26.

M. KANDASWAMI CHETTY (DEFENDANT), APPELLANT,

v.

P. SUBRAMANIA CHETTY (PLAINTIFF), RESPONDENT.*

Injunction—Temporary injunction in mandatory form—Power of Indian Courts to grant under Order XXXIX, rule 2, Civil Procedure Code (Act V of 1908).

Courts in India can under Order XXXIX, rule 2, Civil Procedure Code, issue temporary injunctions in a mandatory form.

Israil v. Shamsar Rahman (1914) I.L.R., 41 Cal., 436, and *Champsay Bhimji & Co. v. Jamna Flour Mills & Co.* (1914) 16 Bom. L.R., 566, referred to.

The view of BEAMAN, J., in *Rasul Karim v. Pirmibhai Amirbhai* (1914) I.L.R., 38 Bom., 381, not followed.

(1) (1868) L.R., 3 Ch. App., 479.

(2) (1860) 8 C.B. (N.S.), 405; s.c., 141 E.R., 1222.

(3) (1862) 2 B. & S., 11; s.c., 121 E.R., 978.

(4) (1872) 4 L.R.P.C., A.C., 144.

* Appeal Against Order No. 64 of 1917.

APPEAL against the Order of C. R. THIRUVENKATA ACHARIYAR, KANDASWAMI v. the City Civil Judge of Madras, in Civil Miscellaneous Petition SUBRAMANIA. No. 1652 of 1916 in Original Suit No. 460 of 1916.

The following facts are taken from the judgment of the lower Court:—

"This is an application for a temporary injunction, under Order No. 39, rule 2 of the Civil Procedure Code, praying for the removal of an obstruction which had been put up by the defendant shortly before the suit which prevents the flow of light and air through a window in the second compartment of plaintiff's house.

"The suit itself is brought for the purpose of establishing an easement of light and air in respect of plaintiff's house through the said window and for a permanent injunction restraining the defendant from obstructing the flow of air and light through the said window. The plaintiff in the alternative prays for damages which he assesses at Rs. 500.

"On behalf of the defendant, two contentions have been pressed, viz., (1) that the Court has no jurisdiction to direct the removal of the obstruction on an application for an interim injunction, in other words, there is no power to pass an interim mandatory injunction, (2) that the inconveniences to which the defendant and his people would be put by the window being open are far more serious than the inconveniences which would be caused to the plaintiff by the closing of the window.

"As regards the first contention I am of opinion that the Court has power in granting an interim injunction to direct the removal of any obstruction which, in its opinion, was quite recently made by the defendant in spite of the plaintiff's objection and which has led to the institution of the suit.

"The next question is whether, in the circumstances of the case, such an interim injunction ought to be granted. . . . There will be an interim injunction as prayed directing the defendant to remove the obstruction which he has placed against the window in question and restraining the defendant from, in any manner, interfering with the access of light and air through the said window pending the disposal of the suit. Costs of this petition to be costs in the cause. Execution of this order will be stayed till 7th March 1917."

The defendant preferred this appeal to the High Court.

T. R. Venkatarama Sastriyar, V. S. Govinda Achariyar and V. S. Kallabhiran Ayyangar for the appellant.

O. Thanikachalam Chettiay for the respondent.

KANDASWAMI
v.
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—
SPENCER AND
SRINIVASA
AYYANGAR,
JJ.

JUDGMENT.—Upon the question whether Courts in this country have the power by virtue of Order XXXIX, rule 2 of the Code of Civil Procedure, to issue temporary injunctions in a mandatory form, we are not prepared to adopt the opinion expressed by BEAMAN, J., in *Rasul Karim v. Pirubhai Amirbhai*(1). The description of temporary injunctions in section 53, Specific Relief Act, does not exclude injunctions of a mandatory nature, and in *Israil v. Shamsur Rahman*(2), upon an application for an interim injunction, pending the disposal of a suit it was ordered that defendant should not only be restrained from further erection of a building but that he should pull down so much of it as he had erected after he became aware of the institution of the plaintiff's suit. We also may observe that SHAH, J., did not agree with the opinion of his learned brother in *Rasul Karim v. Pirubhai Amirbhai*(1) and that two other Judges of the Bombay High Court took a different view from BEAMAN, J., in *Champsey Bhimji & Co. v. Jamna Flour Mills & Co.*(3)

On the merits, however, we are of opinion that the present was not a case of such urgency as to make it necessary for the protection of the plaintiff's rights that the defendant should be made to remove the screen put up by him before the rights of the parties were heard and determined in the regular suit which was filed for this very purpose. The facts of this case resemble those of *Bonner v. Great Western Railway Company*(4) in which a temporary injunction was disallowed.

The question of what rights the plaintiff possessed to light and air through the window which the defendant blocked by his screen might very well have been left to be decided in the suit without anticipating the results of it. We allow the appeal. Each party will bear his own costs in this Court.

N.R.

(1) (1914) I.L.R., 38 Bom., 381.

(2) (1914) I.L.R., 41 Calc., 436.

(3) (1914) 16 Bom. L.R., 566.

(4) (1883) 24 Ch. D., 1.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Ayyangar.

KOZHICKOTI KHADIR PALLIVEETIL MAHAMED HAJI
(DEFENDANT), APPELLANT,

1917,
March, 28.

v.

MOIDEEN VEETIL KALIMABI (PLAINTIFF), RESPONDENT.*

Muhammadan Law—Shafi School—Maintenance, arrears of—Whether recoverable in the absence of a decree or agreement to pay.

According to the Shafi School of Muhammadan Law maintenance is a debt and the wife is entitled to recover from her husband arrears of maintenance though there be no decree of Court or mutual agreement in respect of such maintenance.

The distinction in this respect between Shafi and Hanafi school pointed out. Muhammadan Law Texts examined.

SECOND APPEAL against the decree of F. J. DeROZARIO, the acting Subordinate Judge of South Malabar at Calicut, in Appeal No. 910 of 1914, preferred against the decree of L. R. ANANTHANARAYANA AYYAR, the Principal District Munsif of Calicut, in Original Suit No. 563 of 1913.

This Second Appeal arises out of a suit brought by a Muhammadan woman against her husband for arrears of maintenance. The parties belonged to the Shafi sect of the Sunni school. The husband neglected to maintain his wife for some time past. The wife filed a suit against the husband for the recovery of arrears of maintenance for about a year and a half. The defendant pleaded that according to the law of his sect arrears of maintenance were not recoverable unless the amount had been previously fixed by agreement between the parties. The Court of First Instance decreed the claim. The decree was confirmed on appeal. The defendant preferred this Second Appeal.

P. Appu Nayar for C. *Madhavan Nayar* for the appellant.

K. V. Madhavan Nayar for K. P. M. *Menon* for the respondent.

* Second Appeal No. 1326 of 1915.

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HAJI
v.
KALIMABI.
—
ABDUR
RAHIM AND
SRINIVASA
AYYANGAR,
JJ.

JUDGMENT.—That in the Shafi Law which governs the parties to this case the wife is entitled to recover arrears of maintenance, though not due under a decree of Court or a mutual agreement, contrary to the Hanafi Law, admits of no doubt. For according to the theory of the former system, maintenance is a debt and not in the nature of a gratuity as is the doctrine of Hanafi lawyers. In the Hedaya (Hamilton, Volume I, page 398), it is expressly laid down as the rule of Hanafi Law that,

“if a length of time should elapse during which the wife has not received any maintenance from her husband she is not entitled to demand any for that time except when the Kajee had before determined or decreed it to her. . . .”

Then the learned author after giving the reasons in support of the Hanafi view and in connection with the further deduction that “arrears of decreed maintenance drop in the case of the death of either party” states, that

“Shafi says that the maintenance is in all circumstances to be considered as a debt upon the husband in conformity with his tenet that it is not a gratuity but a return, wherefore it cannot drop like demands of the former description.”

The Hedaya is devoted to the exposition of the Hanafi Law, but the erudition and accuracy of its learned author was so great that whenever according to the practice that prevailed in those days, he states on any point the contrary doctrine of the Shafi or any other branch of the Sunni system, that statement may generally be safely accepted as correct. In Minhajet Talabin of Namawi, a high authority on the Shafi Law and recently translated by Messrs. Van Ien Beg and Howard it is stated (at page 385 of the translation):

“During his stay in Egypt, Shafi adopted the doctrine that a wife's maintenance is obligatory only if she puts herself at her husband's disposition and not in virtue of the contract of marriage . . . ; consequently a husband owes his wife no maintenance so long as she refuses to come to him; but *owes it from the moment* he hears she is willing to put herself at his disposition.”

Then further on it is laid down,

“when a husband during his marriage becomes so insolvent that he can no longer give the minimum maintenance prescribed, but his wife in spite of this continues to live with him the maintenance becomes a debt due to her from him and exigible at any moment.”

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JJ.

This makes it clear that according to the Shafi school arrears of maintenance can be recovered by the wife counting from the date when her husband wrongfully refused or neglected to maintain her.

In Tohfatal Mierhaj which is an authoritative commentary on the Mirhaj by Shahabuddin Ahmad Ibu Hayanul Hailini who flourished in the sixteenth century, it is expressly stated that the maintenance is a debt on her husband “even if it was not decreed by the Kazeer” (Volume 3, page 382, in original Arabic text). The law therefore is correctly stated in Mr. Tyabji's Principles of Muhammadan Law, section 307, cited in the lower Court's judgments. It may however be pointed out that in paragraph (2) of that section ‘Sunni Law’ is a mistake for the ‘Hanafi Law.’ The decision in *Abdul Fatter Moulvie v. Pabunesa Khatoon*(1) is according to the Hanafi school of law which is followed by the Muhammadans of Bengal generally. The appeal is dismissed with costs.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Srinivasa Ayyangar.

ARUNACHELLAM CHETTY (PLAINTIFF), APPELLANT,

v.

SABAPATHY CHETTY (DEFENDANT), RESPONDENT.*

Jurisdiction of Inferior Court to set aside decrees of Superior Court obtained by fraud—Reliefs that can be granted.

A District Munsif can entertain a suit for a declaration that a decree passed by a District Court was obtained by fraud when the amount decreed and the subject-matter of the suit are within his jurisdiction; but he cannot direct a retrial of the suit by the District Court. The previous suit can be revived only by an application to the District Court.

APPEALS under clause 15 of the Letters Patent against the judgment of NAPIER, J., in *Arunachallam v. Sabapathy*(2).

(1) (1881) I.L.R., 6 Cal., 631.

* Letters Patent Appeal No. 215 of 1916.

(2) Civil Revision Petition No. 951 of 1916 praying the High Court to revise the order of D. G. WALLER, the District Judge of Coimbatore, in Civil Miscellaneous Appeal No. 6 of 1916, preferred against the order of S. RAJAGOPALA AYYANGAR, the District Munsif of Thruppur, in Original Suit No. 1631 of 1915.

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CHELLAM
v.
SABAPATHY.

The plaintiff brought the present suit (Original Suit No. 1631 of 1915) in the District Munsif's Court of Tiruppur, to set aside a decree passed by the District Court of Coimbatore in Original Suit No. 20 of 1914. The decree of latter Court was a mortgage-decree passed on compromise for the payment of Rs. 1,700 with subsequent interest and costs in favour of the defendant against the plaintiff in the present suit, but the plaint in the previous suit was filed in the District Court for recovery of Rs. 2,732 and odd from the plaintiff herein. The property secured by the compromise decree was situate, and the defendant resided, within the local limits of the jurisdiction of the District Munsif's Court of Tiruppur. The plaintiff prayed in the plaint that the District Munsif's Court "may be pleased to pass a decree setting aside the razinama decree passed in Original Suit No. 20 of 1914, on the file of District Court of Coimbatore, declaring that it is not binding on the plaintiff, and directing that the suit be re-tried and decided on the evidence," and for some other reliefs. The defendant contended that the District Munsif's Court was not competent to entertain the suit. Both the lower Courts held that the District Munsif's Court, being a Court of inferior jurisdiction, was not competent to entertain a suit for setting aside a decree of a Court of superior jurisdiction. The plaintiff preferred a Civil Revision Petition to the High Court, which was heard by NAPIER, J., who delivered the following judgment:—

"The petitioner is unable to invite my attention to any case in which it has been held that a person who was a party to a suit in the District Court which was not within the pecuniary limits of the jurisdiction of a District Munsif's Court can sue to set aside the decree in that suit in a District Munsif's Court because the amount disposed of by the terms of the compromise decree was within the jurisdiction of a District Munsif.

The petition is dismissed."

The plaintiff preferred a Letters Patent Appeal against the judgment of NAPIER, J.

N. A. Krishna Ayyar for the appellant.

T. Narasimha Ayyangar for the respondent.

SPENCER, J.

SPENCER, J.—The question that has been argued in this Letters Patent Appeal is whether it is competent to a Court of inferior jurisdiction to entertain a suit to declare a compromise

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decree obtained in a Court of superior jurisdiction to be not binding on the plaintiff as having been obtained by fraud. The plaintiff asked in his plaint not only for a declaration that the decree in Original Suit No. 20 of 1914 on the file of the District Court of Coimbatore was not binding on him but also that it should be set aside and that the said suit should be re-tried and decided on the evidence. The District Munsif to whom the plaint was presented held that he had no jurisdiction to go into the question whether the former decree was obtained by fraud and that only an appellate Court or a Court transferring a suit from one Court to another would have the power to direct a re-trial. The District Judge, who heard an appeal from the District Munsif's decision, was of opinion that a Court of inferior jurisdiction could not either set aside or order a re-hearing of a suit tried by a Court of superior jurisdiction.

The learned Judge of this Court, who disposed of a petition to revise the District Judge's order, gave as his reason for refusing to interfere in the matter that the suit as originally instituted was not within the pecuniary jurisdiction of the District Munsif, although the amount involved in the compromise decree was.

There seems to have been a considerable misapprehension as to the course that the Court trying the question of fraud would have to follow if it decided in the plaintiff's favour. As observed in *Vijaya Ramayya v. Venkata Subba Rao*(1), it would be sufficient for the Court to declare that the previous decree was of no effect so far as he was concerned. Their Lordships remarked in that case that the trial of the suit, which had been improperly compromised, after a declaration to that effect would no doubt proceed if a proper application were made to the proper Court. They refused in second appeal to make any order as to that. So here, the fact that the plaintiff asked for two reliefs which could not in the nature of things be granted was no reason for not deciding whether he was entitled to the declaration which he demanded if he proved that the compromise was fraudulent.

Next as regards the powers of the District Munsif to try a suit brought for a declaration that a decree obtained in the

(1) (1916) I.L.R., 39 Mad., 853 at p. 873.

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District Court was obtained by fraud, section 9 of the Civil Procedure Code runs thus:—

"The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

The respondent has not shown that there is any express or implied bar to such a suit as this. Under section 56, clause (b) of the Specific Relief Act a Court has no power to stay proceedings in a Court not subordinate to it; but there is no such limit placed by section 42 on a Court that has otherwise jurisdiction over the suit making a declaration as to a plaintiff's title to a legal right and granting a permanent injunction against the decree-holder executing his fraudulent decree against the plaintiff.

If it were only the Court which possessed the jurisdiction to try the suit in which the fraud was committed that could entertain a question whether a decree so obtained was vitiated by fraud, there would be no relief by suit under article 95, Limitation Act, for parties aggrieved by fraud perpetrated in the trial of small cause suits, or of rent suits in Revenue Courts, or in appeals to the Privy Council, however gross the fraud. In *Nistarini Dassi v. Nando Lall Bose*(1) STANLEY, J., quoting from *Shedde v. Patrick*(2) observed:

"It matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest Court of judicature in the realm; in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud."

His judgment was upheld in appeal by a bench of three Judges in *Nistarini Dassi v. Nando Lall Bose*(3) (see observations of MACLEAN, C.J., at pages 381—2) and confirmed by the Privy Council in *Benode Behary Bose v. Nistarini Dassi*(4).

In *Banke Behari Lal v. Pokhe Ram*(5) and *Jawahir v. Neki Ram*(6) it was held that a Subordinate Judge and a District Munsif could try suits to declare that decrees passed by the

(1) (1899) I.L.R., 26 Cal., 891.

(2) (1854) 1 Macq. H.L.C., 607.

(3) (1903) I.L.R., 30 Cal., 369.

(4) (1906) I.L.R., 33 Cal., 190 (P.C.).

(5) (1903) I.L.R., 25 All., 48.

(6) (1915) I.L.R., 37 All., 189.

* Calcutta High Court and by another Court in Bengal respectively were void as against the plaintiff, when the cause of action arose within the jurisdiction of the former Courts owing to execution proceedings having been taken in that locality.

As regards pecuniary jurisdiction the compromise decree was for Rs. 1,700 and interest, and that is therefore the extent to which the interests of the plaintiff in this suit have suffered. It is not suggested that there has been any undervaluation. The property is situated, and the defendant resides, within the jurisdiction of the Tiruppur District Munsif's Court. Under section 12 of the Civil Courts Act the Tiruppur District Munsif's Court is the proper Court to try the suit unless it is shown to be "otherwise exempted from his cognizance." I am not aware of any provision of law which has the effect of exempting from the jurisdiction of a Court, otherwise competent to try them, suits brought to avoid decrees obtained in suits when the original plaintiff claimed in his plaint more than he got by the final decree.

I consider therefore that this appeal should be allowed and that the District Munsif of Tiruppur should be directed to restore Original Suit No. 1631 of 1915 to his file and dispose of it according to law. Costs throughout to abide and follow the result.

SRINIVASA AYYANGAR, J.—I agree. The question in this appeal is whether one Court has jurisdiction to entertain a suit to set aside the decree of another Court, in this case a superior Court, on the ground of fraud. The present suit was filed in the Munsif's Court, Tiruppur, to set aside a mortgage decree passed by consent by the District Court, Coimbatore, for a sum of Rs. 1,700 in favour of the defendant against the plaintiff in a previous suit in that Court by the former against the latter to recover a sum of money which was beyond the pecuniary jurisdiction of the Munsif. The lands charged are wholly within the local limits and the value of the relief sought is within the pecuniary limits of the jurisdiction of the Munsif. The plaintiff's claim is to relieve himself from the liability to pay Rs. 1,700 under the previous decree and to get rid of the charge on his lands for the same amount. The defendant also lives within the jurisdiction of the Munsif.

It is now quite settled that the more appropriate mode of setting aside a consent-decree for fraud is by a separate action

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instituted for that purpose where charges of fraud can be fully investigated, rather than by a motion in the cause in the nature of a review; but such a suit is not, I think, the same as an action of review or the old bill of review: *Mussummut Gulal Koer v. Badshah Bahadur*(1). Legislative recognition of this mode of procedure is afforded by article 95 of the Limitation Act. A suit instituted for that purpose is an ordinary civil suit and the jurisdiction of the Court to entertain such a suit must depend on the provisions of the Civil Courts Act and the Code of Civil Procedure. It was not said that suits to set aside decrees were exempted from the cognizance of Munsifs and under section 12 of the Civil Courts Act therefore Munsifs have jurisdiction to try suits of this class. If the suit is considered to be one for the determination of a right to, or interest in, immoveable property, the District Munsif's Court, Tiruppur, was the proper Court to try it (section 16 of the Code); otherwise the same Court will have jurisdiction to try it as the defendant actually and voluntarily resides within the local limits of its jurisdiction (section 20 of the Code). If for instance the plaintiff in the present suit had executed a mortgage deed in favour of the defendant for Rs. 1,700 and interest on the security of the property charged by the decree in satisfaction of his claim in the previous suit and if that suit had been withdrawn or dismissed as adjusted without there being a decree and if the present suit was to set aside the mortgage on the ground of fraud, there can scarcely be any doubt that the District Munsif of Tiruppur would have jurisdiction to entertain it. For the purpose of determining the Court in which the suit should be filed I do not see any difference between the two suits. The District Judge may also have concurrent jurisdiction, but the suit must be instituted in the District Munsif's Court as that is the Court of the lowest grade competent to try it. That is how the matter stands on the construction of the relevant portions of the statutes which prescribe or limit the jurisdiction of Courts.

A certain amount of confusion has however arisen, by not keeping quite distinct the question of the appropriate relief or reliefs which a Court can grant in a suit to set aside a decree or

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the consequences which follow the setting aside of a decree, from the question of competency of the Court to try the suit. In this very suit the plaintiff after praying that the consent decree should be set aside, further prayed that the Court should direct the previous suit in the District Court to be re-tried and decided on the evidence; this latter relief he was not entitled to in the suit and the District Munsif was not competent to grant it. If the plaintiff succeeds in the suit, and gets the consent-decree set aside, any application in the previous suit, either to revive it or proceed with it, can only be made to the Court in which that suit was pending and it is only that Court that can make any order in respect of that suit; but that in no way affects the jurisdiction of the Munsif to try the suit to set aside the decree. What exactly are the forms of relief which a Court can grant when a party establishes his right to set aside a decree for fraud need not be considered or specified now as they may conceivably depend on the nature of the decree sought to be set aside and other circumstances of the case. Ordinarily a declaration that the decree is not binding on the plaintiff and an injunction restraining the other party from executing it, would be sufficient and proper.

The learned District Judge in his judgment in appeal in this case draws a distinction between the jurisdiction of the Court to treat a decree obtained by fraud as a nullity when the impeachment of the decree arises incidentally or is only one of the reliefs prayed, and the jurisdiction of the Court where the impeachment of the decree is the sole object of the suit. It is quite possible that a Court which has jurisdiction over a cause, may have jurisdiction to decide on the validity of a decree though if the suit was wholly to set aside that decree it may have no jurisdiction on the ground that no part of the cause of action arose within its local limits or the defendant did not reside there. That difference arises, not out of any distinction between a direct and collateral impeachment of the decree, not out of any difference in the nature of the suits, but arises solely out of the difference in the place of suing as determined by the provisions of the Code or any other law determining the venue. I do not understand how a Court which is not competent to adjudicate directly on the validity or the invalidity of a decree can do so indirectly. If a decree obtained

(1) (1909) 10 C.L.J., 420.

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by fraud is a nullity and is wholly void (which I think it is not in spite of some expressions to the contrary in the reported judgments), the Court may ignore it; but if it is binding till set aside, the fact that it is impeached in a suit in which other or substantial reliefs are asked which depend or are consequential on the setting aside of the decree cannot confer a jurisdiction which otherwise the Court did not possess. The recent decisions of the Calcutta and Allahabad High Courts, some of which were confirmed by the Privy Council, support the view taken above. In an early case in Calcutta, *PONTIFEX, J.*, in connection with an application to take the plaint off the file on the ground that leave to sue was not obtained is reported to have said, that

“where the principal part of the prayer of the suit was to set aside a consent-decree of the High Court in a previous suit, that Court and that Court alone had jurisdiction.”

Bibee Soloman v. Abdool Aziz(1). In that case the whole cause of action appears to have arisen within the local limits of the original jurisdiction of the High Court as the fraud which gave rise to the action was committed within the local limits. The suit itself appears to be one in which substantial relief for the recovery of property appears to have been claimed and the previous decree which limited the right of the plaintiff was sought to be set aside as a preliminary to obtain such relief. If that be so, the later decision of the same Court on the original side in *Nistarini Dassi v. Nundo Lal Bose*(2) which was confirmed in appeal, which again was confirmed by the Privy Council, is conclusive authority for the position that a Court which has jurisdiction over the cause has jurisdiction to set aside the decree of another Court on the ground of fraud as an auxiliary to the granting of the other reliefs: *Benode Behari Bose v. Nistarini Dassi*(3). I would draw particular attention to the judgment of Chief Justice MACLEAN in appeal at pages 380 and 381 in *Nistarini Dassi v. Nundo Lal Bose*(4) where the question of jurisdiction of one Court to set aside the decree of another Court for fraud is discussed with reference to the Indian statutes. In *Kedar Nath Mukerjee*

(1) (1879) 4 C.L.R., 366.

(2) (1899) I.L.R., 26 Calc., 891.

(3) (1906) I.L.R., 33 Calc., 180 (P.O.).

(4) (1908) I.L.R., 30 Calc., 869.

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v. Prosonna Kumar Chatterjee(1) the suit was to set aside on the ground of fraud a decree of a Small Cause Court at Krishnagar and sale of immoveable properties in execution of that decree on transfer by a Munsif's Court. The plaintiff also claimed to recover possession of the property sold in execution and instituted the suit in the Munsif's Court. On objection taken, the jurisdiction of the Munsif to entertain the suit was sustained, but the learned Judges were disposed to hold that if the action was brought simply to set aside the decree, the suit should have been instituted in the Krishnagar Civil Court. It is important to note that the learned Judges say that the suit to set aside the decree of the Small Cause Court *would not lie in that Court*, but would have to be brought in the ordinary Civil Court, and it may be that Krishnagar Civil Court was the only Court which could take cognizance of a suit under the Code of Civil Procedure, if it was simply to set aside the decree.

The precise question now raised came up for decision in *Sarthakram Maiti v. Nundo Ram Maiti*(2) and the Calcutta High Court decided that a Munsif's Court had jurisdiction to declare that a decree obtained by fraud in a Subordinate Court was not binding on the plaintiff and to grant an injunction restraining the defendant from executing the decree. There also the decree in the previous suit was for a sum which was within the pecuniary jurisdiction of the Munsif, though apparently the claim was for an amount above it. In this judgment the learned Judges appear to draw a distinction between “setting aside a decree” and declaring it to be a nullity; but what exactly is the difference is not explained. No doubt one Court has no control over the record of another Court, and one Court setting aside the decree of another Court on the ground of fraud in an action brought for that purpose, does not do so in the sense in which a judgment is vacated in appeal or on review. The consequences are, or may be, different; further in the latter case directions may be given as to revivor, new trial or continuance of the proceedings and the Court may even enter a fresh judgment in the old suit. Again there may be matters over which particular Courts have exclusive jurisdiction as for

(1) (1901) 5 C.W.N., 559.

(2) (1906) 11 C.W.N., 579.

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instance Probate Courts. If an order or decree is passed by such Courts in matters within their exclusive jurisdiction, such order or decree cannot be set aside by another Court, though the latter Court may be able to make a declaration, that a party was guilty of fraud in obtaining that order: see *Priestman v. Thomas*(1). In *Earl of Baudon v. Becher*(2), Lord BROUGHAM said:

"it is undeniably true that the Court of Chancery has no right to review a decree of the Court of Exchequer; that nothing but a Court of Appeal can give redress if such decree is erroneous is clear, and indeed nothing can be more true than such a proposition; but it is equally true that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim, or to the defence of a right."

How far such a distinction applies to Courts exercising the same or similar jurisdiction as the ordinary Civil Courts in British India may be a question. If however that was the distinction made by the learned Judges in *Sarthakram Maiti v. Nundo Ram Maiti*(3), as probably it was, that does not affect the present question. In a later case in the same Court, *Abdul Hug Chowdhry v. Abdul Hafiz*(4), the suit was instituted in a Munsif's Court to set aside a decree of the Presidency Small Cause Court. The jurisdiction of the Munsif was upheld and the learned Judges pointed out that where a decree is set aside on the ground of fraud an injunction restraining execution is necessarily consequential thereon, even where no other relief is sought and that such a decree is more than a mere declaratory decree. They followed their previous decision in *Sarthakram Maiti v. Nundo Ram Maiti*(3), and also another decision in *Pramnath Roy v. Monesh Chandra Moitra*(5) which was confirmed by the Privy Council. *Radha Raman Shaha v. Pram Nath Roy*(6), and *Khagendra Nath Mahata v. Pram Nath Roy*(7). In these cases the main question in dispute was whether a party who had applied to the Court which passed the decree, under sections 108 and 311 of the old Code, to set aside an *ex parte* decree and a sale in execution of it, can sue to set them aside on the ground

(1) (1884) L.R., 9 P.D., 210.

(2) (1835) 3 Cl. and Fin., 479 at p. 510.

(3) (1906) 11 C.W.N., 579.

(4) (1910) 14 C.W.N., 695.

(5) (1897) I.L.R., 24 Calc., 546.

(6) (1901) I.L.R., 28 Calc., 475.

(7) (1902) L.R., 29 I.A., 99.

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of fraud in a fresh suit. Their Lordships in the Privy Council confirming the judgment of the High Court held that he can; but these cases are important for the present purpose for two reasons. In the first place though relief by way of recovery of possession of immoveable property sold in execution of the fraudulent decree was asked, their Lordships do not appear to think that this made any difference, for they describe the suit as one "for setting aside a decree and auction sale on finding them to be illegal, fraudulent and collusive"; in the next place though the previous decree was passed and the auction held by the Munsif, the suit to set them aside was instituted in a different Court, the Court of the Subordinate Judge. These two decisions of the Privy Council appear to me to conclude the question in the present appeal.

The latest case in Allahabad is *Jawahir v. Neki Ram*(1). There a suit was instituted in the Munsif's Court, Fatehabad (Agra), to set aside a decree of a Court in Silguri in Bengal. The learned Judges held that the Munsif had jurisdiction. They based their judgment on the ground that a portion of the cause of action at least arose within the jurisdiction of the Fatehabad Munsif as the fraudulent decree was sought to be executed by attaching properties situate within his local jurisdiction and they followed an earlier case in the same Court where it was held that it was competent for the Cawnpore Court to set aside a decree of the Calcutta High Court: *Banka Behari Lal v. Pokke Ram*(2). The decision in *Banka Behari Lal v. Pokke Ram*(2) was followed in this Court in *Arunachallam Chetti v. Vellappa Tambiran*(3), by the CHIEF JUSTICE and HANNAY, J.

There was a reference made to section 56 of the Specific Relief Act, but that section has no application to the present case, for the Court is not asked to stay any proceedings in a superior Court.

The respondent broadly contended that there was some principle of law which obliged a party desirous of setting aside a decree obtained by fraud, to seek relief in the Court which passed the decree; but except the dictum of PONTIFEX, J., he did

(1) (1915) I.L.R., 37 All., 189.

(2) (1903) I.L.R., 25 All., 48.

(3) (1914) 28 M.L.J., 410.

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not refer to any other authority. If that contention is correct, a Court of Appeal which has no original jurisdiction and a Small Cause Court or a Revenue Court which has only a limited jurisdiction cannot entertain an original suit to set aside its decree, and no other Court can. This, however, does not appear to be the law. In *Flower v. Lloyd*(1), the Court of Appeal in England held that that Court had no original jurisdiction to hear an application to set aside their decree passed in appeal on the ground of fraud but that a fresh action should be brought in a Court having original jurisdiction to set aside the decree. In the same case, BAGGALLAY, L.J., no doubt said that under the old practice when a decree has been obtained by fraud a bill was filed in the Original Court in which suit had been brought for the purpose of setting the decree aside and the same may be done even after the Judicature Acts came into force. I doubt however whether the Lord Justice was thinking of Courts of different grades exercising similar jurisdiction. I therefore think that the District Munsif of Tiruppur had jurisdiction to entertain the suit, though he had no power to grant the second prayer of the plaint which however did not affect the jurisdiction of the Court. It may be mentioned that the plaintiff agreed to withdraw this prayer in the first Court.

K.B.

(1) (1877) 6 Ch.D., 297.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Oldfield.*

BANGHY ABDUL RAZACK SAHIB OF MESSRS. KHAN
SAHIB BANGHY ABDUL KHADAR SAHIB & CO.
(PLAINTIFF), APPELLANT,

1917,
March, 21
and 29.

v.

KHANDI ROW AND ANOTHER OF W. K. A. RANE & CO.
(DEFENDANTS), RESPONDENTS.*

Contract, breach of—Suit for damages—Contract after outbreak of war to supply enemy goods out of stock in a particular ship—Royal Proclamation, prohibiting contract as illegal, effect of—Capture and condemnation of steamer and goods by Prize Court, effect of, on contract—Purchase of goods from Prize Court by defendant and bringing goods to place of performance by other steamers, effect of—Contract to supply goods of a certain description and quality—Supply of inferior goods, effect of.

A contract made on the 25th August 1914, after the outbreak of war with Germany on the 4th August 1914, to supply German dyes expected to arrive by certain steamers believed to have started on their voyage from Germany before the war, is unenforceable, if under the contract the defendant was not to be liable in case of non-arrival of the steamers at certain ports on account of the state of war and the ship and the dyes therein were as a fact seized during the voyage and condemned as prize by a Prize Court.

Held further,

(a) that the effect of the Royal Proclamation of 8th September 1914, prohibiting trading with the enemy and in enemy goods as illegal, was to render the further performance of the contract illegal and to put an end to the contract;

(b) that the condemnation of the goods by the Prize Court related back to the date of seizure and divested the owners of the goods as from the date of seizure;

(c) that the fact that the defendants for their own convenience bought the goods from the Prize Court and brought them to the place of performance is immaterial as the goods ceased to be goods consigned to the defendants; and

(d) that a contract to supply dyes of 40 per cent strength on arrival of certain steamers is not enforceable when the steamers arrive with dyes of inferior description and quality, viz., 16 per cent strength.

Hale v. Rawson (1858) 27 L.J., C.P., 189, distinguished.

Arnhold Karberg & Co. v. Blythe Green Jourdain & Co. (1916) 1 K.B., 495, *The Odessa* (1916) A.C., 163, and *The Zamora* (1918) 2 A.C., 77, followed.

* Original Side Appeal No. 22 of 1916.

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APPEAL against the judgment of BAKEWELL, J., in Civil Suit No. 229 of 1915.

This is a suit for damages for breach of contract entered into between the plaintiffs who were merchants at Ambur and the defendants who were importers of German dyes on the 25th August 1914 after the outbreak of war with Germany. The contract was as follows:—

Madras, 25th August 1914.

“KHAN SAHIB

BANGHI ABDUL KADIR SAHIB,

AMBUR.

DEAR SIR,

We agree to deliver to you the following packages from the lot that is coming per S.S. *Steinturm*, 3 casks = 12 cwt. Alizarine per cent 4 cwt. at 501-4-0.

From Bombay lot—

5 kegs 1 cwt. each Alizarine 20 per cent at 55.

N.B.—

(initialled)
for W. K. A. RANE & Co.

2 casks each 4 cwt. 40 per cent. To be delivered on arrival of
2 " " " other steamers, one lot of 2
2 " " " casks to be delivered each
time at the abovementioned rate, i.e., Rs. 501-4-0 per cwt. We are
not responsible for the supply of goods if steamers do not come to
Madras or Madura."

The Royal Proclamation prohibiting trading with the enemy and in enemy goods as illegal came into force on 9th September 1914. The steamer *Barenfels* and its cargo (the dyes in question) were captured in October 1914 as prize of war and taken into Alexandria for condemnation and were eventually condemned as prize of war in September 1915. In the meanwhile the defendants got the goods released on payment of double the invoice value agreeing to treat it as their sale price in case of their eventual condemnation and the ship and the goods in question arrived in Colombo in May 1915. In addition to claiming a right to delivery of the abovementioned goods the plaintiffs claimed that the defendants were bound to deliver them certain dyes which arrived by S.S. *Frimley* though they were not of 40 per cent strength but only 16 per cent. On defendant's failure to supply goods the plaintiffs sued for

damages for breach of contract. The defendants pleaded that they were not liable for the following reasons:—(1) the contract freed them from liability, as in the events that were contemplated and happened, the steamer *Barenfels* did not arrive, (2) that the contract was void, illegal and unenforceable, having been made after the outbreak of war, (3) that it was later on cancelled, (4) that no dyes of 40 per cent strength arrived by the other steamers named, and (5) that the seizure and condemnation of the goods relieved them of all liability though they bought the goods from the Prize Court for purposes of their own and brought them to India, as they ceased to be goods consigned to them. The following issues were framed:—

(1) Has the contract sued on become void and unenforceable owing to the outbreak of war between England and Germany?

(2) Are defendants liable in respect of the two casks that arrived by S.S. *Barenfels*?

(3) Are the defendants absolved from liability owing to their not being able to obtain delivery of the two casks?

(4) Is the contract in respect of the remaining casks premature owing to the non-arrival of the steamers?

(5) To what damages is the plaintiff entitled?

Mr. Justice BAKEWELL, who tried the suit, dismissed it by the following judgment:—

JUDGMENT.—The plaintiffs are owners of a factory for dyeing yarn and have obtained their dyes for the last few years from the defendants who are importers. I hold that the plaintiffs were aware that the dyes which they obtained from the defendants were obtained by the latter from a German firm, and that on the 25th August 1914, the date of the contract in suit, the plaintiffs were aware that the defendants had consignments coming to Madras of dye which had been shipped before the 4th of August. War broke out between England and Germany on the 4th August 1914 and the contract in suit of the 25th of August, was evidently entered into in contemplation of the fact that the dyes coming from Germany would be difficult to obtain.

The contract is for the delivery of three casks of Alizarine dye ex S.S. *Steinturm* and five kegs from the Bombay consignment, and it contains the following postscript:—

"Six casks of 4 cwt. 40 per cent to be delivered on arrival of other steamers, one lot of two casks to be delivered each time at the abovementioned rate, i.e., Rs. 501-4-0 per cask; we are not

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ABDUL RAZACK v. KHANDI ROW. BAKWELL, J. responsible for the supply of goods if the steamers do not come to Madras or Madura." The quality of the goods *S.S. Steinturm* was to be 40 per cent and from Bombay lot 20 per cent. I think it is clear that the contract was for the supply of goods manufactured in Germany and purchased by the defendants from a German firm, which the parties contemplated would be shipped before the outbreak of the war but delivered subsequently. I have no doubt that both parties were aware of the outbreak of the war and of the Proclamation against dealing with enemy goods; but it is equally probable that they thought that goods shipped before the outbreak of war might be safely dealt with.

The plaint relates to goods shipped by *S.S. Barenfels* and *Frimley*? A claim was also made with regard to another ship *Waturm* but I do not think that any question arises as to this steamer which carried goods consigned to Bombay. The *S.S. Barenfels* carried goods consigned to Madras which would fall within the terms of the contract, but she was captured and the ship and the goods were condemned by the Prize Court at Alexandria. I think that it is clear from the finding of that Court that the goods were enemy goods and therefore that the contract between the parties related to enemy goods coming from the enemy country. If therefore the defendants had taken up these goods and paid for them, they would have been trading in goods coming from the German Empire and from a person carrying on business therein, and the contract to sell such goods to the plaintiff falls, I think, within the Proclamation and is illegal and void.

It has been argued that the defendants obtained part of the goods consigned to them from *S.S. Barenfels* but procured their transshipment to Bombay instead of to Madras, and that having thus diverted the goods from their proper port of delivery they are liable for this consignment; but the correspondence that has been put in shows, I think, that these goods were taken by the defendants provisionally and subject to a decision by the Prize Court at Alexandria, and having been subsequently condemned they became the property of the Crown, and the voyage of the captured ship came to an end. The result is, therefore, that the goods came to the defendants as purchasers from the Crown at Colombo and they were at perfect liberty to treat this purchase as one independent of their contract with the plaintiffs and to deal with the goods as a separate consignment.

It has also been argued that the consignment ex *S.S. Frimley* is included in the suit contract. The facts as to this shipment are not

at all clear. It appears that the goods were shipped at Antwerp on the 7th June, 1914, for Masulipatam via Colombo and that they were transhipped at Colombo on the 5th January, 1915, but it does not appear that the property in these goods had not passed to the defendant before the outbreak of the war, and I do not think they have shown that this consignment consisted of goods coming from Germany. It would seem that they are foreign goods which have Germany as their country of origin; but goods of that kind would not come within the Proclamation, which covers 'goods coming from the German Empire' and not goods which may originally have come from Germany. The consignment was to Masulipatam and I do not think that the fact that the defendant diverted the consignment to Madras brings these particular goods within the contract. Moreover the goods ex *S.S. Frimley* do not come within the precise terms of the contract which relates only to goods of 40 per cent, the consignment ex *S.S. Frimley* being all kegs of 16 per cent only. I think the onus is on the plaintiffs to show that the goods of 16 per cent are substantially equivalent to those of 40 per cent. The evidence on the point is not very satisfactory. The point does not seem to have been clearly raised in the pleadings and the working partner of the plaintiffs' firm was not cross-examined on the point, but I think the onus was upon the plaintiffs to show that the two classes of goods are practically identical, and the fact that the contract itself draws a distinction between goods of 40 per cent and 20 per cent and expressly stipulates for those of 40 per cent shows that what the parties had in contemplation was a particular quality, and that *prima facie* the plaintiffs would have been entitled to reject the tender of goods of any other quality. I hold, therefore, that the plaintiffs have failed to prove that the defendants received any consignment in Madras or Madura of the particular goods stipulated in the contract. It has been argued on their behalf that the arrival of any steamer containing goods of a particular description, whether consigned to the defendants or not, would entitle the plaintiffs to claim delivery of the contract goods. Having regard to the knowledge of the plaintiffs of the course of business carried on by the defendants, I think that this exceedingly wide interpretation of the contract is not admissible. I think it is reasonably clear that the contract relates only to consignments which the parties knew were coming to the defendants in the ordinary course of business.

The result is that the plaintiffs' suit fails and is dismissed with costs.

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RAZACK
v.
KHANDI ROW
The plaintiffs preferred this appeal.
Hon'ble Mr. S. Srinirasa Ayyangar, the Advocate-General, and
M. D. Devados for the appellants.

W. Barton and V. L. Ethiraj for the respondents.

WALLIS, C.J.,
AND
OLDFIELD, J.
JUDGMENT.—This is a suit for breach of contract between the plaintiffs who are merchants at Ambur and the defendants who were importers of German dyes to Madras and Tuticorin, entered into on the 25th August 1914 after the outbreak of the war, by which the defendants undertook to deliver certain casks of dye from the lot to arrive per S.S. *Steinturm* and certain other casks from what is described as the "Bombay lot" meaning the lot imported by the defendants at Bombay. The contract went on to stipulate for three deliveries of two casks each of the weight and description mentioned,

"to be delivered on arrival of other steamers, one lot of two casks to be delivered each time at the abovementioned rate, i.e., Rs. 501-4-0 for each cask. We are not responsible for the supply of goods if steamers do not come to Madras or Madura".

The evidence shows that the defendants had arranged for consignments by successive steamers, and having regard to this we have no doubt that what the defendants undertook to deliver was two casks of the required description arriving in the ordinary course in successive steamers consigned to the defendants at Madras or Tuticorin, the port for Madura. In the case of Tuticorin the ship either touched at Tuticorin or landed the goods at Colombo for transshipment. One of the steamers, S.S. *Barenfels*, had left Hamburg and Antwerp before the outbreak of war and, according to the evidence, should have arrived in Madras about the 17th August, in the ordinary course. On the date of the contract she was overdue and the defendant says he did not know what had happened to her. She did arrive ultimately in May, 1915, and the first contention of the learned Advocate-General was that under the contract on the arrival of the S.S. *Barenfels* the defendants became bound to make delivery, even if the goods were not on board, citing *Hale v. Rawson*(1). In that case which was an action for failure to deliver tallow, the defendants had contracted to deliver tallow on the arrival of a certain steamship and it was held that they were not relieved

from their obligation, because it turned out the ship had no tallow on board. Here we think it is clear from the language of Exhibit A and having regard to the course of business and the stipulation as to the non-arrival of the steamers, that the defendants were only bound to make deliveries out of the lots consigned to the defendants in the ordinary course of business by the steamers referred to and arriving therein, and that they were not bound to make any such delivery on the arrival of the steamer without having on board any such goods consigned to the defendants.

This being the interpretation of the contract, as the goods had not arrived before the coming into force of the Proclamation of the 9th September, 1914, against trading with the enemy, the effect of that Proclamation was to render the further performance of the contract illegal, as it would admittedly have been impossible for the defendants to take up the goods and pay for them, and to put an end to the contract; *Arnhold Karberg & Co. v. Blythe Green, Jourdain & Co.*(1).

The case may also be disposed of on another ground. The S.S. *Barenfels* and her cargo were captured in October, 1914, as Prize of War and taken into Alexandria for condemnation, and they were subsequently condemned as Prize of War in September, 1915, a condemnation which related back and divested the owners of the goods as from the date of seizure: *The Odessa*(2), *The Zamora*(3). Under the contract, as already stated, the defendants were not to be responsible for the supply of goods, if steamers did not come to Madras or Madura; and these steamers clearly were the "other steamers", already mentioned by which the three consignments were coming out. In these circumstances the capture of the S.S. *Barenfels* which must have been one of the possibilities contemplated, in our opinion, relieved the defendants of liability under this clause and put an end to the contract so far as this particular consignment was concerned. And it seems to us immaterial that some six months later the ship and cargo were sent out to Colombo, Madras and Calcutta by bailees from the Prize Court who landed the goods in question, which were consigned to Tuticorin, at Colombo and did not forward

(1) (1853) 27 L.J., C.P., 189.

(1) (1916) 1 K.B., 495.

(2) (1916) A.C., 153.

(3) (1916) 2 A.C., 77.

ABDUL RAZACK v. KHANDI ROW. WALLIS, C.J., AND OLDFIELD, J. them by transshipment to the defendants, the consignees at Tuticorin. There was no certificate of release from the Prize Court in respect of these goods, which at the time were being proceeded against for condemnation; and the only terms on which the defendants were able to obtain delivery of them was by depositing a sum amounting to twice their invoice value, and by agreeing that, if the goods were condemned, as happened, this sum should be treated as the sale price paid to the Prize authorities as vendors. It cannot be said that the defendants were under any obligation to purchase these goods at a greatly enhanced price from the Prize authorities and make them over to the plaintiff, and we think the plaintiff's claim in respect of these casks fails.

The case as regards the plaintiff's other ground of claim on account of the consignment on the S.S. *Frimley* is even clearer. The evidence, for there is nothing explicit in the plaint, is that kegs of 16 per cent strength arrived by that ship. The contract being for delivery of kegs of 40 per cent strength it was for the plaintiff to show that the defendants were in a position to deliver dye such as that described in the contract. We think it is clear that the plaintiffs have not done so and that the description of the dye on the S.S. *Frimley* differs in toto from the description stipulated for. We may add that on the evidence the plaintiffs failed entirely to establish that the dye on the S.S. *Frimley* could be accepted as equivalent to that referred to in the contract, the only witness who had any practical knowledge of dyeing deposing that dye of 16 per cent strength would not produce the same quality of colour as that of 40 per cent strength after admixture.

In the result, the appeal fails and is dismissed with costs. (Two counsel.)

Solicitors for the appellants.—Messrs. *Grant and Greatorax*.

Solicitors for the respondents.—Messrs. *Short, Beves & Co.*

N.B.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice
Kumaraswami Sastriyar.

THENAL AMMAL AND ANOTHER (PLAINTIFFS NOS. 1 AND 3),
APPELLANTS,

1917,
April, 11.

v.

SOKKAMMAL AND FORTY-SIX OTHERS (DEFENDANTS NOS. 1 TO 7.
10 TO 15, 17 TO 19, 21 TO 27, 29 TO 37, 39, 42, AND 42 TO 54),
RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3, and sec. 98, cl. (3)—Compromise—Power of vakil to enter into—Construction of vakalat—Recording of compromise—Duty of Court to inquire—Decree in terms of compromise—Appeal, when allowed.

A vakalat containing a provision authorizing the vakil "to present if necessary petitions for rasinama for withdrawal and for referring to arbitration and to sign the rasinama, etc., petitions," does not give authority to the vakil to enter into a compromise without reference to his clients.

An appeal lies against a decree passed in accordance with a compromise, where the authority to enter into it, is impeached.

Ayyagiri Veerasalingam v. Koovur Basivi Reddi (1915) 27 M.L.J., 173, followed.

Jagapati Mudaliar v. Ekambara Mudaliar (1898) I.L.R., 21 Mad., 274, and *Raghoji Rao v. Lakshman Rao* (1912) 22 M.L.J., 381, referred to.

Duty of Courts to scrutinize compromises before recording them pointed out.

SECOND APPEAL against the decree of H. O. D. HARDING, the District Judge of Trichinopoly, in Appeal No. 265 of 1913, preferred against the decree of R. ANNASWAMI AYYAR, the Temporary Subordinate Judge of Trichinopoly, in Original Suit No. 9 of 1912 (Original Suit No. 70 of 1910, on the file of Subordinate Judge of Trichinopoly).

The plaintiffs sued for a declaration that certain alienations made by the first defendant who was their mother, were not binding on them and the second defendant who were the daughters and reversioners to the estate of their late father. The first defendant was the mother of the plaintiffs and the second defendant, and was in possession and enjoyment of a widow's estate in her husband's property. The other

* Second Appeal No. 1755 of 1914.

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defendants were alienees from the first defendant of different portions of the property. The suit ended in a compromise between the plaintiffs and the contesting defendants. The first and second defendants were *ex parte*. A compromise petition was filed by the plaintiffs' pleader and by the pleaders for the contesting defendants and was signed by the said pleaders and by the husband of the second defendant. On the day to which the case was adjourned for hearing, the plaintiffs' pleader stated that the second defendant did not consent to the compromise, and the latter also applied to set aside the order declaring her *ex parte*. The first plaintiff also applied through another pleader that the case should be tried as against all the defendants, as the former pleader for the plaintiffs had no power to compromise on behalf of the first plaintiff and that she had not given her consent to its terms. The Subordinate Judge, who tried the suit, dismissed both the petitions and passed a decree in terms of the compromise. On appeal by the plaintiffs Nos. 1 and 3 (the second plaintiff being dead), the District Judge confirmed the decree, holding that the compromise was binding on the plaintiffs as the *vakalat* expressly gave him power to compromise. The *vakalat* was in the following terms :—

"Whereas we have hereby fully authorized you to appear on our behalf in the Temporary Sub-Court of Trichinopoly to present petitions, etc., to examine witnesses, to argue the case, to pay batta, etc., to get copies, to get refund of batta, document, etc., that can be taken back, to present if necessary petition, etc., for *razinama*, for withdrawal, and for referring to arbitration under section 1, second schedule, to sign *razinama* withdrawal, etc., petitions yourself, to conduct proceedings necessary for the execution of decrees or order, etc. . . . ; we shall accept everything that may be done by you with regard to this matter, either orally or in writing as if done by ourselves alone."

The plaintiffs preferred this Second Appeal.

L. A. Govindaraghavan Ayyar for the appellants.

T. Narasimha Ayyangar for the respondents.

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AYYAR AND
KUMARA-
SWAMI
SASTRIYAR,
JJ.

JUDGMENT.—A preliminary objection is taken by Mr. Narasimha Ayyangar that no Second Appeal lies as the compromise was recorded *without protest* and as subsequently a decree was passed in terms of the compromise. This objection should be overruled, as the very foundation of the compromise, namely the

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authority to enter into it, is impeached. Following *Ayyagiri Veerasalingam v. Koovur Basivi Reddi*(1) we hold that the appeal is competent. The Courts below have held that the plaintiffs were bound by the compromise as the *vakalat* given by them to their vakil expressly enabled him to enter into a compromise. We do not think that the word *அவசியமாகவே* supports this conclusion. We understand the expression "to mean" that the vakil is to do certain acts when and if the occasion arises. The acts themselves are subsequently enumerated. They are (a) to sign the petition for entering into the compromise or for withdrawing the suit, and (b) to sign the final compromise petition to the Court. These two enumerated powers show that the plaintiff did not intend that the vakil should have unlimited powers to settle the claim of his clients.

Mr. Narasimha Ayyangar contended that the ordinary power of the vakil to enter into compromises and to withdraw suits in which he is engaged is inherent in him by the engagement, and cites Justice SADASIVA AYYAR's decision in *Ragoji Rao v. Lakshman Rao Sahib*(2) in support of this contention. In *Jagapati Mudaliar v. Ekambara Mudaliar*(3) SUBRAHMANYA AYYAR and BENSON, JJ., pointed out that the practice prevailing in England by which Counsel and Solicitor are clothed with extensive powers to agree to terms on behalf of the client should not be imported into this country. We are inclined to agree with this view. It is not the ordinary duty of an Advocate to negotiate terms, without reference to his client, with the opposite party. Such an action is calculated to place the practitioner in a false position. We do not think it desirable that such a power should vest in him in the interest of the profession. From the point of view of the client, we think that it is not safe that he should be regarded by engaging a vakil to have given him authority to dispose of his rights in any way he chooses. Therefore we think that the general power claimed is not in consonance with the highest ideals of the profession or of justice. For these reasons we think that a very strict interpretation should be placed upon *vakalats* containing powers of this kind. The learned vakil quoted *Matthews v. Munster*(4) to show that

(1) (1915) 27 M.L.J., 173.

(3) (1898) I.L.R., 21 Mad., 274.

(2) (1912) 22 M.L.J., 381.

(4) (1887) 20 Q.B.D., 141.

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Counsel was allowed to settle the amount of the damages awardable to his clients. Lord Justice BOWEN points out in that case that the client asked the Counsel to do the best he can in the case; such an unlimited authorization might have justified the view taken in that case. It is pointed out by all the Lords Justices that the Court has plenary powers in any case to enquire into the justness or bona fides of the settlement reported to it. In this country such a power should be exercised by the Court even more largely than in England. It is for that reason that the intermediate stage of recording the compromise is introduced in the Code. We are afraid that Courts seldom appreciate the significance of this provision. At any rate, we are satisfied that in this case the importance and necessity of recording the compromise was not realized by the Subordinate Judge.

We must hold that there has not been a sufficient enquiry into the question whether the compromise was authorized by the appellants especially as we hold that the *vakalat* does not give authority to the vakil to enter into the compromise without reference to his clients.

We must set aside the decrees of the Courts below and remand the case to the Court of First Instance for ascertaining whether the compromise is binding on the plaintiffs. If he comes to the conclusion that it is not binding, he must proceed to dispose of the case in the usual way. Costs will abide the result.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

P. L. A. ALAGAPPA CHETTIAR AND TWO OTHERS (PLAINTIFFS
Nos 2 TO 4), APPELLANTS,

1917,
April 20, and
25.

v.

R. M. P. CH. MUTHIAH CHETTIAR (DEFENDANT), RESPONDENT.*

Religious Endowments Act (XX of 1863), ss. 14 and 18—Leave given to four persons under section 18 of the Act—Suit by them under section 14—Death of one of the plaintiffs after suit, whether it effects abatement.

A suit instituted under section 14 of the Religious Endowments Act by four persons with the leave of the Court under section 18 of the Act does not abate on the death of one of the plaintiffs.

Venkatesha Molai v. Ramayya Hegade (1915) I.L.R., 38 Mad., 1192, *Maddala Bayavannarayana v. Vadapalli Perumalla Charyulu* (1916) 29 M.L.J., 231, distinguished.

Chabile Ram v. Durga Prasad (1915) I.L.R., 37 All., 298, not approved.

Parameswaran Munnee v. Narayanan Nambodri (1917) I.L.R., 40 Mad., 110, referred to.

APPEAL against the decree of W. L. VENKATARAMAYYA, the District Judge of Ramnad at Madura, in Original Suit No. 22 of 1913.

The facts appear from the judgment of AYLING, J.

S. T. Srinivasagopala Achariyar for the appellants.

G. S. Ramachandra Ayyar for the first appellant.

A. Krishnaswami Ayyar and M. Patanjali Sastri for the respondent.

AYLING, J.—The suit from which this appeal arises was instituted under section 14, Religious Endowments Act XX of 1863, by four persons who had obtained leave of the Court under section 18 of the same. Subsequent to its institution one of these persons died and the District Judge has dismissed the suit on the single ground that it is not competent to the three survivors to maintain it, it being “essential that all the donees of the power (to institute a suit) conferred by the Court should jointly exercise that power right up to the finish of the suit”. The surviving plaintiffs appeal.

* Appeal No. 44 of 1916.

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AYLING, J.

The chief authority relied on by the District Judge is that of *Venkatesha Malia v. Ramayya Hegade*(1) in which it was held that where sanction was given under section 18 of the Religious Endowments Act to two men, it was not open to one of them alone to institute the suit under that sanction. It may be pointed out at once that this ruling does not necessarily cover the present case, in which the suit was validly instituted by all the persons who obtained leave to sue but one of them subsequently died. It does not necessarily follow that a validly instituted suit abates for this reason. Another judgment of this Court quoted in support of the lower Court's decree, *Maddala Bagavannarayana v. Vadapalli Perumalla Charyulu*(2), also deals with a case in which the institution was itself defective (in the above sense): and the only authority brought to our notice in support of the abatement is *Chabile Ram v. Durga Prasad*(3) which was expressly dissented from in a recent case of this Court: *Parameswaran Munpee v. Narayanan Nambodri*(4). All the last three cases were of suits instituted under section 92, Civil Procedure Code; but as I shall endeavour to show presently the difference between the two sections is in the present appellant's favour.

Section 18 of the Religious Endowments Act is very similar to section 195 of the Code of Criminal Procedure. In each the Courts are expressly forbidden to entertain a complaint or suit, unless express sanction or leave for its institution has been previously obtained. The grant of the sanction or leave in each case removes the bar to the Court taking cognizance of the matter; and once that bar is removed it is not easy to see how either of the two sections can have further effect. In the case of section 195 of the Code of Criminal Procedure the complaint may be filed by a different person altogether from the person who applied for the sanction [vide *In re Thathayya*(5)] and though it is not necessary for us to go so far as the present case, I do not see why the same should not hold good in the case of leave granted under section 18 of the Religious Endowments Act.

With all respect to the learned Judges who decided *Venkatesha Malia v. Ramayya Hegade*(1) the wording of section 18 of the

(1) (1915) I.L.R., 38 Mad., 1192.

(2) (1916) 29 M.L.J., 231.

(3) (1915) I.L.R., 37 All., 298.

(4) (1917) I.L.R., 40 Mad. 110.

(5) (1889) I.L.R., 12 Mad., 47.

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Religious Endowments Act seems to afford no warrant for the consideration by the Court of the personality of the applicant. The duty of the Court is specifically defined as the determination of whether there are sufficient *prima facie* grounds for the institution of the suit. In dealing with applications under section 195 of the Code of Criminal Procedure Courts do not uncommonly bear in mind the personality of the applicant and his probable motives, although section. 195 is in this respect quite general in its terms, and does not attempt to define the matters for the Court's determination. Nevertheless, as already stated, a sanction granted to one person may be utilized by another. Section 92 of the Code of Civil Procedure is different. It expressly authorizes the institution of a suit by

"two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General."

This wording certainly supports the view that the persons who institute the suit must be identical with those who obtained the sanction.

Under section 14 of the Religious Endowments Act, on the contrary, any person or persons interested may sue: and section 18 merely interposes an independent condition that the suit shall not be entertained unless leave has been previously granted on application but without indicating in any way by whom the application should be made.

There seems to me therefore no need to adopt the District Judge's very narrow view of the section: and where the District Court has, on due consideration, decided that there are sufficient *prima facie* grounds for the institution of a suit against trustees of religious endowments it is undesirable in the public interest that unnecessary obstacles should be thrown in the way of its prosecution.

I would set aside the decree of the District Court and remand the suit for disposal on its merits. Costs in this Court should be costs in the cause.

SADASIVA AYYAR, J.—I should like to reserve my opinion on the question whether when leave is granted to A under section 18 of Act XX of 1863 to institute a suit, B could institute that suit under section 14.

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AYYAR, J.

But I entirely agree with my learned brother that there is nothing in section 18 which can be construed as putting an end

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to the suit after it is once legally instituted simply because one of several persons who obtained the leave under section 18 died during the pendency of the suit. I think that the general provisions of the Civil Procedure Code become applicable as much to a suit brought in the special Court mentioned in section 14 of the Religious Endowments Act after the first step, namely, the institution of the suit has taken place, as to a suit brought under section 92, Civil Procedure Code, except that a certain special or rather supplemental provision regarding reference to arbitration (see section 16 of the Religious Endowments Act) is also applicable to the former case and the Court is given express powers to award certain named reliefs in its decree to a suit under section 92, Civil Procedure Code (see also *Parameswaran Munpee v. Narayanan Nambodri* (1) and *Varadayya Chetty v. Munusami Chetty* (2)).

A suit under section 14 of Act XX of 1863 is, in my opinion, as much a representative suit as one brought under section 92 of the Civil Procedure Code or some of the suits under Order I, Rule 8 of that Code, as it is equally brought in and as it affects the rights of all those interested in the religious endowment. All such interested persons become in the eye of the law parties to such a suit and the death of one or more of them cannot cause the suit to abate nor would it prevent the suit from being heard till "its finish" after it has been once properly and legally instituted unless perhaps in the almost impossible contingency of all the persons interested ceasing to exist in this world by death or by wholesale apostasy. I agree in the order proposed by my learned brother.

S.V.

(1) (1917) I.L.R., 40 Mad., 110.

(2) (1911) 10 M.L.T., 514.

APPELLATE CIVIL.

Before Mr Justice Spencer and Mr. Justice Srinivasa Ayyangar.

PARVATHAMMAL (SECOND RESPONDENT), PETITIONER,

1917,
April, 26.

v.

CHOKKALINGA CHETTY (PETITIONER), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), sec. 34—Civil Procedure Code (Act V of 1908), sec. 36—Order—Decree—Marriage expenses of person dependent on the ward—Order against guardian—Ward attaining majority—Discharge of guardian—Application for execution against ward after majority—Jurisdiction of Court to order execution—Omission to object before attachment—Waiver—Estoppel.

An order under section 34 of the Guardians and Wards Act directing a guardian to pay a sum of money out of his ward's estate for the marriage-expenses of a person dependent on his ward is neither a decree nor an order executable as a decree under the Civil Procedure Code, and cannot be enforced against the ward after he has attained majority and the guardian has been discharged.

There being an initial want of jurisdiction in the Court to execute such an order, the omission of the ward to object, after notice, to an order for attachment of his property, does not estop him from objecting to the jurisdiction of the Court to sell the property after attachment.

Somakka v. Ramiah (1913) I.L.R., 36 Mad., 39, referred to.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the order of J. T. GILLESPIE, the District Judge of Salem, in Execution Petition No. 14 of 1914, in Interlocutory Application No. 20 of 1908 connected with Original Petition No. 28 of 1906.

The material facts appear from the judgment of SPENCER, J.

Pattabhirama Ayyangar for the petitioner.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the respondent.

SPENCER, J.—One Anganna Chetti had three wives. At his death he left surviving him a daughter by his first wife, named Thayammal, and Parvathammal, his third wife. Application was made to the District Court of Salem to appoint a guardian for the estate of Parvathammal. As the result of a *razinama* put in by

* Civil Revision Petition No. 181 of 1916.

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the contending parties, it was arranged that Chokkalinga Chetty should be guardian of Thayammal. Subsequently Gurunatha Chetty was appointed by Court guardian of the person and property of the minor Parvathammal, he being her own father. In 1908 an application was made to the Court to allot a sum of money for the marriage-expenses of the minor Thayammal. The District Judge after considering all the circumstances of the case, fixed Rs. 1,600 as a proper sum to be paid out of the estate for the said marriage, and on appeal to this Court, the order was confirmed. Parvathammal has now attained majority and her guardian Gurunatha Chetty has been discharged. Chokkalinga Chetty now seeks to have the order directing the minor's guardian to pay Rs. 1,600 for the marriage-expenses of Thayammal, executed under the Civil Procedure Code by attachment and sale of the property of Parvathammal and the District Judge has made an order accordingly.

Objection has been taken in appeal that the Court was not competent to pass an order of this kind as though it was an order passed between parties in execution, orders passed under the Guardians and Wards Act being by way of administrative directions to the guardian.

Under section 34 of the Guardians and Wards Act, a guardian may apply for the maintenance, education and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of the persons dependent on him may be a party, such portion of the income of the property of the ward as the Court may direct to be employed for the purpose. But this Act contains no provision for the execution of such order as decrees of the Court. It is however sought to justify the District Judge's order by a reference to section 36, Civil Procedure Code. That section says :

" the provisions of this Code relating to the execution of decree shall, so far as they are applicable, be deemed to apply to the execution of orders,"

and an "order" has been defined in section 2 (14) of the Civil Procedure Code as, "the formal expression of any decision of a civil Court which is not a decree." I do not think that the order passed by the District Judge in 1908 was such an order as is contemplated in this section. Moreover the order was one

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SPENCER, J.

intended to be obeyed by the guardian appointed by the Court and to relate to the property of the minor who was a ward of Court. There is now no guardian and no minor. It is therefore not possible to execute it against Parvathammal who has now become a major, without allowing her an opportunity to contest the order in her own right. In *Somakka v. Ramiah*(1) to which I was a party, it was pointed out by ABU RAHIM, J., that the Guardians and Wards Act does not provide any machinery for deciding upon and enforcing claims of third parties for or against a ward as those are left to be regulated by ordinary proceedings by suits.

We decided that an order purporting to be made under the Guardians and Wards Act, could not be enforced as a decree passed in a suit.

Secondly, an attempt has been made to justify the order by relying on the fact that notice was given to Parvathammal of the application and that she did not object that the Court had no jurisdiction. In *Somakka v. Ramiah*(1), that point also was considered, but there the respondent's pleader did not attempt to argue that, if the Court did make an order without jurisdiction altogether any waiver of objection or consent on the part of a party would make it valid. I am clearly of opinion that if there is an initial absence of jurisdiction, the conduct of the parties cannot validate an order passed without such jurisdiction.

Lastly, it is suggested that justice does not require the order to be set aside, that it is an order held by three Courts to be a fair one and therefore that we should not interfere in revision. In the previous proceedings, Parvathammal was represented by her guardian Gurunatha Chetty who has since been discharged. She has had no opportunity of raising any contention as to her personal liability to pay the sum now sought to be recovered, the order in that case being one of the nature of a direction to the guardian appointed by Court. It is thus an open question whether Parvathammal should justly be made to pay the sum.

I therefore consider that the order under appeal was one that the Court was not competent to pass and it should be set aside with costs here and in the lower Court.

(1) (1913) I.L.R., 36 Mad., 39.

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SRINIVASA AYYANGAR, J.—I agree. The facts of the case have been fully stated in the judgment just delivered. The order that was passed in favour of Chokkalinga Chetty on behalf of the minor girl Thayammal in the guardianship matter of Parvathammal was in these terms: "I accordingly direct that the respondent (i.e., Gurunatha Chetty) pay this amount (viz., Rs. 1,600) to the petitioner (i.e., Chokkalinga Chetty)." This order was passed under section 34, clause (e) of the Guardians and Wards Act, under which a Court may direct a guardian to apply the income of the property or if the Court so directs the whole of the property for among other things the celebration of the ceremonies of any person who is dependent on a ward. This is in the nature of a direction to the guardian over whom the Court has control, to pay a certain sum of money out of the funds of the minor in discharge of the liability of the minor's estate. If this is obeyed by the guardian, that would be so far as between himself and the minor a good payment, and to that extent the guardian will be discharged of his liability to account for that sum. But this does not, in my opinion, give any right to the person to whom the money is directed to be paid, to enforce it as if there was a decree in his favour. The order, as a matter of fact, does not purport to adjudicate upon the relative claims of the minor and the person who seeks to enforce the liability against the minor's estate. If, for example, a person calling himself a creditor of the minor's estate applies to the Court for a direction to the guardian to discharge that debt, and if on enquiry, the Court comes to the conclusion that the liability is subsisting and the debt is payable out of the minor's estate, and makes an order to pay that debt, still I conceive that the minor would be entitled to challenge the order or the amount of debt so directed to be paid. That is the nature of the order and I think there was nothing to execute. It was quite competent to the person in whose favour this order was made to go to the Court which had jurisdiction in the guardianship matter and ask for a direction that the guardian should pay the money or the income of the minor's estate in his hands into Court, and if he gets such an order the Court will be competent to pay the money on behalf of the guardian or of the minor to the person so entitled. But I do not think that this so-called order can be executed as if it was a decree. In this case, as has been pointed out, the guardian has been

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discharged and the minor has been allowed to take possession of her property.

One argument which was advanced by Mr. Krishnaṣwami Ayyar is that at the time the guardian was discharged, in view apparently of some objection by the guardian with reference to this order for payment of Rs. 1,600 which he had not obeyed, there was an undertaking by Parvathammal who had then attained majority that she would pay this sum. That undertaking evidently was given in order that the guardian may be free from all liability with reference to this matter. But that, to my mind, does not, by itself, impose any liability on the minor, for it is not shown that undertaking was given to or that agreement was made with Chokkalinga Chetty on behalf of Thayammal.

The next objection taken is, there having been notice to Parvathammal of an application made to execute this order and there having been an order for attachment, that order is *res judicata* and binding on her. But it is clear that she is entitled to raise the question that the order cannot be executed at all, in that it is not an order within the meaning of section 36, Civil Procedure Code. I do not think there is any substance in the contention and further it was quite open to the Court which previously passed the order on objection made at a later stage to vacate the previous order, if it came to the conclusion that that order was *ultra vires*, as I think it was in this case.

I do not wish to add anything with regard to the last contention of the learned pleader, viz., that in this case we ought not to interfere in the interests of justice, for we do not know whether the order directing Rs. 1,600 to be paid out of the minor's estate is just or unjust.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Abdur Rahim and Mr. Justice Napier.

1917,
April, 30.

NAGIREDDY KONDA REDDY AND SIX OTHERS (ACCUSED),

v.

KING-EMPEROR.*

Criminal Procedure Code (Act V of 1898), ss. 107, 192 and 528—Previous proceedings under section 107 and prosecution under the Penal Code—Discharge—Subsequent proceedings under section 107 on the same facts, if maintainable—Jurisdiction of Magistrates—Transfer by District Magistrate to a Magistrate without local jurisdiction before issue of notice to accused—Order of such Magistrate, validity of—Notice to accused, vague—Effect of notice.

A Magistrate is not entitled to institute proceedings under section 107 of the Criminal Procedure Code upon facts and information which have already been the subject of enquiry under that section or in connexion with charges under the Penal Code brought against persons who have been discharged in those proceedings.

A District Magistrate cannot be said to have taken cognizance of a case under section 107, in which he has not issued notice to the accused to show cause why they should not be proceeded against, and has no power under section 192 of the Criminal Procedure Code to transfer such a case to another Magistrate.

A District Magistrate has no power under section 528 of the Criminal Procedure Code to make over the initiation of proceedings in a case under section 107 of the Criminal Procedure Code to a Magistrate who has no local jurisdiction in the matter.

A Magistrate who has no local jurisdiction to initiate proceedings in a matter under section 107, Criminal Procedure Code, acquires none by the transfer of a case to him from a Magistrate who has jurisdiction but has not taken proceedings, and his proceedings are void and should be quashed.

Proceedings under section 107 of the Criminal Procedure Code should be quashed if the notice issued to the accused under that section is so vague as not to give the accused particulars of the offences charged.

Nirbeekar Chandra Mukerjee v. The Emperor (1909) 13 C.W.N., 580,

Surjya Kanta Roy Chowdhry v. Emperor (1904) I.L.R., 31 Cal., 350, and

King-Emperor v. Munna (1902) I.L.R., 24 All., 151, followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to quash the proceedings of T. V. TYAGARAJA AYYAR, the Headquarters

* Criminal Revision Case No. 759 of 1916 (Criminal Revision Petition No. 614 of 1916).

First-class Deputy Magistrate of Nellore, in Miscellaneous Case No. 20 of 1916.

The material facts are set out in the judgment.

Dr. S. Swaminathan for the petitioner.

P. R. Narayanaswamy Ayyar for the Acting Public Prosecutor for the Crown.

ORDER.—In this case notice has been issued by the Headquarters Deputy Magistrate of Nellore calling on the petitioners to show cause why they should not give security under section 107, Criminal Procedure Code. The matter has a long history. It appears that in the village of Kaluvoy there are two factions, one headed by the first petitioner Nagireddy Konda Reddy who has under his protection a number of Muhammadans, some of whom are also petitioners in this matter, and on the other side are the rest of the influential Hindus of that locality. For some time there has been a dispute as regards the right to play music during the *Mohurram* before the Hindu temples. On the other hand, the Hindus claim the right to play music during their festivals before the local mosque. There seems to be also a private quarrel between the first petitioner on the one side and some of the other leading Hindu residents of that village on the other. There have been a number of cases and proceedings going on since 1914 between the parties and strange to say, in all these cases the persons accused of the offences were either acquitted or discharged and the proceedings taken under section 107 fell through. These proceedings now in question are the last of the series. Two objections are taken to them. The first is that the facts and the information upon which the proceedings were had, had already been the subject of enquiry in previous proceedings under section 107 and also in certain criminal charges, and that in those proceedings and charges the present petitioners were discharged. This is undoubtedly so and further, it is clear, that there are no fresh materials of any importance available on which it could be said that fresh apprehension arose of a breach of the peace being committed by the petitioners. It is also a fact, that since at least September 1916 when the Police applied for proceedings to be taken under section 107 there has been no breach of the peace. We are quite clear that the Magistrate was not entitled to initiate proceedings upon facts and information which had already been

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the subject of enquiry under section 107, or in connexion with charges under the Penal Code brought against the petitioners. The same facts cannot form the subject of repeated proceedings either under the Penal Code or the Criminal Procedure Code. If fresh facts had occurred upon which the Police and the Magistrate were apprehensive that there was a likelihood of a breach of the peace, then, there would have been justification for the initiation of proceedings under section 107. If there had been any such information forthcoming, it was the duty of the Magistrate to set out the substance of such information in the proceedings, but on looking at the preliminary order we find that the information therein referred to is only what had already been before other Magistrates in connexion with other proceedings and had been the subject of orders which must be taken to be final so far as those matters are concerned. The wording of the notice we may also point out in passing is vague to a degree. All that is stated there is that "seven persons headed by Nagireddy Konda Reddy, the first accused, a rich and influential resident of Kaluvoy, and others are addicted to crimes of violence involving a breach of the peace and threatened injury to the lives and property of several persons and there is an imminent danger of a breach of the peace." It does not at all state when these threats were uttered, who are the persons who were threatened and when this apprehension of a breach of the peace arose. We think that the above objection is good in law and the proceedings must be quashed on that ground.

But there is also another valid objection to these proceedings. Under section 107, Criminal Procedure Code, it is the District Magistrate or Subdivisional Magistrate or any Magistrate of the first class, who is informed that a person is likely to commit a breach of the peace, that may require such person to show cause why he should not be bound down. Sub-section (2) says, that

"proceedings shall not be taken under this section unless the person informed against and the place where the breach of the peace is likely to occur, are within the local limits of the Magistrate's jurisdiction."

From the operation of this provision the District Magistrate is excepted in so far that he can take cognizance of a matter like this, if either the person informed against or the place

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where the breach of the peace is likely to occur is within the local limits of his jurisdiction. Then sub-section (3) empowers a Magistrate who is not authorized to act under sub-section (1) to order the arrest of a person who is likely to commit a breach of the peace, and send him to the Magistrate who is empowered to institute proceedings under the section. These provisions of section 107 seem to us to be very specific and clear in laying down this imperative prohibition with regard to Magistrates, other than a District Magistrate.

Now a Magistrate cannot be said to have taken proceedings under section 107 until he issues notice to the person charged to show cause why he should not be proceeded against under that section. In this case it is clear that the Police reported the matter to the District Magistrate who ordered, without stating that, in his opinion as head of the district, there was a likelihood of a breach of the peace, the case to be transferred to the file of the Headquarters Deputy Magistrate within whose jurisdiction neither the accused resided nor was the place where there was a likelihood of the breach of the peace occurring situate. It was the Headquarters Deputy Magistrate of Nellore that issued notice to the accused under section 107 and he must therefore be taken to have initiated proceedings under that section. It was suggested that, under section 192, the District Magistrate could make over the case to the Headquarters Deputy Magistrate before any notice was issued. Section 192 of the Criminal Procedure Code is a general section which empowers a District Magistrate to transfer any case of which he has taken cognizance, for enquiry or trial, to any Magistrate subordinate to him. In the matter of proceedings under section 107 it could not be said that the District Magistrate to whom the Police reported certain facts had taken cognizance of a case against the accused by reason of that fact alone.

Nor do we think that section 528 of the Criminal Procedure Code empowers the District Magistrate in a case under section 107 to make over the initiation of proceedings to a Magistrate who has no local jurisdiction over the matter. That is a general section which empowers a District Magistrate to withdraw any case or recall any case on the file of a Subordinate Magistrate and make it over to any such Subordinate Magistrate. But section 107 is a specific provision dealing with certain preventive

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proceedings, and its sub-section (2) expressly prohibits proceedings being instituted except by certain Magistrates. It is the District Magistrate or Subdivisional Magistrate or any other First-class Magistrate who is in executive charge of a certain area that is the best person to judge whether there is a likelihood of a breach of the peace within the local limits of his jurisdiction and whether it is necessary or desirable that preventive proceedings should be taken under section 107. It appears to us that the legislature purposely left it to the discretion of such a Magistrate to say whether proceedings ought to be taken or not, and in this respect the provision of section 107 stands on a very different footing from the provision of section 177. Section 177 says :

"Every offence shall ordinarily be enquired into and tried by a court within the local limits of whose jurisdiction it was committed."

Here the legislature has, advisedly, used the word ordinarily which does not occur in section 107.

This view of the law finds support from a number of rulings; see *Nirbeekar Chandra Mukerjee v. The Emperor*(1), *Surjya Kanta Roy Chowdhry v. Emperor*(2) and *King-Emperor v. Munna*(3). The proceedings, therefore, in this case were without jurisdiction. On this as well as the other ground already mentioned the proceedings must be set aside.

K.R.

(1) (1909) 13 C.W.N., 580.

(2) (1904) I.L.R., 31 Cal., 350.

(3) (1902) I.L.R., 24 All., 151.

APPELLATE CIVIL.

*Before Mr. Justice Ayling and Mr. Justice Kumaraswami
Sastriyar.*

MASILAMAN/ MUDALIAR (SECOND RESPONDENT), APPELLANT,

1916,
November,
28 and
December,
12, and 1917,
April, 30.

SETHUSWAMI AYYAR AND ANOTHER (PETITIONER AND FIRST
RESPONDENT), RESPONDENTS.

Execution Petition, prayer therein for attachment—Attachment ordered—Failure to pay batta—Presumed oral application at the hearing of the petition to issue warrant of attachment—Whether such application is step in aid of execution—Part-payment entered in the petition—Civil Procedure Code (Act V of 1908), G. XXI, r. 2, cl. 1, whether certificate of payment proved—Limitation Act (IX of 1908), sec. 20, saving of limitation.

Where an assignee of a decree filed a petition for execution on the 13th July 1911 and an order of attachment was made on the day of hearing, the 12th August 1911, and the petition was subsequently dismissed on the 26th August 1911 on his failure to pay batta within the time allowed, and a fresh application was filed on the 10th August 1914,

Held, that, though in the above circumstances, the Court might presume that the decree-holder made an oral application on the day of hearing to proceed with the execution such application was not a step in aid of execution and that the second application filed more than three years after the date of the first was barred by limitation.

Held also, that the part-payment of a decree amount entered in an execution petition, presented within three years from the date of such alleged payment amounts, if the fact of payment is proved, to a certificate of payment under Order XXI, rule 2 of the Code of Civil Procedure, and will operate to save limitation under section 20 of the Limitation Act.

Rajam Aiyar v. Anantharatnam Aiyar (1915) 29 M.L.J., 669, and *Lakhi Narain v. Felamani Dasi* (1914) 20 O.L.J., 131, referred to.

APPEAL against the order of G. KODANDABAMANJULU NAYUDU, the Temporary Subordinate Judge of Tanjore, in Appeal No. 203 of 1915, preferred against the order of K. M. KESHERA KURUP, the Acting District Munsif of Tanjore, in Execution Petition No. 526 of 1914, in Original Suit No. 379 of 1908, on the file of C. V. VISVANATHA SASTRIYAN, the District Munsif of Kumbakonam.

The necessary facts appear from the judgment of AYLING, J.

* Appeal Against Appellate Order No. 80 of 1916.

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AYYAR.

K. R. Suōrahmanya Sastriyar for the appellant.

K. Ramachandra Ayyar for the respondent.

The appeal coming on for hearing the Court delivered the following JUDGMENTS :—

AYLING, J.

AYLING, J.—The first respondent in this case is the assignee decree-holder in Original Suit No. 379 of 1906 on the file of the Court of the District Munsif of Kumbakonam, and the sole question for disposal is whether his Execution Application (Execution Petition No. 526 of 1914) presented on 12th August 1914, was barred by article 182 of the Indian Limitation Act, 1908 (Schedule I). The next previous application of which there is record was Execution Petition No. 385 of 1911, presented on 13th July 1911; but the decree-holder relies on the following circumstances to save limitation :—

(1) an oral application in aid of execution presumed to have been made on the 12th August 1911, in the course of the hearing of Execution Petition No. 385 of 1911,

(2) an alleged payment towards the decree on 17th August 1911.

As regards the first, the facts are simple. In Execution Petition No. 385 of 1911, the decree-holder applied for attachment and sale of the judgment-debtor's moveables after issue of the preliminary notice required by Order XXI, rule 22 of the Code of Civil Procedure. Notice was accordingly issued to the judgment-debtor for 12th August 1911. On that date as the judgment-debtor did not appear, attachment order was issued; but, as the decree-holder failed to pay batta within the time allowed, the petition was dismissed on the 26th August 1911. The Subordinate Judge says:

"It seems to me, looking to the liberal spirit in which acts done by a decree-holder are viewed by the Madras High Court to operate as steps in aid of execution, vide *Abdul Kader Rowther v. Krishnan Manamalai Nair*(1), it will not be wrong to hold that the decree-holder should be presumed to have made an oral application for issue of a warrant of attachment on 12th August 1911 and this was a step in aid of execution."

Now in my opinion the utmost that can be presumed is that the decree-holder was present in Court on 12th August 1911

(1) (1915) I.L.R., 38 Mad., 695.

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either in person or by pleader and intimated his desire to proceed with execution. He had already asked for attachment in his written application; and assuming that he repeated his request by word of mouth in Court, I am unable to see any ground for viewing this as fresh step in aid of execution. The point is, not that the application was oral, but that it was the merest repetition, and an entirely superfluous repetition, of an application, which he had already made in writing, and which was pending orders of the Court. None of the cases relied on by the first respondent's vakil seem to me to be of use to him. In the Calcutta Full Bench Case, *Ambica Pershad v. Sing Surdhari Lal*(1), there was an application to issue proclamation nearly a year after the attachment, which indeed the judgment-debtor claimed to be no longer subsisting; and the judgment of GARTH, C.J., makes it quite clear that he held that, without such a fresh application, no further action should have been taken by the Court. In *Vijayaraghavalu Naidu v. Srinivasulu Naidu*(2) the batta memorandum was accompanied by a written application; and the Court laid stress on the fact that the proclamation would not have issued if the batta memorandum had not been put in. *Abdul Kader Rowther v. Krishnan Malamalai Nair*(3) is a case in which SADASIVA AYYAR and SPENCER, J.J., held that an oral application by a decree-holder for an adjournment to enable him to adduce evidence was a step in aid of execution. This is a view, in which speaking with all deference, I find it impossible to concur; and, if the facts of that case were similar to those of the present case, I should be inclined to make a reference to a Full Bench. Fortunately they are not: and with the general principle enunciated I have no quarrel, i.e., if even an oral application is for an order which is really a step in aid, it may be treated as within the scope of article 182 of the Indian Limitation Act. I am inclined to think however that such applications will be rare. The most recent case, *Varadaraja Mudali v. Murugesam Pillai*(4) is cited chiefly for the proposition that article 182 of the Indian Limitation Act, 1908, should receive a fair, liberal, and not too technical construction so as to enable the decree-holder to obtain the fruits of his decree. I quite agree: but it seems to me that the danger is, not of too technical construction of the article,

(1) (1884) I.L.R., 10 Cal., 851.
(3) (1915) I.L.R., 38 Mad., 695.

(2) (1905) I.L.R., 25 Mad., 399.
(4) (1916) 30 M.L.J., 460.

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but that the courts in their anxiety to prevent justice being defeated by technicalities, may introduce so much uncertainty, that it will be most difficult for any party to know whether execution of a decree is barred or not. Where the starting point is the recorded date of presentation of a formal application, we are on sure ground; but if any unrecorded oral intimation of the decree-holder's desire to proceed may be treated as such, the ascertainment of the period will be beset by extraordinary difficulties. I feel confident that nothing of the kind was contemplated by the Legislature and that there is nothing in the Act to support such a construction.

I would therefore hold that the presumed oral application of 12th August 1911 does not save limitation.

It then becomes necessary to consider the second point regarding which the Subordinate Judge decided against the decree-holder on the ground that the payment was not certified to the Court, and, therefore, under Order XXI, rule 2 of the Code of Civil Procedure, could not be taken into account.

The payment is set forth in column 5 of Execution Petition No. 526 of 1914, which was presented within 3 years of the date of the alleged payment. I see no reason why this should not be accepted as a certificate of payment under clause (1) of the rule; for nothing is prescribed in the rule as to the time within which or the manner in which the decree-holder must certify payment—vide *Rajam Aiyar v. Anantharatnam Aiyar*(1) and *Lakhi Narain v. Felamani Dasi*(2). No doubt a Court will do well to carefully scrutinize evidence of a payment reported in such circumstances, where the fact of payment is denied; but there is no reason why, if proved, such a payment should not be considered, in the light of section 20 of the Indian Limitation Act.

I would therefore call for a finding on the following issue from the Court of the Subordinate Judge after taking evidence:

'Is the alleged payment of Rs. 25 by the judgment-debtor on 17th August 1911 true? and does it operate to save limitation under section 20 of the Indian Limitation Act?'

Two months will be allowed for submitting the finding and seven days for filing objections.

(1) (1915) 29 M.L.J., 669.

(2) (1914) 20 C.L.J., 131.

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KUMARASWAMI SASTRIYAR, J.—I agree and have little to add. I do not think that the mere oral repetition of request contained in the execution application is a step in aid of execution. Where, however, several reliefs are prayed for in the execution application, which the Court is not bound to grant concurrently, or, where an application to the Court is made, asking it to exercise its discretion in matters where it is not bound to grant the prayer asked for in the execution application as a matter of course, the fact that the relief asked for orally is already contained in the execution application, would not prevent the oral application from being effective as a step in aid of execution. Order XXI, rule 11 of the Civil Procedure Code, 1908, after providing for an oral application for execution at the time of the passing of the decree requires a written application containing the particulars specified in the order and specifying the mode in which execution is sought. Rule 176 of the Civil Rules of Practice, 1905, only enables a party to apply orally for orders which are necessary to give effect to or work out the prayers contained in the execution application without the necessity for putting in an application in writing for every small step necessary for realizing the fruits of a decree. When the Code requires a written application for execution, it cannot be contended that a mere oral application would be a step in aid of execution, and where a written application is filed as required by the Code, an oral application to the same effect is a mere superfluity.

In order that an oral application may be effective as a step in aid of execution the application must be one which it is necessary to make in order to get the main reliefs prayed for in the execution petition. It must be of such a nature that, if the application were not made, further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application, or by reason of the Code or the rules or practice requiring some further acts to be done before the main reliefs prayed for in the execution application can be granted or enforced.

As regards the payments acknowledged in the execution application the decision of this Court in *Rajam Aiyar v. Anantharatnam Aiyar*(1) is clear, and I do not think that the payments

(1) (1915) 29 M.L.J., 669.

MASILAMANI MUDALIAR v. SETHUSWAMI AYYAR. — KUMARASWAMI SASTRIYAR, J. can be ignored as not certified if they were as a matter of fact made. I agree with the order proposed by my learned brother. In compliance with the above order, the temporary Subordinate Judge of Tanjore submitted a finding that the payment set up was not true and did not operate to save limitation under section 20 of the Indian Limitation Act.

This appeal coming on for final hearing the Court delivered the following

JUDGMENT.— We accept the findings and as a result set aside the order of the Subordinate Judge, and direct that the petition be dismissed with costs throughout.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Bakewell.

1917,
May, 1.

VAIGUNTATHAMMAL AND ANOTHER (DEFENDANTS NOS. 3 AND 4),
APPELLANT,

v.

VALLIAMMAN AMMAL AND ANOTHER (PLAINTIFF AND SECOND
DEFENDANT), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. III, r. 1 and O. IX, r. 12—Order of Court directing a party to appear in person—Refusal of the party to comply with the order—Order of Court declaring him ex parte, legality of.

A Court is empowered, under Order III, rule 1, of the Civil Procedure Code, to direct the appearance in Court of a party in person and if the party so directed refuses to appear, the Court may declare him *ex parte* even though he has engaged a pleader who is prepared to appear for him in the case.

Satu v. Hanmant rao (1899) I.L.R., 23 Bom., 318, dissented from.

SECOND APPEAL against the decree of S. MAHADEVA SASTRIYAR, the Subordinate Judge of Tuticorin, in Appeal No. 44 of 1915, preferred against the decree of M. ANANTHAGIRI RAO, the

* Second Appeal No. 78 of 1916.

Temporary Additional District Munsif of Tinnevely, in Original Suit No. 37 of 1914.

The necessary facts appear from the judgment of SADASIVA AYYAR, J. VAIGUNTA-THAMMAL v. VALLIAMMAN.

K. R. Guruswami Ayyar and A. Subrahmanya Ayyar for the appellants.

T. R. Venkatarama Sastriyar for the respondents.

SADASIVA AYYAR, J.—Defendants Nos. 3 and 4 are the appellants in the second appeal. After the issues were settled, which was on the 27th June 1913, the District Munsif on the 15th August 1914 directed the defendants Nos. 3 and 4 to make their appearance in person on the 29th August 1914 to which date the hearing was adjourned. On the said 29th August 1914 defendants Nos. 3 and 4 failed to appear and represented through their vakil that they would refuse to appear even if they were granted time. The learned Munsif, thereupon, on the 29th August 1914, declared them *ex parte* and decided the suit, on the evidence of the plaintiff's husband, in plaintiff's favour. The Subordinate Judge, on appeal, confirmed this decree. Hence this second appeal.

It is to be regretted that the District Munsif did not mention the provision of law under which he acted in calling upon defendants Nos. 3 and 4 to appear in person, nor the provision of law under which, on their failure to do so, he declared them *ex parte*. The learned Subordinate Judge has also failed to state the provision of law under which, according to him, the Munsif acted in calling upon defendants Nos. 3 and 4 to appear in person, though he considered that the decree *ex parte* was granted under Order XVII, rule 3, Civil Procedure Code. I do not see how Order XVII, rule 3, has any application to the circumstances of this case. As my learned brother pointed out during the course of the argument, I think the direction to defendants Nos. 3 and 4 to appear in person must be deemed to have been made under Order III, rule 1, Civil Procedure Code. That rule empowers the Court to make an order that

"any appearance required or authorized by law to be made by a party shall be made by the party in person."

Now, the appearance for 29th August 1914 was one which was authorized by law to be made by the party and such appearance for that particular date could be directed by the Court under this

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provision to be made in person. Then, we came to Order IX, rule 12, which provides that if a party who has been ordered to appear in person does not appear in person, or show sufficient cause to the satisfaction of the Court for failing to appear in person, he might be treated as not appearing even though (I take it), he had engaged a pleader who had appeared and was then prepared to appear for him in the case. In this view, it is unnecessary to resort to the principle indicated by me (sitting as a single Judge) in *Anni Ammal v. Muthukumara Chettiar* (1) namely that, even if not empowered by any specific provision found in the Civil Procedure Code, the Court has inherent power to order a party to appear in person if it considers it necessary to do so in the interests of justice. That Order IX, rule 12, applies to all cases where a party has been ordered to appear in person is clear from the fact that the words "under the provisions of section 66" (corresponding to Order V, rule 3) "or section 436" (correspondent to Order XXIX, rules 2 and 3) appearing in the corresponding section 107 of the old Civil Procedure Code have been deliberately omitted from Order IX, rule 12. Cases decided under section 107 of the old Code [for example, *Satu v. Hanmant-rao* (2)] are, therefore, no authorities on the construction of Order IX, rule 12, so far as this point is concerned. The other contentions put forward on behalf of the appellants need not be dealt with in detail, there being nothing in them. I would, therefore, dismiss this second appeal with costs.

BAKEWELL, J. — A party is bound to attend the Court whenever so required, and although ordinarily he may fulfil this obligation by means of an agent, if the Court so directs he is bound to attend in person. (Order III, rule 1, Civil Procedure Code.) If the evidence of the party is required, a summons can be issued in the same manner as to a stranger to the suit; but when the parties are before the Court either personally or by their pleader, it is competent for the Court to direct them orally to attend without a summons. The provisions of Order IX, rule 12, are perfectly general and are evidently framed for the purpose of dealing with obstructive tactics and of enabling the Court to proceed against any party who does not attend. The diary in the present case shows that there were numerous adjournments

(1) (1912) 28 M.L.J., 678.

(2) (1899) I.L.R., 22 Bom., 318.

for the purpose of settlement and for other reasons and it may well have been that the District Munsif thought that he should put a stop to these tactics and have the parties before him personally. I think that he was perfectly right in proceeding under his rule. With regard to the provisions of Order X on which the learned vakil for the appellants relied, I think that they relate primarily to the ascertainment of points in dispute and may point out that they do not refer to the administration of an oath or provide for the examination or cross-examination of parties. I must respectfully dissent from the decision in *Satu v. Hanmantrao* (1). With regard to the merits of the case, the plaintiff set up a possessory title under which she and all the defendants claimed the property as owners in common, and I think the evidence was sufficient to support the plaintiff's claim. I agree that this second appeal should be dismissed with costs.

S.V.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Aylmer and
Mr. Justice Kumaraswami Sastriyar.

MARTURU SUBBAMMA (DEFENDANT), APPELLANT,

v.

GADDE NARAYYA (PLAINTIFF), RESPONDENT.*

*Transfer of Property Act (IV of 1882), ss. 58 (a) and (d), 67 and 68 (c)—
Usufructuary mortgage—Failure of mortgagor to deliver possession—Right of
mortgagee to sue for sale.*

Held, by the Full Bench:—Where a mortgagor fails to deliver possession to his mortgagee, the mortgage is not a usufructuary mortgage within the meaning of section 58 (d) of the Transfer of Property Act, and the mortgagee is entitled to bring a suit for sale of the mortgaged property.

Sections 58 (a) and (d), 67 and 68 (c) of the Transfer of Property Act referred to.

Ram Narayan Singh v. Adhindra Nath Mukherji (1917) I.L.R., 44 Cal., 388 (P.C.), followed.

Arunachalam Chetti v. Ayyavayyan (1898) I.L.R., 21 Mad., 476 (F.B.), overruled.

1917,
April,
4 and 11
and
October,
3, 9 and 12

(1) (1899) I.L.R., 23 Bom., 318.

Second Appeal No. 1672 of 1915 (F.B.).

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SECOND APPEAL against the decree of J. C. FERNANDEZ, the District Judge of Guntūr, in Appeal No. 389 of 1913, preferred against the decree of L. NARAYANA AYYAR, the District Munsif of Tenali, in Original Suit No. 45 of 1913.

This was a suit brought in 1912 for sale of property usufructuarily mortgaged by the defendant to plaintiff on 15th March 1902, for Rs. 75, on the allegation that the defendant did not give him possession. The defendant pleaded *inter alia* that plaintiff was put in possession of the mortgaged property and was therefore not entitled to sue for sale and that the mortgage amount was discharged from the usufruct. The Court of first instance held on the authority of *Arunachalam Chetti v. Ayyavayyan*(1) that the plaintiff being a usufructuary mortgagee, pure and simple, was not entitled to sue for sale and was also barred by article 120 of the Limitation Act from suing for sale, more than six years having elapsed from the time when defendant failed to give possession. On appeal by the plaintiff, the District Judge held that the mortgage deed did not contain a covenant to pay that the defendant never put the plaintiff in possession, and that the plaintiff was entitled to sue for sale. The defendant preferred this second appeal to the High Court.

The mortgage document ran as follows :—

“EXHIBIT A.

The mortgage deed of immoveable property executed on the 15th of May, 1902, by Subbamma . . . in favour of Gadde Narasayya Garu

I borrowed from you for my own necessities. . . . Rs. 75. I have borrowed seventy-five rupees and the interest upon it is at the rate of Rs. 1-9-0 (one rupee nine annas, per cent). For the principal and interest upon this, you shall, out of the mortgaged property detailed below, deduct from the income upon my half share in the Sngupalam inam after meeting the expenses, the interest first and then, if anything remains, it shall go to reduce the principal. The mortgage for this is the inam land of acres 3 and 73 cents I have not as yet mortgaged or otherwise alienated the aforesaid property. I herewith give to you the said inam sale-deed, which was executed in my favour by Dhanikonda Ramaswamy

(1) (1898) I.L.R., 21 Mad., 476 (F.B.).

Garu. Therefore, as soon as the said debt is discharged I shall take back the said sale-deed. This deed of mortgage of dry inam and backyard compound is executed with my consent.

(Signed) Maruturu Subbamma.”

V. Ramadoss for the appellant.

K. V. L. Narasimham for the respondent.

This Second Appeal coming on for hearing in the first instance before SESHAGIRI AYYAR and KUMARASWAMI SASTRIYAR, JJ., the following ORDER OF REFERENCE TO A FULL BENCH was made by

KUMARASWAMI SASTRIYAR, J.—As regards the contention that there is a covenant to pay in respect of the mortgage of item No. 1, we must overrule it, having regard to *Ram Narayan Singh v. Adindra Nath Mukherji*(1) and *Hakeem Patte Muhammad v. Shaik Davood*(2). Consequently section 68, clause (a) of the Transfer of Property Act, is not applicable. The further question is whether in the events which have happened, the mortgagee is not entitled to bring item No. 1 to sale. The mortgagor covenanted to put the mortgagee in possession, and the finding is that he has broken the covenant. Therefore section 68, clause (c) of the Transfer of Property Act, applies.

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Mr. Ramadoss argued that the failure to give possession, although it may give a right to the mortgage money, would not enable the mortgagee to sue for the sale of the property. He is supported in his contention by *Arunachalam Chetti v. Ayyavayyan*(3) and by the cases following that decision. On the other hand the recent decision of the Judicial Committee in *Ram Narayan Singh v. Adhindra Nath Mukherji*(1) seems to suggest that the failure to fulfil the conditions mentioned in clauses (b) and (c) of section 68 would ensure the same legal consequences as may be enforced under clause (a).

The right to sue for sale under a covenant to pay the mortgage money is provided for by section 67 of the Transfer of Property Act. As at present advised, we fail to see why that section should not be appealed to where there is a default under

(1) (1917) I.L.R., 44 Calc., 388. (2) (1916) I.L.R., 39 Mad., 1010.
(3) (1898) I.L.R., 21 Mad., 476 (F.B.).

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clauses (b) and (c) of section 68. *Arunachalam Chetti v. Ayyavayyan*(1) seems to proceed on the footing that the ordinary right of a usufructuary mortgagee to realize the monies due to him is to claim possession. In other words, notwithstanding the fact that the mortgagor refuses to perform his part of the contract, the mortgagee is only entitled to specific performance of the contract and is precluded from claiming any other relief. We think this position requires reconsideration. The Judicial Committee by saying that accounts might have to be taken in the case already referred to impliedly recognize the mortgagee's right to sue for the sale of the property and we think that the restriction on the mortgagee's right enunciated in *Arunachalam Chetti v. Ayyavayyan*(1) is not justifiable.

Under these circumstances, we must refer the following question for the decision of the Full Bench:—

“Whether a usufructuary mortgagee is not entitled to sue for the sale of the property mortgaged to him when the mortgagor fails to deliver possession of the said property to him and has consequently to sue for the money.”

ON THIS REFERENCE—

V. Ramadoss for the appellant.—The mortgage does not contain any covenant to pay and it is purely a usufructuary mortgage and as there is no contract to the contrary, the mortgagee has no right to sue for sale; see *Arunachalam Chetti v. Ayyavayyan*(1) and section 67 (a) of the Transfer of Property Act. The mortgagee has also no charge; *Ram Narayan Singh v. Adhindra Nath Mukherji*(2). Reference was also made to *Lazarannessa Bibi v. Mahomed Jaffur*(3), *Luchmeshar Singh v. Dookh Mochan Jha*(4), *Kangaya Gurukul v. Kalimuthu Annari*(5), *Perianna Servaigaran v. Marudainayagam Pillai*(6) and *Samayya v. Nagalingam*(7).

K. V. L. Narasimham for the respondent.—As possession was not given, the plaintiff was not a usufructuary mortgagee, but is only a simple mortgagee; see the definition of ‘usufructuary mortgage’ in section 58 (d) of the Act. Section 67 (a)

(1) (1898) I.L.R., 21 Mad., 476 (F.B.). (2) (1917) I.L.R., 44 Calc., 388.
(3) (1912) 13 I.O., 336. (4) (1897) I.L.R., 24 Calc., 677.
(5) (1904) I.L.R., 27 Mad., 526 (F.B.). (6) (1899) I.L.R., 22 Mad., 332.
(7) (1892) I.L.R., 15 Mad., 174.

cannot apply as the restriction therein contained refers only to a usufructuary mortgagee ‘as such.’ The words ‘as such’ must be given their due meaning. The property has been secured for the money; see the definition of ‘mortgage money’ in section 58 (a) of the Act. On failure to give possession the mortgage money has become payable according to section 68 (c) of the Act; and the mortgagee is entitled to sue for sale and realize his money by sale of the property: see *Venkatarao v. Mahableshwar*(1) and *Bihari Lal v. Deoki Nandal Lal*(2).

The Court expressed the following OPINIONS:—

WALLIS, C.J.—I agree with the referring Judges and answer *WALLIS, C.J.* the question in the affirmative. A mortgagee does not become a usufructuary mortgagee within the meaning of section 58 (d) until the mortgagor has given him possession of the mortgaged property and so put him in a position to realize his security out of the accruing rents and profits. It is because the intention is that the security shall be realized in this manner that by section 67, proviso (a), a usufructuary mortgagee as such is debarred from suing for foreclosure or sale under the section. A mortgagee to whom possession has not been given is not a usufructuary mortgagee. Consequently he does not come within the proviso and is entitled to sue for foreclosure or sale under the section, in the absence of a contract to the contrary, “at any time after the mortgage money has become payable to him.” Section 68 entitles the mortgagee to sue the mortgagor for the mortgage money,

“where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.”

The first of these events having happened, the mortgagee has become entitled to sue for the mortgage-money, or in other words, the mortgage-money has become payable to him, and he is entitled under section 67 to sue for foreclosure or sale, in the absence of a contract to the contrary which cannot be implied. On the contrary the fact that the mortgagor was unable to put the mortgagee in a position to realize his security out of the rents and profits makes it only reasonable that he should be

(1) (1902) I.L.R., 28 Bom., 241.

(2) (1914) 24 I.C., 867.

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APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and
Mr. Justice Kumaraswami Sastriyar.

ANNAMALAI CHETTIAR (TWENTY-FIFTH DEFENDANT),
APPELLANT,

v.

PALAMALAI PILLAI AND TWO OTHERS (PLAINTIFFS NOS. 2 TO 4),
RESPONDENTS.*

1917,
March,
27 and 28,
April, 18,
and October,
9, 10 and 26.

Civil Procedure Code (Act V of 1908), sec. 64, Expl., effect of—Attachment of land by one decree-holder—Application for rateable distribution by other decree-holders—Satisfaction of attaching decree-holder's decree by subsequent private alienation of the land attached—The other decree-holders cannot impeach the alienation.

Where a decree-holder attached land in execution of his decree and the other decree-holders applied for rateable distribution without attaching the land in execution of their decrees and subsequently the judgment-debtor alienated the land and paid off the attaching decree-holder.

Held by the Full Bench, that the other decree-holders were not entitled to question the alienation under section 64 of the Civil Procedure Code.

Mina Kumari Bibi v. Bijoy Singh Dudhuria (1917) I.L.R., 44 Calo., 662 (P.C.), relied on.

Effect of Explanation to section 64, Civil Procedure Code, considered.

SECOND APPEAL against the decree of E. H. WALLACE, the District Judge of Tanjore, in Appeal No. 40 of 1914, preferred against the decree of A. S. BALASUBRAHMANYA AYYAR, the Subordinate Judge of Kumbakonam, in Original Suit No. 2 of 1912.

The facts are given in the first paragraph of the ORDER OF REFERENCE of SESHAGIRI AYYAR, J.

Hon. Mr. S. Srinivasa Ayyangar, the Advocate-General, and K. Raja Ayyar for the appellant.

Hon. Mr. T. Rangachariar, E. Duraiswami Ayyar and K. R. Narayanaswami Ayyar for the respondents.

This Second Appeal came on for hearing in the first instance before SESHAGIRI AYYAR and BAKWELL, J.J., who made the following ORDERS OF REFERENCE to a Full Bench:—

SESHAGIRI AYYAR, J.—The twenty-ninth defendant was heavily indebted and a large number of decrees were passed

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WALLIS, C.J. remitted to the ordinary remedies of a mortgagee by foreclosure or sale, and the legislature has recognized this by making the mortgage money payable in this event. He has advanced his money on the security of the mortgagor's interest in the property, and mortgagor has failed to perform his part of the contract by putting him in possession and enabling him to realize his security in that manner, and there is no reason why he should not be allowed to realize it by bringing the mortgagor's interest to sale if he so desires or for requiring him to undergo the expense and trouble of litigation with third parties unless he is content to lose his security. These aspects of the question appear to have been overlooked in *Samayya v. Nagalingam*(1) and *Arunachalam Chetti v. Ayyavayyan*(2). In *Ram Narayan Singh v. Adhindra Nath Mukherji*(3) the Judicial Committee observed:

"It must also be borne in mind that if the mortgagor be in the first instance under no personal liability, such liability may arise under section 68 (b) or (c) of the Transfer of Property Act."

As pointed out in the Order of Reference, once the mortgage-money becomes payable under any clause in section 68, there can be no reason for refusing to give effect to section 67 which allows of a suit for foreclosure or sale "at any time after the mortgage money has become payable" except in certain cases of which this is not one.

I accordingly answer the question in the affirmative.

AYLING, J.—I concur.

KUMARA-
SWAMI
SASTRIYAR, J. KUMARASWAMI SASTRIYAR, J.—I agree and have nothing useful to add to what I have said in the ORDER OF REFERENCE.
N.R.

(1) (1892) I.L.R., 15 Mad., 174. (2) (1898) I.L.R., 21 Mad., 476 (F.B.).
(3) (1917) I.L.R., 44 Calo., 388 at p. 400.

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against him. A number of execution applications were presented under those decrees. We are concerned at present only with three of them, namely applications in the decree in Original Suit No. 22 of 1909, in the decree in Original Suit No. 8 of 1910 and the decree obtained by the twenty-fifth defendant in Original Suit No. 32 of 1909. The allegation of this last decree-holder is that the twenty-ninth defendant with a view to defraud him and the other creditors executed a sale-deed nominally in favour of the plaintiff. The deed is dated the 15th June 1910. When an application for attachment was made against the properties in suit, the plaintiff put in a claim petition alleging that they were his and that they should be released from attachment. The Subordinate Judge of Kumbakonam held that the claim was fraudulent and dismissed it. Thereupon the present suit was instituted for a declaration that the sale is valid. The first Court held that no consideration passed for the sale and that the plaintiff and the twenty-ninth defendant colluded together to defraud the creditors. On appeal, the District Judge differed from the Subordinate Judge on this question and held that the sale was supported by consideration. Hence this Second Appeal by the twenty-fifth defendant. The learned Advocate-General does not contest the finding as to consideration. He contended that even on that finding, the sale should be held invalid. The question of law now argued was raised in both the lower Courts, but has not been adequately dealt with by either of them. The contention of the learned Advocate-General is that as at the time of the sale to the plaintiff an attachment of the properties was subsisting, although his client was not the attaching creditor, he is entitled to take advantage of the attachment as his client had applied under section 73 of the Code of Civil Procedure for rateable distribution. The attachment referred to was in Original Suit No. 22 of 1909. Exhibit DDD is the execution application. On that application the properties were attached on the 22nd January 1910. On that day, the application was adjourned for taking further steps to the 9th February 1910. The application was ultimately dismissed on the 29th March 1910. The contention of Mr. Rangachariar, the learned vakil for the respondents, is that this dismissal operated to put an end to the attachment made in January 1910 and that therefore at the time of the sale to the plaintiff, there was no subsisting

attachment. It may be mentioned that against this dismissal the decree-holder in Original Suit No. 22 of 1909 appealed to the High Court. The order of the High Court is Exhibit DDD2. The dismissal was confirmed. It was argued before us that the appeal was really withdrawn. But as the matter has not been enquired into, I prefer not to express any opinion on that question. Notwithstanding the dismissal of the petition by the Subordinate Judge and the dismissal of the appeal by the High Court, the properties were directed to be sold under the original execution application. Thereupon the present plaintiff put in a claim petition, Exhibit VIIc, for releasing the property from attachment and to prevent the threatened sale. The claim was enquired into by the Subordinate Judge and it was contended before him that the attachment ceased to exist by the dismissal of the petition on the 29th March 1910. He, however, held that the attachment subsisted. It may be that this conclusion is not *res judicata* as the present appellant was not a party to the proceedings. It has, however, to be found whether there was default on the part of the decree-holder and whether in consequence of that default, his application was dismissed. Consequently, if it is necessary to express a final opinion on that question, I would ask the lower Court to return a specific finding as to whether the dismissal of the 29th March 1910 was due to want of prosecution on the part of the decree-holder in Original Suit No. 22 of 1909. Another disputed point should also be mentioned before dealing with the question of law. The present appellant's decree was obtained in Original Suit No. 32 of 1909. It is dated the 22nd September 1909. He applied for execution on the 4th January 1910. It is said that this application also was dismissed for want of prosecution and that therefore on the date of the sale to the plaintiff, the twenty-fifth defendant's application for rateable distribution was not pending. That question again has not been considered by the Courts below. They seem to have taken it for granted that he would be entitled to rateable distribution. It may become necessary to call for a definite finding on this question as well.

As regards the attachment in Original Suit No. 8 of 1910, it is enough to point out that that was issued by the District Court of Tanjore, and as neither the twenty-fifth defendant nor the other decree-holders had their decrees transferred to the District

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Court, the attachment under that decree is of no value to them.

Now I proceed to consider the question of law argued by the learned Advocate-General. The contention of the learned vakil for the respondents was that as the decree in Original Suit No. 22 of 1909 was satisfied in September 1911, the sale to his client was not obnoxious to section 64 of the Code. Broadly put, Mr. Rangachariar's reasoning is that in order that a private alienation during the pendency of an attachment may be caught by section 64, the particular attachment under which the twenty-fifth defendant and the other decree-holders claim should have resulted in the realization of the assets. If the matter were *res integra*, and if I were not hampered by precedents, I would have found great difficulty in accepting this contention. In my opinion, the legislature by section 73 has enabled decree-holders other than the one who attaches the property to reap the benefit of his labours, provided they comply with certain requirements. The attaching decree-holder is *dominus litis*. He alone can apply to bring the property to sale, and he is entitled in the first instance to get his expenses paid out of the sale-proceeds. Subject to this reservation, he holds no higher position than the other decree-holders who have applied for rateable distribution prior to the realization of the assets. The object is on the one hand not to harass the judgment-debtor by too many applications for attachment by decree-holders, and on the other, to relieve the various decree-holders from the necessity of applying for separate attachments when their object can be gained by taking shelter under a pre-existing attachment. Such an attachment, although it does not prevent the decree-holders from separately attaching the property secures to them a benefit without themselves attaching the properties. Consequently, the attaching creditor is in a sense the representative of all the other decree-holders.

The language of the section as well as of the explanation suggests that if at the time of the private alienation there was a subsisting attachment, all persons who could have enforced their claim for rateable distribution should have the benefit of such an attachment. In the explanation, the language is 'claims enforceable under an attachment' and not 'enforced under an attachment.' The other construction would enable an attaching

decree-holder to enter into a fraudulent compromise with the judgment-debtor and the private alienee and thus defeat all the claims for rateable distribution. I do not think the legislature contemplated such a state of affairs; but the course of decisions under section 276 of the old Code of Civil Procedure and under section 64 of the new Code are all one way. Under the old Code, there were two classes of decisions. In the one, it was held that it is the attaching decree-holder alone that can avoid a private alienation. *Manohar Das v. Ram Autar Pande*(1) has taken this view. The other view was that all persons who would be entitled to rateable distribution have the right to impeach a private alienation if the attachment under which they claim was subsisting. The able and exhaustive judgment of Mr. Justice TELANG in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(2) enunciates this proposition. In that judgment, the learned Judge discussed *Durga Churn Rai Chowdhry v. Monmohini Dasi*(3) and *Ganga Din v. Khushali*(4) where it was held that if the attachment ceased to have force by the decree being satisfied, other decree-holders could derive no benefit under it. Mr. Justice TELANG apparently accepted this view as correct. The same view was held in Madras under the old Code: *Kunhi Moossa v. Makki*(5), *Vidudhapriya Tirthaswami v. Yusuf Sahib*(6) and *Venkatrama Iyer v. Esumsa Rowthen*(7). In this state of the authorities the Act of 1908 was passed and it introduced the explanation to section 64 which did not exist under the old Code. It is clear that the legislature intended to uphold the view of Mr. Justice TELANG, as against the view of the Allahabad Judges in *Manohar Das v. Ram Autar Pande*(1). If the legislature intended to go further, the language could certainly have been clearer. It must be noticed that until the new Act was passed, there was no decision which went to the length of holding that even though the decree of the attaching creditor had been satisfied, still the other decree-holders would be entitled to impeach the private alienation, provided at the time of the private alienation, they had applied for rateable distribution. The natural inference to be drawn from the action of the legislature is that the

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(1) (1908) I.L.R., 25 All., 431.

(3) (1888) I.L.R., 15 Calc., 771.

(5) (1900) I.L.R., 28 Mad., 478.

(2) (1892) I.L.R., 16 Bom., 91.

(4) (1885) I.L.R., 7 All., 702.

(6) (1905) I.L.R., 28 Mad., 380.

(7) (1910) I.L.R., 33 Mad., 429.

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explanation to section 64 was intended to give legislative sanction to the view enunciated by Mr. Justice TELANG in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(1) and no more. Since the explanation, there have been some decisions in Bombay. The other High Courts have not dealt with the question. In *Khushalchand v. Nandram Sahebram*(2), in *Jetha Bhima & Co. v. Lady Janbai*(3) and in *Jetha Bhima & Co. v. Lady Janbai*(4) the learned Judges of the Bombay High Court have held that if the decree under which an attachment was made was satisfied, other decree-holders who had applied for rateable distribution will not be entitled to impeach the alienation. In *Bibi Miyakhan v. Gulabchand*(5), apparently, a different view was taken. But it is pointed out in *Jetha Bhima & Co. v. Lady Janbai*(3) by Mr. Justice BEAMAN that the learned Judges who decided *Bibi Miyakhan v. Gulabchand*(5) disclaimed any intention of enunciating the proposition imputed to them. Moreover one of the learned Judges who took part in *Bibi Miyakhan v. Gulabchand*(5) was a party to the decision in *Khushalchand v. Nandram Sahebram*(2) and in *Jetha Bhima & Co. v. Lady Janbai*(4). Under these circumstances, I would have held that as the decree in Original Side No. 22 of 1909 was satisfied, the twenty-fifth defendant and persons like him are not entitled to question the private alienation made in favour of the plaintiff. But my learned brother is inclined to take a different view, and as I have said before, the language of the section and reason and justice are in favour of the broader proposition contended for by the learned Advocate-General.

Since writing the above, I came across the decision of the Judicial Committee in *Mina Kumari Bibi v. Bijoy Singh Dudhuria*(6). Although the decision was under the old Code, in the argument, Counsel referred to the new Code as well. The Board seem to doubt the correctness of *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(1). Further they lay down that an attachment which does not finally fructify is of no avail. I drew the attention of my learned colleague to this judgment. He thinks that as the decision was under the old Code, it is not

(1) (1892) I.L.R., 16 Bom. 91.

(3) (1912) 14 Bom. L.R., 511.

(5) (1911) 13 Bom. L.R., 1189.

(2) (1911) I.L.R., 35 Bom., 516.

(4) (1914) I.L.R., 37 Bom., 138.

(6) (1917) I.L.R., 44 Calc., 662 (P.C.).

binding on us, having regard to the explanation added to the new Code. I would, therefore, refer for the decision of the Full Bench the following question :—

“ Whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise are entitled to question a private alienation made during the continuance of such attachment ? ”

BAKEWELL, J.—In order that a judgment-creditor may obtain a rateable distribution of assets of his debtor, he must have applied for execution of his decree to the Court by which the assets are held before the receipt thereof. This claim may therefore be made either before or after property of the debtor has been attached and must be made before the proceeds of that property have been received by the Court, but it subsists independently of the attachment. Where assets result from the sale of immoveable property, any person entitled to share in a rateable distribution thereof may apply to the Court to set aside the sale (Order XXI, rule 90); and, since an order setting aside a sale destroys the fund in which he claims a share, I think that such a person's interests are affected within the meaning of rule 92 and that he should be given notice of an application for such an order. For the purposes therefore of challenging and upholding a sale of his debtor's property a person entitled to rateable distribution may become a party to proceedings instituted by a rival judgment-creditor.

The Code does not declare the procedure to be observed upon the distribution of assets, but since it is a general principle that all persons interested in a fund are entitled to appear and to be heard when it is dealt with, and since a person cannot complain that his interests have been neglected if he has failed to bring them to the notice of the Court and the other claimants, I think that each claimant should present an application in the execution proceedings instituted for the realization of assets and should give notice thereof to the decree-holder who is prosecuting them. He will then be entitled to notice of any application relating to the assets and to this extent at least is in the position of a party to the execution proceedings. As my learned brother has pointed out, this procedure avoids multiplicity of proceedings in

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execution of decrees against the same debtor and the resulting complications. An attachment of immoveable property is effected by an order prohibiting the debtor from dealing with the property and all persons from taking any benefit from such dealing, and by a proclamation and publication of this order intended to give notice thereof to all persons interested. *Prima facie* a public injunction of this kind should only be dissolved by an express order of the Court upon notice to the parties interested. The explanation to section 64 of the Code declares that the words used therein "claims enforceable under the attachment" include "claims for the rateable distribution of assets," and accordingly I think that the section should be read as providing that where an attachment has been made, any private transfer of the property attached shall be void as against all claims enforceable under the attachment or for the rateable distribution of assets to be realized thereunder.

Having regard to the above provisions, I think that it was the intention of the legislature to place claimants for rateable distribution of assets as far as possible in the same position as the decree-holder who is actively prosecuting the proceedings from which all expect to benefit and no order should be passed by the Court which may affect their interests without notice to them, such, for instance, as an order raising an attachment or directing satisfaction to be entered of the decree which is in course of execution.

The Bombay cases and the decision in *Mina Kumari Bibi v. Bijoy Singh Dudhuria*(1), which have been cited, were with reference to the Code of 1882, from which the present Code differs largely both in form and matter, and with all respect I deprecate the use of decisions under the former law for the purpose of construing a comprehensive enactment such as the Code of Civil Procedure when the provisions construed are not identical.

I agree with the reference proposed by my learned brother.

ON THIS REFERENCE—

K. Raja Ayyar for the appellant.—Decree holders who have not attached but who are entitled to rateable distribution are

(1) (1917) I.L.R., 44 Calc., 662 (P.C.).

entitled to all the benefits of the attachment effected by another decree-holder. Hence if an alienation is made pending the attachment, that alienation is void as against all the other decree-holders entitled to rateable distribution, even though the attaching decree-holder is thereafter satisfied; vide Explanation to section 64, Civil Procedure Code; *Lakshmi v. Kuttunni*(1) and *Mohunt Megh Lall Pooree v. Shib Pershad Madi*(2). As to what 'assets' mean, see *Narasimhachariar v. Krishnamachariar*(3). He referred to *Mina Kumari Bibi v. Bejoy Singh Dudhuria*(4). The respondent has prevented the realization of the assets by means of the private alienation. The word is 'enforceable.' The claim of others will be enforceable if the attachment had been followed by sale, etc., in the normal course. [He was stopped.]

Hon. Mr. T. Rangachariar for the respondents.—The explanation to section 64 is only nominally new; the decisions under the old Civil Procedure Code proceeded on the view of the law as now laid down by the explanation. All decree-holders are entitled to attach; unless each is vigilant and himself attaches, he will not have the benefit of another's attachment if that other is otherwise satisfied and his attachment consequently ceases. The Privy Council point out that there is only one attachment; vide *Mina Kumari Bibi v. Bejoy Singh Dudhuria*(4). The right given by section 73 fructifies only when assets are held by a Court. Assets can be realized or held by a Court only if there is a sale and there can be a sale only if there is an attachment; vide *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(5), *Kunhi Moossa v. Makki*(6) and *Vibudhapriya Tirthaswami v. Yusuf Sahib*(7). The difference between the old and new Codes is only verbal. Effect must also be given to Order XXI, rule 69, which enacts that if the decree amount is paid into Court, the sale shall be stopped. See also Order XXI, rules 89, 55 and 57. The claims will be 'enforceable' only if assets are realized; vide *Jetha Bhima & Co. v. Lady Janbai*(8), *Venkatrama Iyer v. Esumsa Rowthen*(9), *Khushalchand v.*

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(1) (1887) I.L.R., 10 Mad., 57. (2) (1881) I.L.R., 7 Calc., 34.
(3) (1915) 26 M.L.J., 406. (4) (1917) I.L.R., 44 Calc., 662 (P.C.).
(5) (1892) I.L.R., 16 Bom., 91 at p. 105.
(6) (1900) I.L.R., 23 Mad., 478. (7) (1905) I.L.R., 28 Mad., 380.
(8) (1913) I.L.R., 37 Bom., 138 at p. 142.
(9) (1910) I.L.R., 33 Mad., 429.

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Nandram Sahebram(1), *Galstoun v. Woomes Chundra Bonnerjee*(2) and *Sorabji Coovarji v. Kala Reghunath*(3). This is only a question of procedure and there must be uniformity. See also *Jetha Bhima & Co. v. Lady Janbai*(4). The case against my position is *Bibi Miyakhan v. Gulabchand*(5). Other cases in favour of my position are *Durga Churn Rai Chowdhry v. Monmohini Dasi*(6) and *Gouri Dutt v. Amar Chand*(7). *Katum Sahiba v. Hajee Badsha Sahib*(8) holds that assets mean assets realized in execution.

[KUMARASWAMI SASTRIYAR, J.—The word is ‘enforceable’ in the Explanation to section 64. Enforceable when? Is it not on the date of ‘alienation’?]

No; at the date when the validity of the alienation subsequently comes into question. The alienation is not void but only voidable, see *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi*(9) and *Gosta Behari v. Sankar Nath*(10). Once the attachment is withdrawn by payment the alienation becomes valid; see *Umesh Chunder Roy v. Raj Bullabh Sen*(11). See the form of the order of attachment in Civil Procedure Code, viz., Form No. 24. The claim for rateable distribution is dependent or contingent upon the attachment.

K. Rajah Ayyar in reply.—The claims enforceable under the attachment include the claim of the attaching creditor and of the other decree-holders. The alienation is void against all claims, whatever may become of the attachment. If we look to Order XXI, rule 90, a person entitled to share can set aside a sale though he applies after sale but before the assets are realized; *Hafez Mahomed Ali Khan v. Damodar Pramanick*(12) and *Maharaja of Burdwan v. Apurba Krishna Roy*(13). But the people who would be entitled to the benefit of section 64 are only those who applied before the alienation. If there are two attachments and other persons have applied for rateable distribution between the two, then they are entitled to rateable

- (1) (1911) I.L.R., 35 Bom., 516. (2) (1917) I.L.R., 44 Calc., 789.
(3) (1912) I.L.R., 36 Bom., 156 at p. 163.
(4) (1912) 14 Bom. L.R., 511. (5) (1911) 13 Bom. L.R., 1189.
(6) (1883) I.L.R., 15 Calc., 771. (7) (1911) 15 C.L.J., 49.
(8) (1915) I.L.R., 38 Mad., 221 at p. 224.
(9) (1902) I.L.R., 29 Calc., 154. (10) (1916) 36 I.C., 510.
(11) (1882) I.L.R., 8 Calc., 279 at p. 281.
(12) (1891) I.L.R., 18 Calc., 242. (13) (1911) 14 C.L.J., 50.

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distribution even if the first attachment is taken away or withdrawn. The argument based on Order XXI, rules 54, 55 and 57 is useless as they do not deal with the effect of alienation. Under section 73, Civil Procedure Code, the claims do not depend upon the attachment but upon money coming into Court by whatever means. Section 63, Civil Procedure Code, shows that an attaching creditor is a trustee for others. Section 73 aims against multiplicity of attachments and proceedings thereon. A second attachment of the same property is unnecessary. The mischief against which section 64 was enacted will be allowed full play if the other argument is accepted; for a judgment-debtor having several decrees against him may combine with a decree-holder for a very small sum and by paying him by a private alienation can defeat all the others. The Privy Council case of *Mina Kumari Bibi v. Bijoy Singh Dudhuria*(1) was one for possession and was under the old Code and it does not decide anything in favour of the opposite view. The Explanation to section 64, Civil Procedure Code, was added expressly to overrule *Manohar Das v. Ram Autar Pande*(2) and *Ramakrishna Reddi v. Kotta Kota Reddi*(3) and the Calcutta cases quoted by the other side. The other cases quoted by the other side were explained and distinguished on the ground that all of them were decided under the old Code.

The Court expressed the following OPINIONS:—

WALLIS, C.J.—The question is as to the effect of the WALLIS, C.J. explanation added to section 64 (formerly section 276) of the Code of Civil Procedure of 1908 that for the purposes of the section “claims enforceable under an attachment include claims for the rateable distribution of assets.” It had been held by the Courts in India that decree-holders other than the attaching decree-holder acquired no right to rateable distribution under section 295 (now 73) of the Code until assets had been realized in execution, and Sir LAWRENCE JENKINS delivering the judgment of the Judicial Committee has observed in the recent case of *Mina Kumari Bibi v. Bijoy Singh Dudhuria*(1):

“To bring section 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court.”

- (1) (1917) I.L.R., 44 Calc., 662 (P.C.).
(2) (1903) I.L.R., 25 All., 431. (3) (1907) I.L.R., 30 Mad., 96 at p. 100.

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Applying this principle the Indian Courts held under section 276 that, if the judgment-debtor has satisfied the claim of the attaching decree-holder even by alienating the attached property, that does not give the other decree-holders who have applied for execution any right to question the alienation; and in the case referred which was decided with reference to the old Code, the Judicial Committee seem to have gone, if anything, further, and have held that the attaching decree-holder himself cannot object to a private alienation by the judgment-debtor subsequent to the attachment unless the attached property has been brought to sale in execution of the decree in respect of which the property was attached. In that case a decree-holder, who had attached and brought to sale and purchased the suit property subsequently to a private alienation by the judgment-debtor, was held not to be entitled to defend his title as against the alienee from the judgment-debtor under section 276 by relying on the fact that before the date of the alienation he had attached the suit property in execution of another decree without bringing the property to sale in execution of that decree. In these circumstances, it was held that section 276 did not protect him.

Section 64 of the present Code affords no greater protection to the attaching decree-holder than section 276 of the old Code, and if he cannot protect himself against an alienation after attachment unless the attached property is brought to sale in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in any better position. It may even be said that, as regards other decree-holders, the language used in the body of section 64 is, if anything, less favourable than the language of section 276, because it only renders void as against the claimants specified alienations which are "contrary to such attachment," and an alienation by means of which the decree in execution of which the attachment was made is satisfied can scarcely be regarded as an alienation contrary to the attachment.

As pointed out by SESHAGIRI AYYAR, J., full effect is given to the explanation to section 64 by regarding it as intended to settle the difference between *Sorabji Edulji Warden v. Govind*

Ramji, F. N. Wadia and another(1) and *Manohar Das v. Ram Autar Pande*(2) in favour of the Bombay decision. Further, if it had been intended to prevent all alienations of the attached property after attachment unless made in execution of the decree and for the benefit of the decree-holders entitled to rateable distribution under section 73 (formerly 295), the legislature would have said so plainly. On the contrary, not only is the language of the body of section 64, if anything, more restrictive than the language of section 276, but the legislature has strengthened the provisions of the former section 275 by providing in Order XXI, rule 59, that on satisfaction of the decree, whether made through the Court or certified to the Court, the attachment shall be deemed to be withdrawn, whereas section 275 only provided for its being withdrawn in such event on the application of any person interested. There are other alterations pointing the same way which are fully dealt with in the Opinion of KUMARASWAMI SASTRI, J. The fact that, when the attached property has been sold in execution, the other decree-holders are now expressly empowered to apply to set aside the sale under Order XXI, rule 90, a point on which there was a conflict of opinion under the former section 311, does not appear to me to affect the present question. A decree-holder who is entitled to share in the sale-proceeds should obviously be regarded as interested in the sale.

For the reasons given, I would answer the question in the negative.

AYLING, J.—I agree.

KUMARASWAMI SASTRIYAR, J.—The question referred to us for decision is:

"whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise, are entitled to question a private alienation made during the continuance of such attachment"

and the answer turns on the scope and effect of the explanation added to section 64 of the Civil Procedure Code of 1908 which runs as follows:

"For the purpose of this section claims enforceable under an attachment include claim for the rateable distribution of assets."

(1) (1892) I.L.R., 16 Bom., 91.

(2) (1903) I.L.R., 25 All., 421.

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The section otherwise reproduces section 276 of the Code of Civil Procedure of 1882, which rendered private alienations of property after attachment void against all claims enforceable under it.

Under the Civil Procedure Code of 1859, section 240, which is practically the same as section 276 of the Acts of 1877 and 1882 rendered private alienation subsequent to the attachment void. This section was construed by their Lordships of the Privy Council in *Anund Loll Doss v. Jullodhur Shaw*(1) to mean that the private alienation was only void in so far as it was necessary to secure the execution of the decree to the creditor who obtained the attachment and that the protection cannot be extended to all persons who at any future time might possibly obtain execution of their decrees. Section 276 of the Act X of 1877 which introduced the words "as against all claims enforceable under the attachment" was, in recognition of the limitation imposed by Courts in India and the Privy Council on the general language used in section 240 of the Act of 1859. Sections 270 and 271 of the Act of 1859 gave priority to the first attaching creditor and provided for rateable distribution between other decree-holders who had taken out execution and not obtained satisfaction in so far as any surplus remained out of the sale-proceeds.

The Acts of 1877 and 1882 took away the priority of the first attaching creditor and in place of sections 270 and 271 of the old Code enacted section 295 which provided for rateable distribution between all decree-holders who prior to the realization of assets had applied to the Court for execution and had not obtained satisfaction.

Though the position of decree-holders who were entitled to rateable distribution in case the attachment culminated in a sale was fairly clear, questions arose as to what was to happen if there was a private alienation during the existence of an attachment which was put an end to either by satisfaction of the decree or was raised owing to other reasons. In *Ganga Din v. Khushali*(2), the judgment-debtor sold attached property and paid off the decree-holder who attached it. Decree-holders who would have been entitled to rateable distribution if the attachment

(1) (1872, 14 M.L.A., 543.

(2) (1885) I.L.R., 7 All., 702.

had not been put an end to objected to the removal of the attachment but their objection was overruled on the ground that their claims were not protected by section 276 they having no right to anything till there was an actual sale and realization of assets, and applications for execution, though entitling the decree-holder to rateable distribution under section 295, were not equivalent to an attachment under section 276. The same view was taken in *Manohar Das v. Ram Autar Pande*(1). In *Umesh Chunder Roy v. Raj Bullabh Sen*(2), where an alienation was made pending an attachment, it was held that the attachment ceased on the decree being paid off and that the assignment was good against a subsequent attachment by the same party in execution of another decree.

In *Durga Churn Rai Chowdhry v. Monmohini Dasi*(3), it was held following *Ganga Din v. Khushali*(4), that a claim under section 295 is not enforceable as an attachment against which an assignment is rendered void by the provisions of section 276. PRIGGOTT and RAMPINI, JJ., after pointing out that the legislature had not provided that a petition under section 295 shall have the same effect as an attachment observed as follows :—

"To hold that claims under section 295 are claims enforceable by attachment against which assignments made under section 276 are void, would perhaps be carrying out the intention of the legislature when section 295 was introduced. Unfortunately, the sections of the Code relating to execution were not recast so as to be fully adapted to the new state of things. Section 276 has not been successfully framed with the object of protecting rateable distribution amongst claimants under section 295."

In *Kunhi Moossa v. Makki*(5) a kanom was executed pending an attachment and the decree in execution of which the property demised under the kanom was attached was paid off. It was held that the kanom was valid as against decree-holders who had applied for execution and who would in the ordinary course have been entitled to rateable distribution if the property had been sold. SUBRAHMANYA AYYAR, J., was of opinion that the attachment ceased to be operative in so far as the attaching

(1) (1903) I.L.R., 25 All., 431.

(2) (1832) I.L.R., 8 Cal., 279 at p. 281.

(3) (1883) I.L.R., 15 Cal., 771.

(4) (1885) I.L.R., 7 All., 702.

(5) (1900) I.L.R., 23 Mad., 478.

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creditor was concerned, on the decree amount due to him being paid off and that

“on principle it follows that with reference to the other judgment-creditors also, who, had the attachment resulted in the realization of assets, would have been entitled to a rateable distribution, the attachment became inoperative.”

In *Vibudhapriya Tirthaswami v. Yusuf Sahib*(1) a similar view was taken. It was held by Sir ARNOLD WHITE, C.J., and DAVIES, J., that the rights of decree-holders who had applied for execution of their decrees depended upon section 295 and that unless the events upon the happening of which section 295 would have come into operation, namely, the realization of assets by the Court, happened, they had no claims enforceable under the attachment so as to attract the provisions of section 276 to the alienations questioned. The further question as to whether the words “claims enforceable under the attachment” would include claims of judgment-creditors other than the attaching creditor as was held in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(2) or only the claims of the attaching creditor as was held in *Manohar Das v. Ram Autar Pande*(3) was left undecided.

The decisions in Bombay have placed a more liberal interpretation on section 276. In *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(2) a more liberal interpretation was placed on the words “claims enforceable under the attachment” than was placed by the Allahabad and Calcutta High Courts. It was held that when a sum of money due to the judgment-debtor was attached and he assigned his rights after attachment and other decree-holders subsequently attached the same sum they were entitled to rateable distribution of the sum paid into Court by the garnishee as against the transferee from the judgment-creditor prior to their attachment on the ground that their claims were claims enforceable under the attachment. Mr. Justice TELANG in an elaborate judgment after a review of all the authorities on the point held that while realization of assets under section 295 would protect decree-holders who had applied for execution even subsequent to the alienation their

rights were dependent on realization and consequently would not prevail over the purchaser after attachment if the attachment ceased to have effect owing to the satisfaction of the decree or other causes—the purchaser being perfectly safe in the latter case.

It was in this state of the authorities that the legislature enacted section 64 of the present Code (Act V of 1908). An explanation was added to section 64 to the effect that for the purposes of that section claims enforceable under the attachment included claims for rateable distribution. As pointed out in *Jetha Bhima & Co. v. Lady Janbai*(1), the effect of the explanation is to give legislative approval to the extended meaning given to the words “claims enforceable under the attachment” in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(2). In this view a reference to the authorities as they stood prior to the passing of the new Act would be relevant. It will be useful to consider in this connexion the other relevant provisions of the Code. In section 73 which corresponds to section 295 of the Act of 1882 the words used are “where assets are held by a Court and more persons than one have, before the receipt of assets, made application” instead of “whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court” in section 295 of the old Code. In Order XXI, rule 55, which corresponds to section 275, a clause is added providing that the attachment shall be deemed to be withdrawn and for notification of such withdrawal by proclamation at the place where the property is situate. The only amount to be paid in order to get the attachment withdrawn is the amount decreed with costs and all charges and expenses resulting from the attachment and clauses (b) and (c) only refer to satisfaction and reversal of the decree in execution of which the property is attached. Order XXI, rule 57, which is new, provides for the determination of the attachment if the execution application is dismissed owing to the decree-holder's default. Order XXI, rule 69, which corresponds to section 291 of the Act of 1882, provides that the sale shall be stopped if before the lot is knocked down the debt and costs including the costs of sale are tendered to the officer

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(1) (1905) I.L.R., 28 Mad., 380.

(2) (1892) I.L.R., 16 Bom., 91.

(3) (1903) I.L.R., 25 All., 431.

(1) (1913) I.L.R., 37 Bom., 138.

(2) (1892) I.L.R., 16 Bom., 91.

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conducting the sale or proof given that the amount has been paid into Court. Order XXI, rule 89, corresponding to section 310A, requires that only the amount specified in the proclamation of sale less any payment subsequently made should be paid into Court with 5 per cent of the purchase money. Form 8 of Appendix E to the Code specifies the sum due and authorizes attachment and direct the officer to hold the same until further order of the Court unless the amount specified is paid and similarly the prohibitory order specifies the amount for which the decree has been passed. Form 24 which relates to attachment of immoveable property under Order XXI, rule 54, also gives the amount of the decree in execution of which the attachment is made. It is clear from the rules and forms above referred to that the attachment ceases to have any force as soon as the decree in execution of which the property has been attached is satisfied or the execution application is dismissed owing to the decree-holder's default. It is significant that the last clause of Order XXI, rule 55, and the whole of rule 57 are new and that no reference is made to the claims of persons who would be entitled to rateable distribution. In contrast with this Order XXI, rule 90, which relates to the setting aside of sales for irregularity which corresponds to section 311 of the old Code contains the words "entitled to share in a rateable distribution of assets" not found in section 311. Reference was made in the course of argument to *Lakshmi v. Kuttunni*(1), *Athappa Chetti v. Ramakrishna Nayakan*(2), *Chakrapani Chettiar v. Dhanji Settu*(3) and *Ayodhya v. Nani*(4), which decided that the term "decree-holder" included a person entitled to rateable distribution for the purpose of section 311 and rule 90 has incorporated the result of the decisions. If the legislature intended the attachment to enure for the benefit of all persons entitled to rateable distribution it would similarly have declared that the attachment should cease only on all their claims being satisfied or that the cesser of the attachment should be without prejudice to their rights. That the difficulty created by rules 55 and 57 of Order XXI is real will be clear from the fact that the existence of a valid attachment is necessary in order to bring the property to sale and

(1) (1887) I.L.R., 10 Mad., 57.

(3) (1901) I.L.R., 24 Mad., 311.

(2) (1898) I.L.R., 21 Mad., 51.

(4) (1898) I.L.R., 15 All., 818.

if the attachment ceases when the decree-holder who attaches is paid off a re-attachment will be necessary which will be of no avail if it is subsequent to the alienation, see *Gobind Singh v. Zalim Singh*(1) and *Mina Kumari Bibi v. Bijoy Singh Dudhuria*(2). In order to get over this difficulty we shall have to read into all the rules in Order XXI relating to the raising of the attachment and in rule 89 the words "the amount due to decree-holders who would be entitled to rateable distribution prior to the private alienation." It is difficult to see under what rules of construction such a wholesale addition to the rules can be made.

It is contended for the appellant with some force that section 64 enacts that the alienation pending attachment shall be void as against all claims for rateable distribution of assets, that claims for rateable distribution are not dependent on the attachment but on section 73 that the claim for rateable distribution would have been enforceable if the properties had been allowed to be sold, that the legislature in enacting the explanation to section 64 intended to make an attachment by one decree-holder to enure for the benefit of all persons entitled to rateable distribution (the policy of the law being to prevent multiplicity of attachments) that the decree-holder who actually attaches and who under the law would have no priority in case the assets were realized by sale ought not to be allowed to defeat the rights of the other decree-holders and that by sanctioning the alienations of property behind their back and paying off the attaching creditor he will virtually get priority. It is also contended that though under rules 55 and 57 the attachment ceases on payment of the decree-debt of the attaching creditor yet a fresh attachment by those entitled to rateable distribution should be treated as a continuation of the original attachment and that in any event section 64 should be read as making the alienation void as against subsequent attachment by those who would if the execution have been allowed to proceed would have been entitled to rateable distribution.

It has been argued for the respondent that the explanation added to section 64 only protects "claims for rateable distribution" that such claims can only arise when assets are held by a

(1) (1884) I.L.R., 8 All., 33.

(2) (1917) I.L.R., 44 Cal., 662 (P.O.).

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Court under section 73, that the explanation was merely the legislative recognition of the principle enunciated by the Bombay High Court in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(1) and that the decision of their Lordships of the Privy Council in *Mina Kumari Bibi v. Bijoy Singh Dudhuria*(2) is conclusive on the matter.

The decision of the question which is not free from difficulty is in my opinion really concluded by the observation of their Lordships of the Privy Council in *Mina Kumari Bibi v. Bijoy Singh Dudhuria*(2). Though section 276 of the old Code did not contain any provision corresponding to the explanation, the effect of the ruling in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(1) was to read the section in the same way as it would have read if the explanations were there and it is difficult to explain away the clear remark of their Lordships [who assume for the purposes of the argument that the decision in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(1) is correct] as having reference only to the wording of the old Code. In that case a decree-holder held two decrees against the same person and attached certain properties in execution of one of his decrees and would have been entitled to rateable distribution if the attachment had resulted in a sale. Pending attachment the judgment-debtor sold the property. The attachment subsequently ceased to be operative and the decree-holder subsequently attached the property and brought it to sale. The purchaser sought to recover the property from the alienees from the judgment-debtor. A decree was passed in his favour by the High Court but it was reversed on appeal by the Privy Council on the ground that the sale in execution being under an attachment subsequent to the private alienation was not protected by section 276. Dealing with the argument that section 276 rendered the alienation void as against the subsequent attachment their Lordships observe:

"That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hypothesi* the alienation to the plaintiff was not during the continuance of the attachment in

(1) (1892) I.L.R., 16 Bom., 91.

(2) (1917) I.L.R., 44 Calc., 662 (P.C.).

Execution Case No. 16 of 1907 or in other words the attachment under which the execution sale to the decree-holders was made. Therefore it cannot be avoided by the attachment."

It was also urged before their Lordships that, having regard to the decision of the Bombay High Court in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(1), the decree-holder was a person who would have been entitled to rateable distribution and was consequently protected against the private alienation. Their Lordships dispose of the argument with the following observations:—

"He relies on section 295 of the Code of Civil Procedure as entitling him to the benefit of section 276 and for this purpose he calls in aid the application for attachment in Execution Case No. 8 of 1902. To bring section 295 into play certain conditions are necessary and one of them is that there should be assets held by the Court. It has not been shown that there was such assets and the indications in the record point the other way. But apart from this section 295 cannot help the decree-holder. Though the word 'attachment' occurs three times in section 276 the reference is to one and only one attachment; and that one in this case is the attachment in Execution Case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation, for it is on that alone that the decree-holder's title to the property in the suit at present rests. So that even if it be assumed for the sake of argument that the view which prevailed in *Sorabji Edulji Warden v. Govind Ramji, F. N. Wadia and another*(1) is correct and that the conditions of section 295 have been satisfied it cannot advance the decree-holder's case."

There can be little doubt that section 64 as it stands at present can protect decree-holders entitled to rateable distribution against private alienation, only where assets have been realized in which case they will be entitled to share the proceeds in preference to the alienee. This can happen only in a very limited class of cases, e.g., where the garnishee pays the attached amount into Court. In the numerous and important class of cases relating to attachment of immoveable property the amendment would be of no use to decree-holders entitled to rateable distribution. Assuming that the legislature intended the attachment

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under section 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation it has not gone far enough when it introduced the explanation to section 64 worded as it is and made no provision for the continuance of the attachment in Order XXI in cases where the attaching creditor was paid off. The result is not very happy, but the remedy is in the hands of the legislature.

I agree with the view expressed by SESHAGIRI AYYAR, J. and would answer this reference in the negative.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Kumaraswami Sastriyar,

PRATIVADI BHAYANKARAM PICHAMMA alias
MANGAMMA (COUNTER-PETITIONER, PLAINTIFF), PETITIONER,
v.

KAMISSETTI SREERAMULU AND TWO OTHERS (PETITIONERS—
DEFENDANTS NOS. 2, 3 AND 5), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Order XVII, rules 2 and 3, scope of—Decree ex parte—Defendant absent at adjourned hearing after taking adjournment for letting evidence.

Where, at the close of the plaintiff's case, an adjournment was granted to the defendant to enable him to produce his evidence and he failed to appear at the adjourned hearing, and the Court proceeded to pass a decree against him.

Held by the Full Bench, that the case came within Order XVII, rule 2, and the decree could be set aside under Order IX, rule 13.

Per SADASIYA AYYAR and KUMARASWAMI SASTRIYAR, JJ.—Rules 2 and 3 of Order XVII, Civil Procedure Code, are mutually exclusive: rule 2 applies to all cases of absence of parties whether time was granted or not to do any of the acts mentioned in rule 3 of the Order, while rule 3 applies only to cases where parties are present and commit default of the kind mentioned in the rule.

Per WALLIS, C.J.—Rules 2 and 3 of Order XVII are not mutually exclusive. Rule 3 may be applied even in the absence of the defendant, but the decree will none the less be *ex parte* and liable to be set aside.

Chandramathi Ammal v. Narayanasami Aiyar (1910) I.L.R., 33 Mad., 241, followed.

Naganadu Aiyar v. Krishnamurti Aiyar (1911) I.L.R., 34 Mad., 97, overruled.

* Civil Revision Petition No. 1248 of 1916 (F.B.).

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21.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the decree of V. R. KUPPUSWAMI AYYAR, the Subordinate Judge of Kistna at Ellore, in Miscellaneous Appeal No. 233 of 1916, preferred against the order of T. M. GOPALA ACHARYA, the Additional District Munsif of Kovvur at Ellore, in Civil Miscellaneous Petition No. 154 of 1916 in Original Suit No. 49 of 1915.

In this case, after the plaintiff's witnesses were examined and cross-examined, the defendant's pleader applied for an adjournment to enable him to produce evidence, and time was granted. Neither the defendant nor his pleader was present at the adjourned hearing. Thereupon the Court made a decree in favour of the plaintiff. Defendant applied to set aside the decree under Order IX, rule 13, Civil Procedure Code, but the Court refused the same, holding that the decree was not one passed *ex parte* and that Order XVII, rule 3, was applicable, relying on *Enatulla Basunia v. Jiban Mohan Roy* (1). On appeal by defendant, the Subordinate Judge held that the decree was, according to *Chandramathi Ammal v. Narayanasami Aiyar* (2), one passed *ex parte* and finding that there was sufficient cause for non-appearance of the defendant and his wakil, reversed the decree and remanded the suit for disposal according to law. Plaintiff preferred a revision petition to the High Court under section 115, Civil Procedure Code, against the said order of the Subordinate Judge.

K. V. L. Narasimham for the petitioner.

P. Somasundaram for the respondents Nos. 1 and 2.

The third respondent did not appear.

This petition came on for hearing in the first instance before ABDUR RAHIM and OLDFIELD, JJ., who made the following ORDERS OF REFERENCE to a Full Bench.

ABDUR RAHIM, J.—The question in this appeal relates to the interpretation of rules 2 and 3 of Order XVII of the Code of Civil Procedure. What happened in this case is shortly stated in the judgment of the Subordinate Judge. The suit was instituted first in the Court of the District Munsif of Kovvur and afterwards transferred to that of the Additional District Munsif. In the latter Court, the plaintiff examined most of his witnesses and on the application of the defendants, the suit was adjourned

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(1) (1914) I.L.R., 41 Cal., 956.

(2) (1910) I.L.R., 33 Mad., 241.

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to 7th February 1916. On that date neither the defendants' guardian nor the vakils were present. The District Munsif closed the case and delivered judgment in favour of the plaintiff on the 8th February 1916. There is, in my opinion, a conflict of rulings in this Court as to whether rule 2 or rule 3 of Order XVII applies to facts like these. In *Naganada Aiyar v. Krishnamurti Aiyar*(1), which was a judgment of MUNRO, J., and myself, it was held that section 158 of the old Code empowers the Court in circumstances such as those in this case to decide the suit on the merits whether the party at whose instance the adjournment was granted was present or not at the date fixed for hearing. If the parties or any of them fail to appear on the fixed date, it is open to the Court to proceed either under section 157 or 158. If there are no materials before the Court on which to come to a proper decision on the merits, it would ordinarily deal with the case under rule 2, otherwise under rule 3. In *Naganada Aiyar v. Krishnamurti Aiyar*(1), an earlier decision of this Court in *Chandramathi Ammal v. Narayanasami Aiyar*(2), to which the present learned Chief Justice and KRISHNASWAMI AYYAR, J., were parties, was not noticed. There it was held that section 158 of the old Civil Procedure Code which corresponds to rule 3 of Order XVII of the new Code would only apply if the parties are in attendance and there is failure to do what a party is given time to do. If the parties are not in attendance, then according to that ruling section 157 of the old Code corresponding to rule 2, Order XVII of the present Code, would alone apply and that these two rules are mutually exclusive. This view seems to have been approved in *Chenroyan v. Rama Chetti*(3), while the view propounded in *Naganada Aiyar v. Krishnamurti Aiyar*(1) appears to be the same as that taken in *Enatulla Basunia v. Jiban Mohan Roy*(4).

The question is one of importance and frequently arises and I think that it ought to be settled by a Full Bench. The question therefore referred to the Full Bench is:

Whether the view taken in Chandramathi Ammal v. Narayanasami Aiyar(2), or in *Naganada Aiyar v. Krishnamurti Aiyar*(1)

(1) (1911) I.L.R., 34 Mad., 97.
(3) (1916) 3 L.W., 524.

(2) (1910) I.L.R., 33 Mad., 241.
(4) (1914) I.L.R., 41 Calc., 956 at p. 962.

as to the proper scope and meaning of Order XVII, rule 2 and rule 3, is correct.

OLDFIELD, J.—I agree to the reference proposed by my learned brother.

ON THIS REFERENCE—

B. *Narasimha Rao* (with K. V. L. *Narasimham*) for the petitioner.—The decree that was passed was not an *ex parte* one. Order XVII, rule 3, Civil Procedure Code, and not rule 2, applies to the case as time was granted to the defendant at his request to let in his evidence at the adjourned hearing and the District Munsif in his order refusing to restore says that he acted under Order XVII, rule 3, Civil Procedure Code. Reference was made to the following cases: *Naganada Aiyar v. Krishnamurti Aiyar*(1), *Enatulla Basunia v. Jiban Mohan Roy*(2), *Kader Khan v. Juggeswar Prasad Singh*(3), *Droupadi Ammal v. South Indian Railway Co., Ltd.*(4), *Ningappa v. Gowdappa*(5), *Subramania Othwar v. Munusamiya Pillai*(6), *Anandaraju v. Venkataraju*(7), *Badam v. Nathu Singh*(8) and *Gaura Bibi v. Ghasita*(9).

P. *Somasundaram* for the respondents Nos. 1 and 2, contended that the proper rule applicable is rule 2 and not rule 3 in all cases of absence whether time was granted or not. Reference was made to *Chandramathi Ammal v. Narayanasami Aiyar*(10), *Maharaja of Vijayanagaram v. Lingam Krishna Bupati*(11), *Majeti Nagaratnam v. Paehigolla Ramayya*(12) and *Chenroyan v. Rama Chetti*(13). The decree is one passed *ex parte*.

The third respondent did not appear.

The Court expressed the following OPINIONS:—

WALLIS, C.J.—I am of opinion that *Chandramathi Ammal v. Narayanasami Aiyar*(10), to which I was a party, was rightly decided. As the question is very fully dealt with in the opinion of my learned brother, I shall merely state the conclusions at which I have arrived on further consideration. Under the Code,

(1) (1911) I.L.R., 34 Mad., 97. (2) (1914) I.L.R., 41 Calc., 956 at p. 962.
(3) (1905) I.L.R., 35 Calc., 1023. (4) (1914) 24 I.C., 358.
(5) (1905) 7 Bom., L.R., 261. (6) (1915) 31 I.O., 869.
(7) (1914) 1 L.W., 428. (8) (1903) I.L.R., 25 All., 194.
(9) (1912) I.L.R., 34 All., 133. (10) (1910) I.L.R., 33 Mad., 241.
(11) (1902) 12 M.L.J., 473. (12) (1915) 2 L.W., 105.
(13) (1916) 3 L.W., 524.

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where the plaintiff appears and the defendant does not appear either on the day fixed for the first hearing [Order IX, rule 61] or on any day to which the hearing of the suit is adjourned [Order XVII, rule 2, read with Order IX, rule 61], the Court, if it is proved that the summons was duly served, may proceed *ex parte*. In either case, where the Court has disposed of the case *ex parte* and passed a decree against the absent defendant, he may, under Order IX, rule 13, move to set aside the decree on the ground that he was prevented by any sufficient cause from appearing when the suit was called on. When a case is called on and the defendant is absent, and the Court resolves to proceed against him *ex parte*, there is nothing, I am now of opinion, to prevent the Court from applying the provisions of Order XVII, rule 3, and disposing of the suit notwithstanding the defendant's failure to do what he had been granted time to do, but that disposal will be none the less both in fact and in law *ex parte*, and the decree will be liable to be set aside by the defendant under Order IX, rule 13. If the *ex parte* decree is set aside and the case restored and the defendant appears, it will still be open to the Court to apply the provisions of Order XVII, rule 3, after hearing what the defendant has to say in explanation of his failure to do what he had been given time to do. There is, I think, no conflict at all between the two rules, and each may be fully applied on this construction at the proper stage of the case. In so far as we laid down in *Chandramathi Ammal v. Narayanasami Ayyar*(1) that the two rules must be read as mutually exclusive, I think we went too far.

With great respect I am unable to agree with any of the rulings or observations in the cases cited that take a different view.

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SADASIYA AYYAR, J.—I have nothing to add to the judgment which my learned brother KUMARASWAMI SASTRIYAR, J., is about to pronounce and I entirely concur in it.

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KUMARASWAMI SASTRIYAR, J.—The question raised by this reference relates to the scope of rules 2 and 3 of Order XVII of the Civil Procedure Code. Rule 1 empowers the Court on proper cause being shown to grant time to the parties at their

(1) (1910) I.L.R., 33 Mad., 241.

instance and to adjourn the suit on such terms as to costs as it thinks fit. Rule 2 provides that, if the parties or any of them failed to appear on the adjourned date, the Court may dispose of the suit in one of the modes directed in that behalf in Order IX or make such other order as it thinks fit. Order IX relates to the procedure to be followed on the date fixed in the summons for the parties to appear and provides for the consequence of non-appearance. Rule 3 provides that the Court may dismiss the suit if both parties fail to appear. Where the plaintiff appears and not the defendant, rule 6 empowers the Court to decide the suit *ex parte* if the summons has been duly served on the defendant in time to enable him to appear. Where the defendant appears and not the plaintiff, rule 8 directs that the Court should dismiss the suit wholly or partially if the claim or any part is not admitted. Rule 9 entitles the plaintiff to have the dismissal set aside if he satisfies the Court that he had sufficient cause for non-appearance. Rules 7 and 13 enable the defendant who failed to appear to set aside the *ex parte* order or decree against him on showing proper cause for his non-appearance. Rule 3 of Order XVII empowers the Court to decide the suit forthwith notwithstanding the failure of either party to whom time is granted to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary for the progress of the suit. It will thus be seen that rule 2 of Order XVII empowers the Court to apply to adjourned hearings the same procedure to be followed in case of failure of the parties to attend at the first hearing. It however expressly empowers the Court instead of proceeding under Order IX to pass such other order as it thinks fit. There is therefore nothing to prevent the Court from adjourning the case to another day if the parties fail to appear and the Court thinks that in the interests of justice it should not dismiss the suit or decree it *ex parte*. This should be borne in mind as it has been strenuously argued before us on the strength of some of the observations in some of the decisions referred to in the course of argument that the view taken in *Chandramathi Ammal v. Narayanasami Aiyar*(1), is likely to entail great hardship on the defaulting party. Where the Judge thinks that a defaulting party has proved his case, he is not

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bound to apply the provisions of Order IX but can adjourn the case to another day in case he fails to appear and I am sure no Judge with any sense of justice would dismiss a just claim which he considers proved *simply because a party fails to appear* on an adjourned date. On the other hand it seems to me to be pretty plain that the application of rule 3 will be the harder of the two courses as rule 3 empowers the Court to proceed to decide the suit forthwith on the materials before it. So far as the plaintiff is concerned the Court may dismiss the suit on the merits if the evidence on record does not prove plaintiff's case. It may pass a decree if the defendant is absent and there is formal proof of plaintiff's claim or the onus is on the defendant. The dismissal of the suit or the passing of a decree being on the merits, the only remedy of the party aggrieved will be by appeal or review. It is difficult to see what the use of an appeal will be if there was no application for adjournment which was refused. The case will have to be considered by the Appellate Court and decided on the materials before it and the Court cannot in very many cases say that the decision of the lower Court on the materials before it is erroneous. As regards review, the scope of Order XLVII is more restricted than that of Order IX. If the plaintiff's evidence is sufficient, then the defendant if he appears will be entitled to let in his evidence in the absence of the plaintiff and it will often be extremely difficult to determine how far reliance ought to be placed on evidence which has not been tested by cross-examination. The provisions of rule 3 are certainly more stringent than the provisions of rule 2 and except in cases where the case has been closed on both sides and the adjournment is only for argument, it is difficult to see how any decision on the materials before the Court can be satisfactory.

If a party is absent and the Judge proceeds to dispose of the case on the merits under rule 3, there can be no review if the Judge does not preside over the Court when the application is made, as rule 2 to Order XLVII limits the power of the successor to grant a review only in cases of discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree. It cannot be said that a party who is given time to adduce evidence and who owing to absence is unable to do so has discovered new and important matter or

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evidence. If owing to absence he is unable to do any other act necessary for the further progress of the suit for which time has been allowed, it is equally a case where no review can be applied for in case the Judge who decided a suit under Order XVII, rule 3, is not presiding over the Court. The Appellate Court in such cases cannot reverse the decree based on the material before it. It cannot say that the Court should have granted an adjournment where the party was absent and did not ask for one and it seems to me that the Appellate Court cannot interfere on the ground that sufficient cause was shown for absence unless it can apply the provisions of Order IX and it cannot do this if rule 3 is held to be the only rule applicable to cases where a decree is passed in the absence of a party to whom time has been given for the doing of an act and the Court in his absence proceeds to decide the suit "forthwith" on the materials before it. Leaving out of consideration the case of a party who is absent on an adjourned date without sufficient excuse (and who deserves no consideration either under rule 2 or 3) the application of rule 2 which would give the party the right to set aside the order of dismissal or *ex parte* decree on merely showing that he was prevented from sufficient cause from appearing and to have the whole case reheard on its merits after adducing all the evidence available is more beneficial and wider in scope than an application for review or an appeal which would be the only course available if rule 3 is held applicable to cases of absence.

The scope of sections 157 and 158 of the old Code which correspond to rules 2 and 3 of Order XVII of the present Code has been the subject of conflicting decisions. The decision of WALLIS and KRISHNASWAMI AYYAR, JJ., in *Chandramathi Ammal v. Narayanaswami Aiyar*(1) which follows *Shrimant Sagajira o v. Smith*(2), is in accordance with the view taken in *Maharaja of Vijayanagaram v. Lingam Krishna Bhupati*(3). It has been followed by SESHAGIRI AYYAR, J., in *Majeti Nagaratnam v. Pachigolla Ramayya*(4) and by SADASIVA AYYAR and MOORE, JJ. in *Ohenroyan v. Rama Chetti*(5). It supports the view that rules 2 and 3 of Order XVII are independent and mutually exclusive

(1) (1910) I.L.R., 38 Mad., 241.

(2) (1896) I.L.R., 20 Bom., 716.

(3) (1902) 12 M.L.J., 473.

(4) (1915) 2 L.W., 105.

(5) (1916) 3 L.W., 524.

PICHAMMA and that where the requisites of rule 2 are satisfied, that rule and not rule 3 should be applied, although in addition to the absence of the party circumstances exist which would satisfy the requirements of rule 3.

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On the other hand, a different view was taken by **MUNRO** and **ABDUR RAHIM, JJ.**, in *Naganada Ayyar v. Krishnamurti Ayyar*(1), where it was held that absence of a party on the date of the adjourned hearing does not preclude the Court from dealing with the case under section 158 (Order XVII, rule 3). The earlier decision in *Chandramathi Ammal v. Narayanaswami Aiyar*(2) has not been considered and the reasons given in that decision have not been met. In *Mariannissa v. Ramkalpa Gorain*(3) (**MOOKERJEE** and **HOLMWOOD, JJ.**) it was held that the scope of section 157 was distinct from that of section 158 but that the Court can act under section 158 even though the parties are absent if the requirements of section 158 are otherwise satisfied and the Judge thinks there are materials on record on which it can pronounce judgment. The learned Judges were however of opinion that there was no justification for applying section 158 to a case to which section 157 is more appropriately applicable. In *Enatulla Basunia v. Jiban Mohan Roy*(4), **IMAM** and **CHAPMAN, JJ.**, held that where an adjournment was granted at the instance of a party for the purposes stated in rule 3 and there are materials enabling the Court to decide the suit, it must act under rule 3 and not rule 2. In *Ningappa v. Gowdappa*(5), a similar view was taken. The learned Judges thought that section 102 contemplates that on the record as it stands the plaintiff has not made a case which if unrebutted would entitle him to any relief and that application of section 158 would be less burdensome to the party but with all deference I think for the reasons already given that the balance of hardship is the other way in the very great majority of cases that are likely to arise under sections 157 and 158. Section 102 contains no such qualification as is indicated and compels the Court to dismiss the suit if plaintiff is absent and defendant does not admit the claim. This decision was followed by **PHILLIPS, J.**, in *Subramania Othuvan v. Munusamiya Pillai*(6), but no reference is made to the decision in

(1) (1911) I.L.R., 34 Mad., 97.

(3) (1907) I.L.R., 34 Calc., 235.

(5) (1905) 7 Bom. L.R., 261.

(2) (1910) I.L.R., 33 Mad., 241.

(4) (1914) I.L.R., 41 Calc., 957.

(6) (1915) 31 I.C., 869.

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IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

- Act I of 1916 (Indian Trusts Amendment). In Urdu. Pies 3. (Anna 1.)
 Act I of 1916 (Indian Trusts Amendment). In Nagri. Pies 8. (Anna 1.)
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 Act II of 1916 (Defence of India Amendment). In Nagri. Pies 3. (Anna 1.)
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 Act IV of 1916 (Indian Tariff Amendment). In Nagri. Anna 1. (Anna 1.)
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 Act VII of 1916 (Indian Medical Degrees). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1916 (Presidency Banks Amendment). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1916 (Presidency Banks Amendment). In Nagri. Pies 3. (Anna 1.)
 Act X of 1916 (Enemy Trading). In Urdu. Pies 6. (Anna 1.)
 Act X of 1916 (Enemy Trading). In Nagri. Pies 6. (Anna 1.)
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 Act XI of 1916 (Imports and Exports). In Nagri. Pies 3. (Anna 1.)
 Act XII of 1916 (Indian Lunacy). In Urdu. Pies 3. (Anna 1.)
 Act XII of 1916 (Indian Lunacy). In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1916 (Bills of Exchange). In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1916 (Bills of Exchange). In Nagri. Pies 3. (Anna 1.)
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 Act XV of 1916 (Hindu Disposition of Property). In Nagri. Pies 3. (Anna 1.)
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 Ordinance VIII of 1916 (Indian Legislative Councils Elections Inquiries). In Hindi. Pies 3. (Anna 1.)
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 Act I of 1917 (Inland Steam Vessels). In Nagri. Anna 1 Pies 6. (Anna 1.)
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 Act II of 1917 (Motor Spirit Duties). In Nagri. Pies 3. (Anna 1.)

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 Act III of 1917 (Indian Defence Force). In Nagri. Pies 6. (Anna 1.)
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 Act IV of 1917 (Indian Army Suspension of Sentences). In Nagri. Pies 3. (Anna 1.)
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 Act V of 1917 (Destruction of Records). In Nagri. Pies 3. (Anna 1.)
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 Act VI of 1917 (Indian Tariff Amendment). In Nagri. Pies 3. (Anna 1.)
 Act VII of 1917 (Indian Income-Tax Amendment). In Urdu. Pies 3. (Anna 1.)
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 Act VIII of 1917 (Super-Tax). In Nagri. Pies 3. (Anna 1.)
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 Act X of 1917 (Indian Army Amendment). In Urdu. Pies 3. (Anna 1.)
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 Act XVIII of 1917 (Post Office Cash Certificates). In Nagri. Pies 3. (Anna 1.)
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 Act XIX of 1917 (Indian Paper Currency Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XX of 1917 (Indian Transfer of Ships Restriction). In Urdu. Pies 3. (Anna 1.)

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 Act XXII of 1917 (Gold Import). In Nagri. Pies 3. (Anna 1.)
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 Act VI of 1901 (Assam Labour and Emigration), as modified up to 1st July 1910. Re. 1 as. 4. (As. 2.)
 Act II of 1902 [Cantonments (House-accommodation)], as modified up to 1st June 1910. As. 6 p. 6. (Anna 1.)
 Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. As. 5 p. 6. (Anna 1.)
 Act I of 1904 (Poisons), with footnotes. As. 2 p. 9. (Anna 1.)
 Act I of 1910 (Indian Press), with footnotes. As. 3 p. 6. (Anna 1.)
 Regulation III of 1818 (Bengal State Prisoners), as modified up to 1st August 1909. As. 2 p. 9. (Anna 1.)
 Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st March 1909. As. 6 p. 6. (Anna 1.)
 Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July 1903. Anna 1 p. 9. (Anna 1.)
 Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February 1897. As. 5 p. 6. (Anna 1.)
 Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894. As. 13. (As. 2.)
 Regulation V of 1886 (Ajmer Municipalities), as modified up to 1st February 1911. As. 15. (As. 2.)
 Regulation VI of 1886 (Ajmer Rural Boards), as modified up to 1st February 1897. As. 5 p. 6. (Anna 1.)
 Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October 1899. As. 4 p. 9. (Anna 1.)
 Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April 1902. As. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

- Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December 1893, with footnotes brought down to 1st December 1901. In Urdu. As. 2 p. 6. (Anna 1.)
 Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. In Urdu. Pies 6. (Anna 1.)
 Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. In Nagri. Pies 6. (Anna 1.)
 Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. In Urdu. Pies 3. (Anna 1.)
 Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. In Nagri. Pies 3. (Anna 1.)
 Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903. In Urdu. Pies 6. (Anna 1.)
 Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903. In Nagri. Pies 6. (Anna 1.)
 Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. In Urdu. Pies 9. (Anna 1.)
 Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act XXX of 1852 (Naturalization), as modified up to 1st December 1902. In Urdu. Pies 6. (Anna 1.)
 Act XXX of 1852 (Naturalization), as modified up to 1st December 1902. In Nagri. Pies 6. (Anna 1.)
 Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. In Urdu. Pies 3. (Anna 1.)
 Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. In Urdu. Pies 6. (Anna 1.)
 Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. In Nagri. Pies 6. (Anna 1.)
 Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1856 (Hindu Widow's Re-marriage). In Urdu. Pies 6. (Anna 1.)
 Act XV of 1856 (Hindu Widow's Re-marriage). In Nagri. Pies 6. (Anna 1.)
 Act XX of 1856 (Bengal Chankidari), as modified up to 1st November 1903. In Urdu. As. 2 p. 6. (Anna 1.)
 Act XX of 1856 (Bengal Chankidari), as modified up to 1st November 1903. In Nagri. As. 2 p. 6. (Anna 1.)
 Act XIII of 1857 (Opium), as modified up to 1st August 1908. In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1857 (Opium), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
 Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. In Nagri. Pies 3. (Anna 1.)
 Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. In Nagri. Pies 3. (Anna 1.)
 Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903. In Urdu. Re. 1 as. 5. (As. 5.)
 Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903. In Nagri. Re. 1 as. 5. (As. 5.)
 Act V of 1861 (Police), as modified up to 7th March 1903. In Urdu. As. 2 p. 9. (Anna 1.)
 Act V of 1861 (Police), as modified up to 7th March 1903. In Nagri. As. 2 p. 9. (Anna 1.)
 Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. In Nagri. Anna 1 p. 3. (Anna 1.)
 Act XVI of 1863 (Excise), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act XVI of 1863 (Excise), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act XXXI of 1863 (Official Gazettes), with footnotes. In Urdu. Pies 3. (Anna 1.)
- Act XXXI of 1863 (Official Gazettes), with footnotes. In Nagri. Pies 3. (Anna 1.)
- Act III of 1864 (Foreigners), as modified up to 1st April 1915. In Urdu. Anna 1. (Anna 1.)
- Act III of 1864 (Foreigners), as modified up to 1st April 1915. In Nagri. Anna 1. (Anna 1.)
- Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. In Urdu. Pies 3. (Anna 1.)
- Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. In Nagri. Pies 3. (Anna 1.)
- Act III of 1865 (Carriers), as modified up to 31st May 1903. In Urdu. Pies 9. (Anna 1.)
- Act III of 1865 (Carriers), as modified up to 31st May 1903. In Nagri. Pies 9. (Anna 1.)
- Act X of 1865 (Indian Succession), as modified up to 1st April 1909. In Urdu. As. 11 p. 3. (As. 2.)
- Act X of 1865 (Indian Succession), as modified up to 1st April 1909. In Nagri. As. 11 p. 3. (As. 2.)
- Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. In Urdu. Pies 9. (Anna 1.)
- Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. In Nagri. Pies 9. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st December 1896. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st January 1905. In Urdu. Anna 1. (Anna 1.)
- Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
- Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August 1908. In Nagri. Pies 6. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1870 (Court-fees), as modified up to 1st February 1909. In Urdu. As. 5 p. 9. (Anna 1.)
- Act VII of 1870 (Court-fees), as modified up to 1st February 1909. In Nagri. As. 5 p. 6. (Anna 1.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. In Nagri. Anna 1 p. 9. (Anna 1.)
- Act V of 1871 (Prisoners), as modified up to 1st May 1894. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. In Urdu. Pies 9. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. In Nagri. Pies 9. (Anna 1.)
- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Urdu. As. 8. (As. 2.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Nagri. As. 8. (As. 2.)
- Act IV of 1872 (Punjab Laws), as modified up to 1st November 1904. In Urdu. As. 2 p. 6. (Anna 1 p. 6.)
- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. In Urdu. As. 9 p. 9. (As. 3.)
- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. In Nagri. As. 9 p. 9. (As. 3.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. In Urdu. As. 3. (Pies 9.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. In Nagri. As. 4. (As. 2.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. In Urdu. Pies 9. (Anna 1.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. In Nagri. Pies 9. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899. In Urdu. As. 3 p. 3. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899. In Nagri. As. 3 p. 3. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1903. In Urdu. Anna 1. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1903. In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1873 (Agra Village and Road Police). In Urdu. Anna 1. (Anna 1.)
- Act IX of 1874 (European Vagrancy). In Urdu. As. 2. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. In Urdu. Pies 3. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. In Nagri. Pies 3. (Anna 1.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. In Urdu. As. 3 p. 9. (Anna 1 p. 6.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. In Nagri. As. 3 p. 6. (Anna 1 p. 6.)
- Act XVIII of 1876 (Oudh Laws). In Urdu. As. 2. (Anna 1.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. In Urdu. As. 4 p. 6. (Anna 1 p. 6.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. In Nagri. As. 4 p. 6. (Anna 1 p. 6.)
- Act I of 1878 (Opium), as modified up to 1st October 1907. In Urdu. Anna 1 p. 6. (Anna 1.)
- Act I of 1878 (Opium), as modified up to 1st October 1907. In Nagri. Anna 1 p. 6. (Anna 1.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. In Urdu. As. 4. (Anna 1 p. 6.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. In Nagri. As. 4. (Anna 1 p. 6.)
- Act XI of 1878 (Indian Arms), as modified up to 1st May 1904. In Urdu. As. 2. (Anna 1.)
- Act XI of 1878 (Indian Arms), as modified up to 1st May 1904. In Nagri. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. In Urdu. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. In Nagri. As. 2. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896. In Urdu. As. 2 p. 6. (Anna 1.)
- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896. In Nagri. As. 2 p. 6. (Anna 1.)
- Act XII of 1880 (Kazis), with footnotes. In Urdu. Pies 3. (Anna 1.)
- Act XHI of 1880 (Vaccination). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XIII of 1880 (Vaccination). In Nagri. Anna 1 p. 3. (Anna 1.)
- Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. In Urdu. As. 4 p. 6. (Anna 1 p. 6.)
- Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. In Nagri. As. 4 p. 6. (Anna 1 p. 6.)
- Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898. In Urdu. As. 9. (Anna 1 p. 6.)
- Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898. In Nagri. As. 9. (Anna 1 p. 6.)
- Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September 1909. In Urdu. As. 4. (Anna 1.)
- Act XXVI of 1881. (Negotiable Instruments), as modified up to 1st September 1909. In Nagri. As. 4. (Anna 1.)
- Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. In Urdu. As. 3 p. 6. (Anna 1.)
- Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. In Nagri. As. 3 p. 6. (Anna 1.)
- Act IV of 1882 (Transfer of Property), as modified up to 1st March 1900. In Urdu. As. 6 p. 9. (As. 2.)
- Act IV of 1882 (Transfer of Property), as modified up to 1st March 1900. In Nagri. As. 6 p. 9. (As. 2.)
- Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. In Urdu. Anna 1. (Anna 1.)
- Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. In Nagri. Anna 1. (Anna 1.)
- Act IV of 1884 (Indian Explosives), as modified up to 1st September 1908. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act IV of 1884 (Indian Explosives), as modified up to 1st September 1908. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September 1906. In Urdu. Pies 6. (Anna 1.)
- Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September 1906. In Nagri. Pies 6. (Anna 1.)
- Act II of 1885 [Negotiable Instruments (Amendment)]. In Urdu. Pies 9. (Anna 1.)
- Act III of 1885 [Transfer of Property (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act X of 1885 [Oudh Estates (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1885 (Indian Telegraph), as modified up to 1st June 1910. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XXI of 1885 [Madras Civil Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act IV of 1886 [Indian Contract (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1886 (Births, Deaths and Marriages Registration). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act X of 1886 [Indian Criminal Law (Amendment)]. In Urdu. Pies 9. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900. In Urdu. As. 3 p. 3. (Anna 1.)
- Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900. In Nagri. As. 3 p. 3. (Anna 1.)
- Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891. In Urdu. Pies 9. (Anna 1.)
- Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891. In Nagri. Pies 9. (Anna 1.)
- Act VII of 1887 (Suits' Valuation). In Urdu. Pies 9. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896. In Urdu. As. 2 p. 3. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896. In Nagri. As. 2 p. 3. (Anna 1.)
- Act X of 1887 (Native Passenger Ships). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XII of 1887 (Bengal, Agra and Assam Civil Courts). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XII of 1887 (Bengal, Agra and Assam Civil Courts). In Nagri. Anna 1 p. 3. (Anna 1.)
- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. In Urdu. As. 3 p. 6. (Anna 1.)
- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. In Nagri. As. 3 p. 9. (Anna 1.)
- Act XV of 1887 (Burma Military Police). In Urdu. Pies 9. (Anna 1.)
- Act XV of 1887 (Burma Military Police). In Nagri. Pies 9. (Anna 1.)
- Act XVIII of 1887 (Allahabad University). In Urdu. Anna 1. (Anna 1.)
- Act III of 1888 (Police), as modified up to 1st January 1909. In Urdu. Pies 3. (Anna 1.)
- Act III of 1888 (Police), as modified up to 1st January 1909. In Nagri. Pies 6. (Anna 1.)
- Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March 1893. In Urdu. Pies 3. (Anna 1.)
- Act IV of 1888 (Indian Reserve Forces), as passed. In Nagri. Pies 3. (Anna 1.)
- Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. In Urdu. Pies 6. (Anna 1.)
- Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. In Nagri. Pies 6. (Anna 1.)
- Act II of 1889 (Measures of Length). In Urdu. Pies 3. (Anna 1.)
- Act II of 1889 (Measures of Length). In Nagri. Pies 3. (Anna 1.)
- Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st February 1904. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st February 1904. In Nagri. As. 2. (Anna 1.)
- Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. In Urdu. Pies 6. (Anna 1.)
- Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. In Nagri. Pies 6. (Anna 1.)
- Act VII of 1889 (Succession Certificate), as modified up to 1st December 1903. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. In Urdu. Pies 9. (Anna 1.)
- Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1889 (Central Provinces Land Revenue). In Urdu. Anna 1 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XVI of 1889 (Central Provinces Land Revenue). In Nagri. Anna 1 p. 6. (Anna 1.)
- Act XX of 1889 [Indian Lunatic Asylums (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1890 (Revenue Recovery). In Urdu. Pies 3. (Anna 1.)
- Act II of 1890 (Probate and Administration). In Urdu. Pies 3. (Anna 1.)
- Act V of 1890 (Forest). In Urdu. Pies 6. (Anna 1.)
- Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
- Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
- Act VIII of 1890 (Guardians and Wards). In Urdu. As. 2 p. 3. (Anna 1 p. 9.)
- Act IX of 1890 (Indian Railways), as modified up to 1st June 1905. In Urdu. As. 8. (As. 2.)
- Act IX of 1890 (Indian Railways), as modified up to 1st May 1896. In Nagri. As. 8. (As. 2.)
- Act X of 1890 [Press and Registration of Books (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XI of 1890 (Prevention of Cruelty to Animals). In Urdu. Pies 6. (Anna 1.)
- Act XX of 1890 (United Provinces). In Urdu. Anna 1. (Anna 1.)
- Act X of 1891 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1891 (Oudh Courts). In Urdu. Pies 6. (Anna 1.)
- Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900. In Urdu. Pies 3. (Anna 1.)
- Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900. In Nagri. Pies 6. (Anna 1.)
- Act II of 1892 (Marriages Validation). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1892 (Bengal Court of Wards (Amendment)). In Urdu. Pies 6. (Anna 1.)
- Act IV of 1893 (Partition). In Urdu. Pies 3. (Anna 1.)
- Act I of 1894 (Land Acquisition). In Urdu. As. 2 p. 3. (Anna 1 p. 6.)
- Act I of 1894 (Land Acquisition). In Nagri. Anna 1 p. 6. (Anna 1 p. 6.)
- Act III of 1894 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act IX of 1894 (Prisons). In Urdu. As. 2 p. 3. (Anna 1.)
- Act IX of 1894 (Prisons). In Nagri. As. 2 p. 3. (Anna 1.)
- Act VII of 1895 [Punjab Laws Act (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VII of 1895 [Punjab Laws Act (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1895 (Pilgrim Ships). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act II of 1896 (Cotton-duties). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act II of 1896 (Cotton-duties). In Nagri. Anna 1. (Anna 1.)
- Act VI of 1896 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VIII of 1896 (Inland Bonded Warehouses). In Urdu. Pies 3. (Anna 1.)
- Act VIII of 1896 (Inland Bonded Warehouses). In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XII of 1896 (Excise), as modified up to 1st March 1907. In Urdu. As. 2 p. 9. (As. 2.)
- Act XII of 1896 (Excise), as modified up to 1st March 1907. In Nagri. As. 3 p. 3. (As. 2.)
- Act I of 1897 [Public Servants (Inquiries) Amendment]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1897 [Public Servants (Inquiries) Amendment]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1897 (Epidemic Diseases). In Urdu. Pies 3. (Anna 1.)
- Act III of 1897 (Epidemic Diseases). In Nagri. Pies 3. (Anna 1.)
- Act IV of 1897 (Fisheries). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1897 (Fisheries). In Nagri. Pies 3. (Anna 1.)
- Act VI of 1897 [Negotiable Instruments (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1897 [Negotiable Instruments (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VIII of 1897 (Reformatory Schools). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act VIII of 1897 (Reformatory Schools). In Nagri. Pies 6. (Anna 1.)
- Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. In Urdu. Pies 9. (Anna 1.)
- Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. In Nagri. Pies 9. (Anna 1.)
- Act X of 1897 (General Clauses). In Urdu. Anna 1. (Anna 1.)
- Act X of 1897 (General Clauses). In Nagri. Anna 1. (Anna 1.)
- Act I of 1898 [Stage-carriages Act (1861) Amendment]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1898 [Stage-carriages Act (1861) Amendment]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1898 (Lepers), as modified up to 1st September 1909. In Urdu. Pies 6. (Anna 1.)
- Act III of 1898 (Lepers), as modified up to 1st September 1909. In Nagri. Pies 6. (Anna 1.)
- Act IV of 1898 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. In Urdu. Re. 1 as. 4. (As. 8.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. In Nagri. Re. 1 as. 6. (As. 8.)
- Act VI of 1898 (Indian Post Office). In Urdu. As. 3 p. 3. (Anna 1.)
- Act VI of 1898 (Indian Post Office). In Nagri. As. 3 p. 8. (Anna 1.)
- Act IX of 1898 (Live-stock Importation). In Urdu. Pies 3. (Anna 1.)
- Act IX of 1898 (Live-stock Importation). In Nagri. Pies 3. (Anna 1.)
- Act X of 1898 (Indian Insolvency Rules). In Urdu. Pies 3. (Anna 1.)
- Act I of 1899 [Indian Marine Act (1887) Amendment]. In Urdu. Pies 6. (Anna 1.)
- Act I of 1899 [Indian Marine Act (1887) Amendment]. In Nagri. Pies 6. (Anna 1.)
- Act II of 1899 (Stamps), as modified up to 1st March 1907. In Urdu. As. 7 p. 6. (Anna 1 p. 6.)
- Act II of 1899 (Stamps), as modified up to 1st March 1907. In Nagri. As. 7 p. 6. (Anna 1 p. 6.)
- Act IV of 1899 (Government Buildings). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1899 (Government Buildings). In Nagri. Pies 3. (Anna 1.)
- Act VIII of 1899 (Indian Petroleum), as modified up to 1st January 1909. In Urdu. Anna 1 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act VIII of 1899 (Indian Petroleum), as modified up to 1st January 1909. In Nagri. Anna 1 p. 6. (Anna 1.)
- Act IX of 1899 (Indian Arbitration). In Urdu. Pies 9. (Anna 1.)
- Act IX of 1899 (Indian Arbitration). In Nagri. Pies 9. (Anna 1.)
- Act XI of 1899 [Court-fees (Amendment)]. In Urdu. Pies 6. (Anna 1.)
- Act XI of 1899 [Court-fees (Amendment)]. In Nagri. Pies 6. (Anna 1.)
- Act XII of 1899 (Currency Notes Forgery). In Urdu. Pies 3. (Anna 1.)
- Act XII of 1899 (Currency Notes Forgery). In Nagri. Pies 3. (Anna 1.)
- Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. In Urdu. Pies 9. (Anna 1.)
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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 100—*Custom or usage having the force of law—Extent of jurisdiction of High Court in second appeal in deciding custom or usage—Mirasidar in Chingleput district, right to thunduvaram by custom from Government ryots—Onus of proving custom on mirasidar—Civil Procedure Code, sec. 103—Power of High Court to decide facts under—Admissions of a party, binding nature of, unless explained—Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 13—Thunduvaram, dues within—Burden of proving abandonment of customary right—Non-exercise of right for a long time, effect of.* Held by the Full Bench:—The existence of a custom or 'usage having the force of law' is a mixed question of fact and law. Section 100, Civil Procedure Code, precludes the High Court from interfering in second appeal with the findings arrived at by the lower Court of actual facts from which the existence of the custom has been inferred; the inference as to the existence and the decision as to the validity of the custom being matters of law, revisable by the High Court in second appeal. *Kakarla Abbayya v. Raja Venkata Papayya Rao* (1906) I.L.R., 29 Mad., 24, overruled. *Kailas v. Padmakisor* (1917) 25 C.L.J., 613 and *Pankajammal v. The Secretary of State for India* (1917) I.L.R., 40 Mad., 1108, followed. *Palaniappa Chetty v. Sreemath Devasikamony Pandarasannadhi* (1917) I.L.R., 40 Mad., 709 (P.C.), referred to. Held further: (a) that in a suit by an

- ekoboga mirasidar* in a village in the Chingleput district, for certain customary dues called *thunduvaram* from the non-mirasidar Government ryots in the village, the onus of proving the custom was on the mirasidar, (b) that on the facts found he had established the custom, (c) that express admissions of a party to a suit are strong evidence against him unless and until explained and (d) that the onus of proving discontinuance of the custom was on the ryot. *Per Sadasiva Ayyar, J.*—The High Court can, under section 103, Civil Procedure Code, decide in second appeal the genuineness or otherwise of the material documents in the case in the absence of a finding by the lower Appellate Court. *Held* by the Division Bench (SADASIVA AYYAR and NAPIER, JJ.): Mirasi right is an interest in the village lands though not a proprietary interest therein. The *thunduvaram* payable to the mirasidar by a ryot according to custom is not in the nature of 'rent' but falls under 'dues' within article 13 of the second schedule to the Provincial Small Cause Courts Act (IX of 1887) and in a suit for such dues a second appeal lies to the High Court.
- Kumarappa Reddi v. Manavala Goundan* (1918) I.L.R., 41 Mad. (F.B.), 374
- CIVIL PROCEDURE CODE (ACT V OF 1903), SEC. 103:—See sec. 100 supra.
- SEC. 144:—See sec. 151 infra.
- SS. 151 AND 144—Money deposited in Court—Withdrawal by one party—Undertaking by party to repay amount—No provision in undertaking to pay interest—Application by party entitled to recover amount with interest—Power of Court to enforce undertaking—Liability for interest.] The plaintiffs having sued to establish their right to certain money which had been paid into Court by a third party, the defendant was allowed to draw the money on an undertaking to repay it if the plaintiffs succeeded. The plaintiffs having obtained a decree, *Held*, that the Court had inherent power to order the defendant to repay the money, and that he could be made liable for interest as he had had the wrongful use of the money. *Redegr v. The Comptoir D'Escompte De Paris* (1871) L.R., 8 P.O.A.C., 465; *Subbarayudu v. Yerram Setti Seshasani* (1917) I.L.R., 40 Mad., 294, and *Indra Chund Bothra v. Mr. A. H. Forbes* (1917) 2 Pat. L.J., 149, referred to.
- Alagappa Chettiar v. Muthukumara Chettiar* ... (1918) I.L.R., 41 Mad., 316
- O. XLI, R. 5 (3)—Order under—Immoveable property given as security for decree by judgment-debtor, whether realizable in execution—Judgment-debtor taking advantage of a favourable order in execution—Estoppel.] Immoveable property given by a judgment-debtor as security for the due performance of a decree, pursuant to an order made under Order XLI, rule 5 (3), Civil Procedure Code, can be realized in execution without attachment, the matter being one relating to execution within section 47, Civil Procedure Code, and a separate suit does not lie. *Sadasiva Pillai v. Ramalinga Pillai* (1875) 2 I.A., 219, applied. *Shyam Sundar Lal v. Bajpai Jainarayan* (1903) I.L.R., 30 Cal., 1060, followed. *Mukta Prasad v. Mahadeo Prasad* (1916) I.L.R., 38 All., 327 and *Saminatha Pathan v. Sornatha Ammal* (1912) 22 M.L.J., 190, referred to. *Tokhan Singh v. Girwar Singh* (1905) I.L.R., 32 Cal., 494, distinguished. Where a judgment-debtor who could have been arrested for the entire amount of a

- decree is on his objection ordered to be arrested only for a certain amount on the ground that the balance could be realized by the sale of the lands given by him as security for the decree amount, he is estopped from afterwards disputing the right of the decree-holder to sell the lands for all the then balance of the decree even though such balance may exceed the amount for which the lands were originally tendered as security. *Sadasiva Pillai v. Ramalinga Pillai* (1875) 2 I.A., 219, followed.
- Subramanian Chettiar v. Raja of Ramnad* ... (1918) I.L.R., 41 Mad., 327
- COMPANIES ACT (INDIAN) (ACT VII OF 1913), SEC. 104, CL. (1) (b)—“Share fully paid up otherwise than in cash,” meaning of—Exchange of debenture not matured for share, whether a payment in cash for share.] Where in accordance with the terms of a debenture deed a company allots to a debenture-holder a fully paid-up share in exchange for the surrender of a debenture deed not then mature, the share as allotted is one “fully paid up otherwise than in cash” within section 104 (1) (b) of the Indian Companies Act (VII of 1913). *Spargo's case* (1873) L.R., 8 Ch. App., 407, distinguished.
- Thodapuzha Rubber Company v. The Registrar of Joint Stock Companies, Madras* ... (1918) I.L.R., 41 Mad., 307
- CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 345—Composition of an offence with one of several accused persons, effect of.] The composition of an offence under section 345 of the Criminal Procedure Code with one of several accused persons does not effect an acquittal of the others. *Chandra Kumar Das v. The Emperor* (1902) 7 C.W.N., 176, dissented from.
- Muthia Naick v. The King-Emperor* ... (1918) I.L.R., 41 Mad., 328
- CUSTOM, finding as to existence of, whether revisable under section 100, Civil Procedure Code:—See CIVIL PROCEDURE CODE, SEC. 100.
- ESTOPPEL:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLI, r. 5 (3).
- HINDU LAW—Grants made of properties for non-religious and for religious and charitable purposes by Raja of Tanjore to his guru the ancestor of the parties—Suit for partition—Dispute whether granted to the guru personally or to the office of head of a mutt held by him—Perpetual conducting of food *chatram* and building *agrahan*—Private charities, management of—Non-religious properties, liable to partition—Charities not liable.] Grants of the property in suit had been made by the Raja of Tanjore from time to time to the ancestor of the parties a holy man whom the Raja brought to Tanjore as his guru. Some of the grants were for non-religious purposes and others for religious and charitable purposes in connexion with a mutt founded when the guru came to Tanjore; and the properties descended to a joint family the adult members of which consisted of three brothers the eldest of whom (the appellant) was the manager of the joint family and the head of the mutt. To a suit by the second brother (the first respondent) to have partition of the non-religious properties, and as to the religious and charitable properties for a scheme of management in which he claimed a share, to be settled by the Court, the other brothers were made defendants the youngest brother (as second defendant-respondent) supporting the

- plaintiff-appellant. Held as to the non-religious properties (upholding the decision of the Courts in India) that there was nothing in the documentary evidence (the original grants, and confirmatory inam grants made by the Government after the escheat of the Tanjore Raj) or in any of the other circumstances of the case to take the descent of the properties out of the ordinary rule of inheritance, and they were therefore liable to partition. The objects for which the religious and charitable properties were given were described in the grants as being for the purpose "of perpetually conducting a food chatram near the tomb of a holy man, and in one case of making an agrahar by building houses round the holy place." Held (reversing the decision appealed from) that there was sufficient indication in the grants and in the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee was inconsistent with the purposes of the founder who must be deemed to have intended that the religious charities should be administered by the man who was head of the mutt, to which office the eldest son of the previous holder would succeed, the office not being the subject of partition, but being indivisible among the members of the family, and the principles to be applied being those laid down in *Jaafar v. Aji* (1863) 2 M.H.O.R., 19 and *Trimbak v. Lakshman* (1896) I.L.R., 20 Bom., 495. Even, if this were not so, *quære* whether the rules laid down in some cases as to the devolution of the management of private charities such as the support of a family idol would be applicable to charities such as those in question.
- Sethuramaswamiar v. Meruswamiar* ... (1918) I.L.R., 41 Mad. (P.C.), 296
- LIMITATION ACT (IX OF 1908), SEC. 10, *whether applicable to suits in respect of property which has not been received by a trustee.* The insertion in section 10 of the Indian Limitation Act, 1908, of the words "or the proceeds thereof, or for an account of such property or proceeds" has not had the effect of exempting from the ordinary rules of limitation suits against trustees for failure to reduce the trust property into possession. *New Fleming Spinning and Weaving Company, Limited v. Kessowji Naik* (1885) I.L.R., 9 Bom., 373 at p. 399, followed.
- Tholasingam Chetty v. Vedachella Aiyah* ... (1918) I.L.R., 41 Mad., 319
- MUHAMMADAN LAW—Contingent right to inherit, transfer or renunciation of, *whether prohibited.* A transfer or renunciation of a contingent right of inheritance is prohibited under Muhammadan Law. *Mussummant Khanum Jan v. Mussummant Jan Bee-bee* (1827) 4 S.D.A., 210, followed. *Kunhi Mamod v. Kunhi Moidin* (1896) I.L.R., 19 Mad., 176, considered. *Mussumut Hurmutt-Ool-Nissa Begam v. Allahdia Khan and Hajee Hidayat* (1871) 17 W.R., 108 (P.C.), explained.
- Asa Beevi v. Karuppan Chetty* ... (1918) I.L.R., 41 Mad., 365
- PENAL CODE (ACT XLV OF 1860), SEC. 370—*Buying and selling as a slave, what amounts to.* The appellants in these cases were convicted by Sessions Court of North Malabar under section 370, Penal Code, the second appellant having been found to have sold, and the first to have bought, a Pulayan named Vellam as a slave. The document recording the above transaction ran as follows:—"I execute to you and give you this day this jenmam deed giving you Velandi's son Pulayan Vellan with his heirs. The sum that I received from you in cash to-day is ten rupees. For this sum of ten rupees, you should get work done for you by the said Vellan and his offspring that may come into being as your jenmam, and not as you please." On a difference of opinion between ABDUR RAHIM and NAPIER, JJ., as to whether the said transaction amounted to an offence under section 370, Indian Penal Code: Held by AYLING, J., that the transaction in question was a sale of Vellan and his offspring as mere chattels and that the appellants were guilty of an offence under section 370, Penal Code. *Empress of India v. Ram Kuar* (1880) I.L.R., 2 All., 728 and *Amina v. Queen Empress* (1884) I.L.R., 7 Mad., 277, referred to.
- Koroth Mammad v. The King-Emperor* ... (1918) I.L.R., 41 Mad., 384
- PROMISSORY-NOTE, *in favour of the managing trustees of a charity—The trustees succeeded by another—Latter's right to sue on the note without any assignment or endorsement.* A promissory-note executed in favour of a trustee can be sued on by his successor without endorsement or assignment, the Negotiable Instruments Act not affecting devolution of rights by operation of law. *Catherwood v. Chabaud* (1823) 1 B. & C., 150, applied and followed. *Sowcar Lodd Govinda Doss v. Muneppa Naidu* (1903) I.L.R., 31 Mad., 534, referred to.
- Ramanadhan Chetty v. Katha Velan* ... (1918) I.L.R., 41 Mad., 353
- PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 7.—*Suit involving apportionment of rent, whether a suit of small cause nature—Transfer of Property Act (IV of 1882), ss. 2 (d) and 36, applicability of, to transfer in execution.* A suit the determination of which involves apportionment of rent by the Court, falls within article 7 of the second schedule of the Provincial Small Cause Courts Act and is exempted from the cognizance of a Provincial Small Cause Court. Though according to section 2 (d) of the Transfer of Property Act, the Act does not apply to sales in execution, yet the principle of section 36 of the Act which embodies a rule of justice, equity and good conscience can be applied and rent apportioned from day to day as between a lessor and the transferee of his right in execution in the course of a year of the lease.
- Rangiah Chetty v. Vajravelu Mudaliar* ... (1918) I.L.R., 41 Mad., 370
- PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 113:—*See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 100.*
- RELIGIOUS ENDOWMENTS ACT (XX OF 1863), SEC. 14—*Procedures to be followed by committees in the transaction of its business—Suspension of a temple trustee by a temple committee—Legality of procedure—Suit by the trustees for damages for illegal suspension—Liability of individual members of the committee in damages.* Notice of suspension was given to a temple trustee in accordance with the opinion of the majority of the members of the local temple committee, to each of whom one of the members sent a copy of his report recommending suspension, and in spite of the objection taken by one member that the matter should be disposed of at a meeting. Held, that a

temple committee under the Religious Endowments Act resembles a corporation and that the ordinary way to transact its business is at a meeting. Assuming that it can do some of its business in circulation, it cannot remove or suspend trustees in this manner. *Res v. Taylor* (1694) 3 Salk, 231; s.c., 91 E.R., 795, *Res v. Sutton* (1711) 10 Mad., 74; s.c., 88 E.R., 632, *Thandarayaya Pillai v. Subbayyar* (1900) I.L.R., 23 Mad., 483 at p. 485 and *Ponnam-bala Pillai v. Muthu Chettiar* (1916) 30 M.L.J., 619, referred to. The procedure being *ultra vires*, it is no answer to the trustee's suit for damages for illegal suspension that there were sufficient grounds for suspension. In India individual members of a temple committee, who are parties to an illegal suspension of this kind are liable in damages. *Vijaya Baghava v. Secretary of State for India* (1884) I.L.R., 7 Mad., 468 and *Ferguson v. Kinnoull* (1842) 9 Cl. & F., 251, followed. Indian and English decisions considered.

Venkata Narayana Pillai v. Ponnusawmi Nadar ... (1918) I.L.R., 41 Mad., 357
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TRUSTEE, suit against—Limitation:—See LIMITATION ACT (IX OF 1908), SEC. 10.
TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 2 (d) AND 36:—See PROVINCIAL
SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 7.

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Chandramathi Ammal v. Narayanaswami Aiyar(1), nor is there of any discussion of the authorities.

I am of opinion that the decision in *Chandramathi Ammal v. Narayanaswami Aiyar*(1), which if I may say so with respect is a well-considered judgment dealing fully with the matter, correctly sets out the principle to be applied to cases of absence of either party at the adjourned hearing.

The decision of the question must depend on the express language of Order XVII, rules 2 and 3. As pointed out in *Chandramathi Ammal v. Narayanaswami Aiyar*(1), section 157 (rule 2) deals with cases of absence of parties and section 158 (rule 3) with failure to do what was ordered. If the party fails to appear section 157 (rule 2) applies and there is no reason why the Court should assume (in the absence of any explanation) that he is guilty of default so as to apply the stringent provisions of section 158 (rule 3). I think the correct rule is to treat rule 3 as applying only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were directed to do. I have already dealt with the matter from the point of view of hardship to the parties and my own experience is that the rule laid down in *Chandramathi Ammal v. Narayanaswami Aiyar*(1) has been a safe and uniform guide to Courts. The construction moreover is one that suggests itself on a consideration of the plain language of rules 2 and 3. I have no hesitation in coming to the conclusion that the decision in *Chandramathi Ammal v. Narayanaswami Aiyar*(1) ought to be followed.

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—
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N.B.

(1) (1910) I.L.R., 33 Mad., 241.

PRIVY COUNCIL.*

1917,
July 13, 16,
17 and
October, 23.

SETHURAMASWAMIAR AND OTHERS (DEFENDANTS NOS. 1, 2 AND 3),

v.

MERUSWAMIAR (PLAINTIFF).

[On appeal from the High Court of Judicature
at Madras.]

Hindu Law—Grants made of properties for non-religious and for religious and charitable purposes by Raja of Tanjore to his guru the ancestor of the parties—Suit for partition—Dispute whether granted to the guru personally or to the office of head of a mutt held by him—Perpetual conducting of food chatram and building aghar—Private charities, management of—Non-religious properties liable to partition—Charities not liable.

Grants of the property in suit had been made by the Raja of Tanjore from time to time to the ancestor of the parties a holy man whom the Raja brought to Tanjore as his guru. Some of the grants were for non-religious purposes and others for religious and charitable purposes in connexion with a mutt founded when the guru came to Tanjore; and the properties descended to a joint family the adult members of which consisted of three brothers the eldest of whom (the appellant) was the manager of the joint family and the head of the mutt. To a suit by the second brother (the first respondent) to have partition of the non-religious properties, and as to the religious and charitable properties for a scheme of management in which he claimed a share, to be settled by the Court, the other brothers were made defendants the youngest brother (as second defendant-respondent) supporting the plaintiff-appellant.

Held as to the non-religious properties (upholding the decision of the Courts in India) that there was nothing in the documentary evidence (the original grants, and confirmatory inam grants made by the Government after the escheat of the Tanjore Raj) or in any of the other circumstances of the case to take the descent of the properties out of the ordinary rule of inheritance, and they were therefore liable to partition.

The objects for which the religious and charitable properties were given were described in the grants as being for the purpose 'of perpetually conducting a food chatram near the tomb of a holy man, and in one case of making an aghar by building houses round the holy place.'

Held (reversing the decision appealed from) that there was sufficient indication in the grants and in the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee was inconsistent

* Present:—Lord BUCKMASTER, Sir JOHN EDGE, Mr. AMEER ALI, and Sir WALTER PHILLIMORE, *Bart.*

with the purposes of the founder who must be deemed to have intended that the religious charities should be administered by the man who was head of the mutt, to which office the eldest son of the previous holder would succeed, the office not being the subject of partition, but being indivisible among the members of the family, and the principles to be applied being those laid down in *Taafar v. Aji* (1863) 2 M. H.C.R., 19; and *Trimbak v. Lakshman* (1896) I.L.R., 20 Bom., 495.

Even, if this were not so, *quære* whether the rules laid down in some cases as to the devolution of the management of private charities such as the support of a family idol would be applicable to charities such as those in question.

APPEAL No. 149 of 1915 from a judgment and decree (18th August 1909) of the High Court at Madras, which affirmed a judgment and decree (11th December 1906) of the Court of the Subordinate Judge of Tanjore.

The facts of the case are sufficiently stated in the judgment of their Lordships of the Judicial Committee, and will also be found in the judgment of the High Court (WALLIS and SANKARAN NAIR, JJ.) appealed from *Sethuramaswamiar v. Meruswamiar*(1).

The suit from which this appeal arose was brought by Meruswamiar, the first respondent for partition and possession of a one-third share of certain properties, movable and immovable (referred to as the non-religious properties), of the Hindu joint family governed by the Mitakshara Law, consisting of himself and his two minor sons and his two brothers. The plaint also contained a prayer that a scheme should be settled for the management of certain other properties (referred to as the religious properties and therefore not available for partition) which were subject to charitable and religious trusts, but the management of which the first respondent alleged he was entitled to in rotation with the first and second defendants. Sethuramaswamiar, the first defendant (now the first appellant), was the eldest brother, and manager, of the joint family; the youngest brother, Sundaraswamiar, was the second defendant (now the second respondent) who supported the case of the first respondent (plaintiff) and asked for possession of his one-third share. The other defendants were Ramasetuswami and Lakshmanaswamy, the third and fourth defendants, and certain widows entitled to maintenance.

(1), (1911) I.L.R., 34 Mad., 470.

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The first defendant pleaded that the properties of which partition was sought were impartible. In paragraph 3 of his written statement he alleged that 'the properties set out in Schedule II annexed to the plaint' (the non-religious properties) 'in so far as they are actually in existence are not divisible joint family properties. The said properties are attached to the Raja Guru Adhinam of Sri Setubhavaswami (the original ancestor of the family) and go by the name of Sri Setubhavaswami's inams and descend according to primogeniture.' He claimed that these lands were given to the guru for the time being for the support of the dignity of his office; and he alone as Raja Guru was entitled to them, his brothers and other members of the family being only entitled to maintenance therefrom; and that as head of the mutt he alone was entitled to manage the religious properties. The Subordinate Judge made a decree in favour of the plaintiff which was on appeal affirmed by the High Court.

On this appeal—

Sir H. Erle Richards, K.C., and J. M. Parikh for the appellants contended that the grantor intended to make the grants to the grantee and his successors to the headship of the grantee's mutt, and to the office of the Raja Guru which the appellant now represents. They were oral grants and the Courts in India wrongly treated the orders to the officials as if they were the original grants. The grants were given to the founder of the family who was the Royal 'Guru' and were made from time to time to support the dignity of his office, which has now devolved by primogeniture on the first appellant, who, it was submitted, was exclusively entitled to the properties as being the holder of the office of Raja Guru. There was consequently no right in the first respondent to have partition of them. These properties devolved in the same way by primogeniture. The succession in the family was not governed by the ordinary rules of succession under the Mitakshara Law; the custom of gaddinishini in the family supports the contention that the rule of descent was by primogeniture. Reference was made to *Nitpal v. Jai Singh Pal*(1), *Garudhwoja Parshad Singh v. Sagarandhwoja*

(1) (1897) I.L.R., 19 All., 1 at pp. 8, 9, 10; s.c., L.R., 23 I.A., 147 at pp. 151, 152 and 153.

Parshad Singh(1) and Mayne's Hindu Law, 8th edition, paragraph 469. *Secretary of State for India v. Kamachee Boye Sahiba*(2) was also referred to as to the action taken by the Government on the escheat of the Raj of Tanjore with regard to properties similar to those now in suit. The plaintiff only received and accepted a fixed monthly allowance; the inference from which was that he became excluded from enjoying the alleged joint family properties as a co-parcener, and lost any right he might have had to partition: see *Raghunath Bali v. Maharaj Bali*(3).

The religious properties were given to the founder of the family to manage for the purposes, charitable and religious, stated in orders to the officials issued at the time. These properties could not be divided, but must be held by the guru himself as head of the mutt. They should, it was submitted, so remain now with the first appellant as head of the mutt, the management of them being his right; they having been managed by the head of the mutt for 140 years. The office of headship of a mutt was not partible, and the properties managed by the holder of that office were consequently not partible: see *Trimbak v. Lakshman*(4) and Mayne's Hindu Law, 8th edition, paragraph 439. The title-deeds of the Inam Commission were always made in the name of the manager of a charity or a religious trust and such manager has always been the head of the mutt as it is admitted the first appellant is here. The first respondent does not claim to be the head of the mutt, but admits that the right to hold that office is in the first appellant; it is submitted that he alone is entitled to manage the religious properties. Reference was made to *Nubkissen Mitter v. Harrichunder Mitter*(5), *Ramanathan Chetty v. Murugappa Chetty*(6), and *Thandavaraya Pillai v. Shunmugan Pillai*(7), relied on by the High Court, but distinguishable from the present case on the facts. The first case related to the endowment of a family idol and

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(1) (1900) I.L.R., 23 All., 37 at p. 50; s.c., L.R., 27 I.A., 233, 250.

(2) (1885) 7 M. I.A., 476.

(3) (1885) I.L.R., 11 Cal., 777 at p. 783; s.c., L.R., 12 I.A., 112 at p. 115.

(4) (1898) I.L.R., 20 Bom., 495 at pp. 500, 501.

(5) (1816) 2 Morley's Digest, 146. (6) (1904) I.L.R., 27 Mad., 193 at p. 200.

(7) (1909) I.L.R., 32 Mad., 167.

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public endowment made by a sovereign ruler, and is one to which the rules as to the management of a private endowment are not applicable: *Trimbak v. Lakshman*(1). In the other cases, though the endowments were public, it was admitted that the office devolved on the heirs of the last sole trustee: they are not authorities for the present case. They also related to the management of a temple, not of charities connected with a mutt. A scheme which provided for an equal right of management by all the co-parceners in a joint family would not be beneficial to the interest of the charities.

DeGruyther, K.C., and *Kenworthy Brown* for the respondents (who were called on only as to the management of the religious properties) contended that the grants were made to Sethubhavaswami, the ancestor of the parties, personally, but subject to a charge for the charities, and the succession in that case would be governed by the ordinary rules of the Hindu Law as to succession. There was no difference in that respect between the non-religious and the religious properties. Reference was made to *Lahar Puri v. Puran Nath*(2) and *Giyana Sambandhu Pandara Sannadhi v. Kandasami Tambiran*(3), and it was submitted the institution was neither a mutt, nor a religious institution. There is no evidence that there was a mutt; and even if there was a mutt the gift was not to the mutt but to the individual managing it: the dwelling house in fact was called a mutt. There is nothing to show that any mutt was in existence at the time of the grant; nor are the properties endowed properties of the mutt. They were managed by the Court of Wards which is not empowered to perform duties connected with a mutt. It is also held by both the Courts below that these properties were not attached to the mutt. They are family properties charged with a religious trust, and descend to the heirs of the grantee: see Mayne's Hindu Law, 8th edition, paragraphs 438 and 439. The inam grants cannot alter the succession not being the foundation of the title: see rule 3 of the rules under which the Inam Commissioners were working. The 'successors' in inam

(1) (1896) I.L.R., 20 Bom., 495 at p. 501.

(2) (1915) I.L.R., 37 All., 298; L.R., 42 I.A., 115.

(3) (1887) I.L.R., 10 Mad., 375 at pp. 386, 387.

title deeds means the heirs of the grantee. Reference was made to *Ramanathan Chetty v. Murugappa Chetty*(1).

Sir H. Erle Richards, K.C., in reply referred to *Sathianama Bharati v. Saravanabagi Ammal*(2), and contended it was for the first respondent to prove his right to share in the management. Mayne's Hindu Law, 8th edition, paragraph 601, the first appellant came within the qualification there mentioned.

THE JUDGMENT of their Lordships was delivered by

Sir WALTER PHILLIMORE.—The plaintiff in this suit is the younger brother of the first defendant, and the nature of his claim is twofold.

He alleged, first, that there were certain joint family properties, of which the first defendant had been manager, and of which he now desired his share.

Secondly, that there were certain properties devoted to charitable and religious purposes, and therefore not available for division, in the management of which he was entitled to share, and for which he desired that there should be a scheme of management settled by the Court.

The second defendant is another younger brother having the same interest as the plaintiff; and the other defendants are widows entitled to allowances during their lives.

The properties, both non-religious and religious, were granted at various times by the then Raja of Tanjore to the ancestor of the parties, one Setubhavaswami. They descended to his son and that son having no natural children, to an adopted son, and then to his adopted son, Ramasetuswami, who died, leaving three natural sons, viz., the plaintiff and the first and second defendants.

At the time of the death of Ramasetuswami in 1886 his three sons were minors. The first defendant came of age in 1890, and the plaintiff somewhere about the year 1894. He made a demand of his rights in 1901 and brought his action in 1904.

There is no dispute as to the circumstances in which the original ancestor received the grants of land from the Raja of

(1) (1904) I.L.R., 27 Mad., 193; s.c. on appeal to the Privy Council (1906) I.L.R., 29 Mad., 283; L.R., 33 I.A., 139.

(2) (1893) I.L.R., 18 Mad., 266 at p. 270.

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Tanjore. He was a holy man, who, somewhere about the year 1739, was brought from a mutt or religious institution at Mannārgudi to Tanjore, and was constituted by the Mahratta Ruler of Tanjore his *guru*, or spiritual preceptor. His descendants in regular succession became *gurus* to the Raja as long as the Raj remained, and were installed by the Raja for the time being with certain ceremonies, one of the most important being the placing of the new *guru* on the *gadi*. There was also a religious ceremony, in which the head of the mutt at Mannargudi and certain other heads of mutts took part, to which reference will be made later on.

When Ramasetuswami, the father of the parties, died the Raj had escheated; but after the usual religious ceremony had taken place, the man claiming to be the adopted son of the last Raja installed the first defendant with the accustomed ceremony; and there is no doubt that the first defendant is the *guru* of the man who installed him.

The contention on behalf of the first defendant is that the office of *guru* is hereditary by way of primogeniture, and that the non-religious lands were given to the *guru* for the time being to maintain the dignity of his office, and are therefore impartible.

The contention for the plaintiff is that these lands were granted to the original *guru*, no doubt as a reward for his services, but to him personally and his heirs, and not as an appanage or endowment of the office of *guru*.

Shortly after the escheat of the Raj in 1855, enquiries were directed by the Government with a view of ascertaining whether the properties enjoyed by Ramasetuswami were service lands, that is, land enjoyed or endowments of offices held by servants or ministers of the Raja, which would escheat upon the termination of the Raj, or whether they had been bestowed as personal grants; and a report was made which was acted upon by the Government to the effect that these non-religious properties were not service lands but personal grants, and consequently had not escheated. Thereupon new *inam* grants in confirmation of the original grants were made by the Government to the father of the parties.

The original grants of the non-religious lands show no indication that they were made by way of endowment of an office.

The utmost that can be said on behalf of that contention is that the grantee is sometimes described as a Royal Priest. But this is mere description.

The confirmation grants of the non-religious lands describe them as the personal *inams* of the grantee to be held by him as his absolute property to hold or dispose of as he thinks proper, subject to the quit-rent. In some of the grants the *inam* is said to be tax free and hereditary, and that on failure of lineal heirs it will lapse to the State.

There is nothing in these documents, or in any of the other circumstances of the case, to take the descent of the non-religious lands out of the ordinary rule of inheritance. This is what has been decided in favour of the plaintiff by the Subordinate Judge, and in the High Court of Judicature of Madras upon appeal; and their Lordships see no reason to differ from this conclusion. They arrive without hesitation at the result that the appeal of the first defendant against this part of the decision in the Courts of India fails.

Both Courts have also decided in favour of the plaintiff on the other claim, and have directed that there should be a scheme for the management of the religious and charitable properties, to be settled in due course. This part of the case has given their Lordships more difficulty.

No scheme has, so far, been settled, but there is no doubt as to the lines on which the scheme would proceed. It would, as asked by the plaintiff, provide for equal rights of management by the plaintiff and the first and second defendants and their heirs, either by giving the management to each in rotation, or possibly by dividing the charities and assigning the management of some to one and of the others to the others.

This will be the nearest approach that can be made to the ordinary partition which is granted at the request of any one of the co-parceners of Hindu family lands.

The objects for which these properties were given are described in the deeds as being for the purpose of perpetually conducting a food chatram near the tomb of the holy man Meruswami, and in one case for the purpose of making an agrahar by building houses round about the holy place.

With regard to what are called private charities, such as endowments for the support of the family idol, the law, as laid

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down by various decisions in India, and apparently accepted in one case by the Privy Council [*Ramanathan Chetty v. Murugappa Chetty*(1)], is that, if there is no contrary provision in the original grant, the right of management passes to the natural heirs of the original grantee, and, if there be no other arrangement or usage and no scheme settled by the Court, will be exercised by the managing member of the family before partition, or in turn by the several heirs after partition.

But their Lordships' attention has not been drawn to any case in which these decisions as to management have been applied to lands which constitute the endowment of such a charity as those in question in this suit.

The case most nearly in point is *Thandavaroya Pillai v. Shunmugam Pillai*(2); but it does not decide this question, and does not seem to have come up before the Privy Council.

It is unnecessary, however, to decide whether there is a general rule for the devolution of the management of charities of this class because, in their Lordships' view, there is sufficient indication in the documents and in the surrounding circumstances of this case that a devolution of the management to the heirs of the original donee is inconsistent with the purposes of the founder when he created the endowments.

The grants of the religious or charitable lands made by the Mahratta Raja to Setubhavaswami, which take the form of orders to his officers, describe them as being for the purpose of *inam* and for the purpose of perpetually conducting or establishing the defined charity; and they proceed to state that for this purpose they had been given to the Royal Priest Setubhavaswami.

Having regard to the donee's position and the way in which these grants are set forth, it would be difficult if there was nothing else to guide the Court to determine whether these grants were made to the person or to the office. But the deeds of confirmation of the religious lands made by Government in 1865 are of assistance. They are in a different form from that used in the confirmation grants of the non-religious lands. Each is described as a title-deed granted to the manager for the

(1) (1904) I.L.R., 27 Mad., 193; s.c., in Privy Council (1906) I.L.R., 29 Mad., 288; s.c., L.R., 33 I.A., 139.

(2) (1909) I.L.R., 32 Mad., 167.

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time being of the charity, which is then described. By the deed the title of the manager is acknowledged, and the *inam* is confirmed to him and his successors. There is no personal name, and it is only from external evidence that it can be determined that the grant was to Ramasetuswami, the father of the parties.

Taking, as their Lordships do, the view that it was not intended by these confirmation deeds to vary the previous rules as to the descent of the religious lands, any more than it was intended to vary the previous rules as to the descent of the non-religious lands, these confirmation grants afford evidence as to the nature of the tenure, as it was commonly understood at the time. These lands, then, had been held, and were to be held in future, by the particular office-bearer from time to time. That office-bearer is, in their Lordships' opinion, to be found in the head of the *mutt*, or institution founded when the original *guru* was induced by the Raja to migrate from Mannārgudi. He would be one person, not several, and the first defendant is the present head.

It is in evidence that the installation ceremonies which are believed to have occurred upon the succession of each new *guru* were of a double character. The induction, as it may be called, by the Raja to the office of Royal Guru with a seat upon the *gadi* was preceded by a religious ceremony in the nature of an ordination or institution in which the *Mohunt*, or head of the parent *mutt*, placed the first defendant in the seat of headship, other heads of *mutts* taking part in this ceremony, and certain religious rites following.

It is in evidence that the defendant, as the head of the *mutt* thus constituted, performs in person, or by deputy, certain religious rites, has given initiation to some people, no doubt not many, and has on some, not very frequent, occasions given religious instruction. He is thus pointed out as the natural head and administrator of the religious charity; and the office of head of the *mutt* and administrator of the charity have been associated from the first.

The headship of a *mutt* is not a matter of partition. Indeed, the plaintiff admits that he has no claim to share in it. This being so, it appears to their Lordships that the intention of the founder must be deemed to have been that his religious charities should be administered by the man who was head of the *mutt*,

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to which office the eldest son of the previous holder would naturally succeed, the office being indivisible among the members of the family, and the principles to be applied being those laid down in the case of *Jaafar v. Aji*(1); and further approved in *Trimbak v. Lakshman*(2). This being so, there was no jurisdiction in the Indian Court to settle a scheme, the only object of which would be to take away the sole power of management from the eldest son.

This part of the appeal therefore succeeds.

Their Lordships think that the plaintiff should have his costs in the Court of First Instance, as he there recovered a very substantial part of his claim, viz., his right to share in the inheritance, and to have partition, if he desired, of the non-religious lands; but they think that there should be no costs of the appeals to the High Court and to His Majesty in Council.

Their Lordships will therefore humbly recommend His Majesty that the decree of the High Court of Judicature of Madras be varied, in so far as it confirmed that part of the decree of the lower Court, paragraph 8, which ordered that a scheme be settled for the due management of the religious and charitable properties, and so far as it ordered the first defendant to pay the costs on appeal of the plaintiff and second defendant; and that the decree of the lower Court be varied by striking out paragraph 8, and that there be no costs of the appeal to the High Court or to His Majesty in Council.

Decree varied.

Solicitors for the appellants:—*Chapman-Walker and Shephard.*

Solicitor for second, sixth and seventh respondents:—*Douglas Grant.*

J.V.W.

(1) (1863) 2 M. H.C.R., 19.

(2) (1896) I.L.R., 20 Bom., 495.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Oldfield.

THE THODAPUZHA RUBBER COMPANY, LIMITED
(PETITIONERS), APPELLANTS,

1917.
July, 16.

v.

THE REGISTRAR AND ASSISTANT REGISTRAR OF
JOINT STOCK COMPANIES, MADRAS (RESPONDENTS),
RESPONDENTS.*

Indian Companies Act (VII of 1913), sec. 104, cl. (1) (b)—‘Share fully paid up otherwise than in cash,’ meaning of—Exchange of debenture not matured for share, whether a payment in cash for share.

Where in accordance with the terms of a debenture deed a company allots to a debenture-holder a fully paid-up share in exchange for the surrender of a debenture deed *not then mature*, the share as allotted is one ‘fully paid up otherwise than in cash’ within section 104 (1) (b) of the Indian Companies Act (VII of 1913).

Spargo’s case (1873) L.R., 8 Ch. App., 407, distinguished.

APPEAL against the judgment of COUTTS TROTTER, J., in *In the matter of the claim of Thodapuzha Rubber Company, Limited, Messrs. Huson and Robinson, the Secretaries*, to file a return of allotment of shares under clause I (a) of section 104 of the Indian Companies Act (VII of 1913).

The facts appear from the third paragraph of the judgment of COUTTS TROTTER, J. (see next page).

The judgment of COUTTS TROTTER, J., was as follows:—

COUTTS TROTTER, J.—This is a motion by the Thodapuzha Rubber Company, Limited, for an order, under section 45 of the Specific Relief Act, in the nature of a Mandamus to compel the Registrar of Joint Stock Companies to accept and file a return, under Form VI of the Indian Companies Rules, 1914, of the allotment of a number of shares. The Registrar refused to file the return on the

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ground that the mere filling up of Form VI was not sufficient and that it was necessary to file further particulars under section 104 of the Act; and the real question is as to whether certain additional stamp duties are or are not payable by the company.

The short point that I have to determine is the true construction of section 104 of the Indian Companies Act, 1913. That is a Consolidation Act and is based in the main on the English Companies Consolidation Act of 1908. Section 104 specifies what the company is to do when it makes an allotment of shares. It must, by sub-section 1 (a), file with the Registrar the number and nominal amount of the shares, the names, etc., of the allottees and the amount paid or payable on each share. By sub-section 1 (b) in the case of shares allotted as fully or partly paid up otherwise than in cash, it must produce the contract in writing which constitutes the title of the allottee and various other particulars. By sub-section (2) where there is a contract upon which the title of the allottee depends but it is not in writing, particulars of its terms are to be reduced into writing and filed with the Registrar. It is unnecessary for me in this case to decide whether the contract evidencing the title of the allottee was or was not wholly in writing. The only question I am asked to decide is whether these shares were fully or partly paid up otherwise than in cash. The object of the section is to let those who have dealings with the company know when its shares have cash behind them and if they have not, to know the nature and value of the consideration or the alleged consideration. It is clear that the promoters of a company can put any value they like on such intangible assets as the good will of a business previously existing and made over to the company and can allot as many shares for it as they are minded to. What is essential is that they should let the public know that those shares so allotted as fully paid up do represent that intangible asset and not hard cash available in the coffers of the company as trading capital.

The facts giving rise to the present motion are very simple and are as follows: The proposed allottees were debenture-holders in the company and they held debentures of one hundred rupees each payable on the 1st of January, 1918. The only material clause in the conditions endorsed on the debenture is No. 11 which runs as follows: "The registered holder hereof shall, while the same remains in force and upon giving previous notice in writing, be entitled to surrender this debenture and receive in consideration thereof one fully paid ordinary share of Rs. 100 of the company

part of or ranking *pari passu* with the ordinary shares of the original capital." The allottees in this case had exercised the option given them by the clause of giving notice to surrender their debentures and receive shares in exchange. The company has allotted them shares in accordance with the notice which rank as fully paid up shares: and the only question I have to determine is whether or no these shares are fully or partly paid up otherwise than in cash. The precise circumstances have not, so far as I can ascertain, been before a Court either in England or in this country. But there is a long line of decisions in the English Courts on various sections of the successive English Company Acts which have exhaustively considered and defined what is meant by a share paid up in cash. I think I ought not to do otherwise than follow those decisions, not only from respect to the very learned Judges who decided them but for the additional reason that the Indian Companies Act was framed on the lines of the English Act and must, I think, be supposed to have been intended to give effect to the settled law of the English Courts on the matters with which it deals. But for this, I should regard this as a plain case. It is, in no sense, within the mischief which the section is designed to obviate. These debentures were paid for in hard cash up to their full face value. When they were converted into shares, there remained behind the shares the one hundred rupees of hard cash in the coffers of the company which had been paid by the debenture-holders. If the public assumed from the register that the face value of these shares had passed to the company in money available to it as trading capital, the public was right. I go further and think that a lay member of the public would be far more likely to be misled if the particulars of the arrangement were placed upon the register as demanded. A lawyer would, no doubt, understand the true nature of the arrangement, I think it quite possible that a layman might misapprehend it and go away with a confused notion that these shares were represented in some way by a paper consideration. I am sorry to say I feel unable, in the face of the decisions, to take this broad view.

Prima facie, 'share fully paid up in cash' would seem to import a handing over of money, including, of course, negotiable instruments, in return for the shares. But it was early seen that the matter was not quite so simple as that. In *Spargo's case*(1), the facts were as follows: Spargo had agreed to take up 51 shares in a

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(1) (1873) L.R., 8 Ch. App., 407.

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company for the price of £ 2,550. He had also agreed to sell a certain mining lease for the sum of £2,176. In the books of the company, he was debited with the price of the shares and credited with the purchase price of the mining lease and paid the balance in cash. It was held that this was a purchase of the shares for cash on the ground that, as there were debts presently due on either side, it was unnecessary to go through the form of handing over cash on one transaction and returning it immediately on the other. Lord Justice MELLISH laid down a test which he had formerly elaborated in *Fothergill's Case*(1) that the shares must be treated as paid for in cash if what had been done would give rise to a good plea of payment, as distinct from a plea of accord and satisfaction. That sounds like a technical rule of English pleading, but it is a very convenient test and is one which, if applied, harmonises all the decisions with the possible exception of some observations of FRY, L.J., in *In re Johannesburg Hotel Company*(2). In *Kent's case*(3), Kent was a holder of shares in a Company which were not fully paid up but in respect of which there were no arrears of past calls or any present calls due. He took an assignment from a creditor of the company of the debt owed by the company to the assignor, but which, by an agreement between the assignor and the company was made repayable in future instalments, none of which was at the moment due or in arrears. Kent and the company came to an arrangement by which the payment of the future calls on Kent's shares was to be satisfied by crediting towards them the instalments as they fell due from the company under its debt to Kent's assignor. It was held by the Court of Appeal that Kent's shares could not be treated as paid for in cash. The Court took notice of the fact that no entries were made in the company's books carrying out the transaction, but the real ground of the decision was that the debt purchased by Kent and the unpaid calls were neither of them debts payable *in presenti*.

In *In re Jones Lloyd and Co., Limited*(4), the company owed a shareholder a present liability in cash which it was agreed should be set off against calls on shares to become due *in future*. Mr. Chamier urges that the real ground of that decision is that the matter is to be looked at broadly to see whether the company has had the enjoyment of cash in return for the shares. If that were so, and I were to follow that case on that supposition that would be enough for

(1) (1873) L.R. 8 Ch. App., 270.

(3) (1888) L.R. 39 Ch.D., 259.

(2) (1891) 1 Ch., 119.

(4) (1889) L.R., 41 Ch. D., 159

Mr. Chamier's contention. But I think the decision is perfectly consistent with the narrower test adopted in the earlier cases. If the Company in that case had brought an action on one of the calls, the share-holder, in my opinion, could have pleaded payment, not the less so because the payment had been made before it was legally due. In *In re Johannesburg Hotel Company*(1), the promoters of the Company agreed to have their promotion expenses discharged by the Company in fully paid shares. The Court held that these shares could not be treated as having been paid for in cash. The decision was arrived at by drawing a distinction between discharging a debt by the allotment of fully paid up shares and the setting off of a debt against the money due on shares which were not fully paid up until the transaction set off had been completed. The distinction is a very fine one and Lord HALSBURY who formed one of the Court took no pains to conceal his view that *Spargo's case*(2) was wrongly decided; and Lord Justice FRY said of *Spargo's case*(2) that it, in effect, struck the words 'in cash' out of the statute. *Spargo's case*(2) has since been re-habilitated by a very strong Committee of the Privy Council in *Larocque v. Beauchemin*(3). In *North Sidney Investment and Tramway Company v. Higgins*(4), *In re Johannesburg Hotel Company*(1) was supported on the narrower ground that as the agreement in that case for promotion expenses was made before the Company came into existence, it could not be said to create a present debt from the Company at all. I am, therefore, of opinion that there is nothing to prevent my applying the principle of *Spargo's case*(2) if the present facts can be brought within it. I need, I think, only refer to one other case and that is *Barrow's case*(5). With the actual decision, I am not concerned; but Sir GEORGE JESSEL, M.R., with the concurrence of JAMES and BAGGALLAY, LL. JJ., made some observations which appear to me exactly opposite to the present case. In that case, the Company had agreed to buy a colliery and to pay for it at their option either in cash or fully-paid-up shares; and at the material period they had exercised their option and elected to pay in shares. Sir GEORGE JESSEL, M.R., says this: 'The appellant must show that there was money due from the Company which could be set off. There never was any due as regards these shares because, before the time for conveying the property had arrived, that is, before any money was receivable from the Company, the Company had exercised the option to pay in shares;

(1) (1891) 1 Ch., 119.

(3) (1897) A.C., 358.

(2) (1873) L.R., 8 Ch. App., 407.

(4) (1899) A.C., 263.

(5) (1880) L.R., 14 Ch.D., 432.

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so that there never was a moment of time when there was any money due from the Company to the appellant which was capable of being set off.' (I insert the word 'because' into the sentence which is omitted in the report by an obvious typographical error.) I see nothing in this inconsistent with the decision in *Spargo's case*(1) and I think it is a direct authority for the proposition that where the taking of shares is the original consideration and not due to a subsequent adjustment by way of set-off there is not a payment of cash within the meaning of the authorities. If I treat that pronouncement of JESSEL, M.R., as forming part of the decision in *Barrow's case*(2) and follow it, it is necessarily fatal to Mr. Chamier's contention. But even if I do not and apply the test of *Spargo's case*(1) directly, I think the same result follows. These debentures were not repayable until the 1st of January, 1918. By an arrangement the terms of which are contained in the 11th clause of the debenture and the notice given by the debenture-holder in accordance with it, the debenture-holder agreed to surrender his debenture before it was repayable and to accept shares in return. It was not within the contemplation of the parties at any time that cash should pass or be considered as due on either transaction. If the debenture-holder had sought before its maturity to surrender his debenture in return for cash, the Company would have been entitled to refuse him. I think it really comes to this: was there a single transaction or was there a conflation of two transactions? An illustration was put in the course of the argument which, at first sight, looked very cogent. Supposing I go into a shop, buy a table and pay for it and subsequently, by arrangement with the shopkeeper, return the table and take a side-board instead, the shopkeeper throughout retaining my money, could any one say that the side-board had not been paid for in cash. Possibly not, though I think it is arguable that the legal effect of the transaction was that I gave up my table in exchange for the shopkeeper's side-board. But the real question is: Could it be said that the true effect of the transaction was that the shop-keeper cancelled the debt which I owed him for the side-board in return for my foregoing the price of the table due from him to me? No one, I think, would so describe the transaction for the simple reason that it was never in the contemplation of the parties that the shop-keeper should pay me a sum of money in any contingency. Applying the direct test of *Spargo's case*(1) to the present facts I am clearly of opinion that, if the Company had sued the allottees of

(1) (1873) 8 Ch. App., 407. (2) (1880) L.R., 14 Ch.D., 432.

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these shares for their value, they could not have pleaded payment but would be compelled to set out the special arrangement and allege it as accord and satisfaction only.

I come to this conclusion with much regret because, as I have said, the transaction is, in my opinion, not within the mischief which the statute meant to guard against and I cannot think that the legislature could have intended, if such cases as the present had been in its contemplation, to inflict so heavy a penalty upon the parties. If an Appellate Court can see its way to cut the knot and declare this broadly to be a payment in cash because the end of the transaction is that the Company is left with the debenture-holder's cash, and the debenture-holder with the Company's shares to the same value, I should welcome the decision. I do not feel myself, as a judge of first instance, free to take that view in the face of the decided cases; and I fear the hardship can only be put right by the legislature. My decision, therefore, must be in favour of the respondent and I dismiss the motion accordingly.

With regard to costs, Mr. Chamier has invited me, should I be against him to deprive the respondent of costs on the ground that the Assistant Registrar of Joint Stock Companies had filed a disingenuous affidavit in response to the notice of motion. At the time I was inclined to agree with his criticism of the affidavit, but on reflection I do not think it can be charged with anything worse than unfortunate wording. Certainly, if the affidavit did hint at a plea evasive of the real merits of the question, the learned Advocate-General has, as one would expect, discarded it and confined his arguments to the substance of what I have to decide. In any case, the correspondence shows, beyond question, that the argument which has prevailed to-day was put before the petitioners and that the Registrar was quite ready to assist them, so far as lay in his power, to mitigate the severity of the result by treating the case as falling under sub-section (2) rather than under sub-section (1) (b). Whether that can be done or not is an extremely difficult question on which I cannot assist the parties, but must leave them to settle with the Revenue authorities. I see no ground for departing from the ordinary course and dismiss the motion with taxed costs."

The petitioners preferred this appeal.

D. Chamier for the appellants relied on his arguments as appearing in the judgment of COUTTS TROTTER, J.

Hon. Mr. S. Srinivasa Ayyangar, the Advocate-General for the respondent, in addition to his arguments which appear in

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the judgment of COUTTS TROTTER, J., cited Palmer's Company Precedents, Part III, Form 44, page 297 (Eleventh Edition), Palmer on Company, Volume I, page 69, Buckley on Companies (Ninth Edition), page 203, to show that unless cash was actually due by the Company there can be no set-off.

WALLIS, C.J.—This is an appeal from a decision of Mr. Justice COUTTS TROTTER that an allotment by the appellant company of a fully-paid-up share to a debenture-holder in exchange for his debenture pursuant to a condition in the debenture is an allotment of a share 'as fully paid up otherwise than in cash' within the meaning of section 104 (1) (b) of the Indian Companies Act, 1913. The debenture deed provides :

"The registered holder hereof shall, while the same remains in force and upon giving previous notice in writing, be entitled to surrender this debenture and receive in consideration thereof one fully-paid ordinary share of Rs. 100 of the Company part of or ranking *pari passu* with the ordinary shares of the original capital. Upon the surrender of this debenture under this condition the holder will not be entitled to proportionate interest thereon and the ordinary share so allotted in exchange shall rank for dividend from and after the half-year in which the registration is made."

I agree entirely with the learned Judge in holding that the share allotted in these circumstances was allotted as fully paid up otherwise than in cash and therefore came within the provisions of section 104 (1) (b) of the Act.

It has been argued before us that because the debenture-holder originally paid Rs. 100 in cash for his debenture the share in the company which was allotted to him some years afterwards should be regarded as paid up in cash. What the debenture-holder got for his Rs. 100 was a debenture and all the rights which a debenture-holder has, and he enjoyed those rights for a number of years and afterwards parted with those rights pursuant to the provision in the debenture deed and acquired a share in consideration of his surrender of the debenture deed, so that he acquired the share, as stated in the clause itself, in exchange for the debenture. Speaking for myself I fail altogether to see how that can be said to be a case in which the share was allotted to him as fully paid up in cash. It seems to me that it was allotted to him as expressly stated not for cash but in consideration of the surrender of his debenture and

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the rights which he held under it. There is admittedly no case in the books upon section 25 of the English Companies Act, 1867, or the more recent sections, which precisely covers this point. But I am glad to see that the same view is taken by Sir Francis Palmer with regard to a clause in the debenture which is practically in the same terms, in Part III of the eleventh edition of his Company Precedents, Form 44 at page 297. I do not think it necessary to go through the cases which have been cited before us; many of which are dealt with by the learned Judge in his judgment. The present case is clearly distinguishable from *Spargo's case*(1) where money was actually due by the company to the person (the vendor to the company) to whom the share was allotted. Here the debenture has not yet become payable to the allottee and therefore there is nothing which can be made the subject of a set-off. It is, I think, clear upon the authorities that in a case like this there must be a debt actually due and owing by the company to make the doctrine of *Spargo's case*(1) applicable. It is also unnecessary to consider whether there must also be a debt immediately due and payable by the company to the allottee. In *Ferrao's case*(2) it was held that this is not necessary. It does, however, appear abundantly clear that to apply that doctrine there must be a debt immediately due and payable by the company to the allottee. For these reasons, I think the appeal fails and must be dismissed with costs.

OLDFIELD, J.—I agree.

OLDFIELD, J.

N.R.

(1) (1873) L.R., 8 Ch. App., 407.

(2) (1874) L.R., 9 Ch. App., 355.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice
Kumaraswami Sastriyar.

1917,
July 16.

ALAGAPPA CHETTIAR AND TWO OTHERS (RESPONDENTS),
APPELLANTS,

v.

MUTHUKUMARA CHETTIAR (PETITIONER)
(RESPONDENT).*

Civil Procedure Code Act of V 1908, secs. 151 and 144—Money deposited in Court—Withdrawal by one party—Undertaking by party to repay amount—No provision in undertaking to pay interest—Application by party entitled to recover amount with interest—Power of Court to enforce undertaking—Liability for interest—

The plaintiffs having sued to establish their right to certain money which had been paid into Court by a third party, the defendant was allowed to draw the money on an undertaking to repay it if the plaintiffs succeeded. The plaintiffs having obtained a decree,

Held, that the Court had inherent power to order the defendant to repay the money, and that he could be made liable for interest as he had had the wrongful use of the money.

Rodger v. The Comptoir D'Escompte De Paris (1871) L.R., 3 P.C.A.C., 465; *Subbarayudu v. Yerram Setti Seshasani* (1917) I.L.R., 40 Mad., 299, and *Indra Chund Bothra v. Mr. A. H. Forbes* (1917) 2 Pat., L.J., 149, referred to.

APPEAL against the decree of SRINIVASA AYYANGAR, J., in *Muthukumara v. Alagappa*(1).

The defendant obtained a decree against X and attached a sum of money belonging to X which was deposited in the District Munsif's Court at M. The plaintiffs preferred a claim petition claiming this sum under a deed of trust executed by X for the benefit of his creditors. The claim petition was dismissed; the plaintiffs then brought this suit in the Court of the District Munsif of T for a declaration that as against the defendant they were entitled to the money and applied for a

* Letters Patent Appeal Nos. 247 and 248 of 1916.

(1) Civil Revision Petition Nos. 591 and 592 of 1915 praying the High Court to revise the order of F. H. WALLACE, the District Judge of Tanjore, in Civil Miscellaneous Appeal No. 78 of 1914, against the order of K. S. RAMASWAMI SASTRI, the District Munsif of Tirutturaippundi, in Original Petition No. 737 of 1914 in Original Suit No. 283 of 1912.

temporary injunction restraining the defendant from drawing the money. Plaintiff's application was allowed to be dismissed on the defendant undertaking to repay the same in case of plaintiff's success in the suit. On plaintiff's success, he applied by a miscellaneous petition for repayment of the amount with interest. The lower Courts allowed the same but on revision by the defendant to the High Court, SRINIVASA AYYANGAR, J., disallowed the interest on the ground that the undertaking did not contain a covenant to pay interest. Hence this Letters Patent Appeal by the plaintiff.

C. V. Anantakrishna Ayyar for the appellants.

S. Muthiah Mudaliyar for the respondent.

The JUDGMENT of the Court was delivered by

ABDUR RAHIM, J.—In this case there was a sum of money in deposit in Court and there was a dispute as to who was entitled to that money—the appellants whose claim was based on a trust-deed, or the judgment-debtor of the respondent. The appellants filed a suit to establish their right and obtained a temporary injunction restraining the respondent from drawing the money. Thereupon the respondent, on giving an undertaking to the Court, was allowed to draw the money. The appellants succeeded in establishing their title and the only question now before us in the Letters Patent Appeal is whether the appellants are entitled to interest on the amount drawn by the respondent till the date when he paid back the amount. Mr. Justice SRINIVASA AYYANGAR has decided against the appellants' contention on the ground that the undertaking given by the respondent did not provide for the payment of interest. We do not think that this is a conclusive factor. There is no express provision in the Civil Procedure Code or any of the other Indian Acts to which we have been referred which covers the question. Section 144 of the Code provides for proper orders being passed as regards payment of interest or damages in cases of restitution. This is not exactly a case of restitution though the principle of that section has been applied to a case somewhat similar to this by a Bench of this Court in *Subbarayudu v. Yerram Setti Seshasani*(1). We have also been referred to a decision

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(1) (1917) I.L.R., 40 Mad., 299 at p. 300.

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of the Patna High Court in *Indra Chund Bothra v. Mr. A. H. Forbes*(1). There also, though it was not a case exactly covered by section 144, the principle of that section was applied. The Privy Council has laid down the principle applicable to such cases in *Rodger v. the Comptoir D'Escompte De Paris*(2). Here the facts show that the appellants were entitled to this money and the respondent who had no title to the money obtained it from the Court by representing that he had a title. The principle therefore applies that having had wrongful use of the appellants' money, he is bound to pay interest during the time he had the use of the money.

The learned pleader for the respondent argued that the Court had no power to order the payment of the money or interest thereon in this proceeding. But the order is simply to enforce the undertaking which was given by the respondent to the Court and we have no doubt in holding that the Court had inherent power to enforce that undertaking on the faith of which the respondent obtained the money. We must allow the appeals reversing the judgment of the learned Judge and the decree will be varied in this way. The decree will provide for payment of interest by the respondent at 6 per cent from the date he drew the money from Court till the date of repayment. The respondent must bear the costs of these appeals and of the revision petitions. The memoranda of objections are dismissed.

K.R.

(1) (1917) 2 P.L.J., 149. (2) (1871) L.R., 8 P.C.A.C., 465 at p. 476.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Oldfield.

KATTA THOLASINGAM CHETTY (DEFENDANT), APPELLANT,

1917,
July,
17 and 19.

v.

VEDACHELLA AIYAH AND FOUR OTHERS (PLAINTIFFS),
RESPONDENTS.*

Limitation Act (IX of 1908), sec. 10, whether applicable to suits in respect of property which has not been received by a trustee.

The insertion in section 10 of the Indian Limitation Act, 1908, of the words "or the proceeds thereof, or for an account of such property or proceeds" has not had the effect of exempting from the ordinary rules of limitation suits against trustees for failure to reduce the trust property into possession.

New Fleming Spinning and Weaving Company, Limited v. Kessowji Naik (1885) I.L.R., 9 Bom., 373 at p. 399, followed.

APPEAL against the judgment of COUTTS TROTTER, J., in Civil Suit No. 376 of 1913.

The following summary of facts is from the material portions of the judgment of COUTTS TROTTER, J. :—

This suit was instituted by the worshippers of Sri Venugopala Krishnaswami temple in Coral Merchant Street, Georgetown, against the defendant as Dharmakarta in relation to his conduct as Dharmakarta of that temple and asking for various reliefs against him. Among the allegations made against the defendant were several breaches of trust with regard to the properties of the temple and one in particular was that the defendant had allowed item No. 11 mentioned in the schedule to the plaint which had been dedicated to the temple by a deed of gift in 1892 to remain in the possession of the donors until the rights of the temple were lost by the law of limitation. The defendant in his written statement pleaded that, though about 1903 he attempted to get possession of the property, as the manager, one Madamorayya Mudaliar whose name was also included in the instrument of gift, was colluding with the relations of the donor and would not part with the possession of the documents

* Original Side Appeal No. 64 of 1916.

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relating to the house or join the defendant in any action, he could not obtain possession of the same. The defendant further alleged that he was taking steps to recover the property for the temple.

The learned Judge, on a consideration of the evidence before him, came to the conclusion that the said property had been allowed to pass into the hands of others irrevocably by the gross misconduct of the defendant and held that he was liable to account both for the corpus and the income of the property and referred the matter to the Official Referee for accounts and enquiries and further gave direction to the Official Referee that the defendant would be at liberty to argue and satisfy him if he could that he was not accountable for the income but only for the corpus. The defendant preferred this appeal against the decision of COURTS TROTTER, J., and contended that the claim for the loss of property, if any, was barred by limitation.

T. R. Venkatarama Sastriyar, V. S. Govindachariyar and V. S. Kallabhiran Ayyangar for the appellant.

C. P. Ramaswami Ayyar and M. Subbaraya Ayyar for the respondents.

WALLIS, C.J. — In this case a trustee was ordered to be removed by Mr. Justice BAKEWELL and an account was directed to be taken against him. That decision was confirmed on appeal and the case went to the learned Official Referee. But the learned Official Referee was of opinion that certain questions of fact involved should be decided by the Court itself, and the case, therefore, came before Mr. Justice COURTS TROTTER sitting on the Original Side and we have now to deal with an appeal from his decision.

The question argued before us on appeal relates to item 11, certain house property to which the trust became entitled in the time of the former trustee, some ten years before the accession to the office of trustee of the defendant in this suit so that the defendant had two years in which he could have taken steps for recovery of the property. It is stated by the learned Judge, and the case proceeds upon that basis, that neither the present defendant nor his predecessor did anything to recover the property and therefore it became lost to the trust by reason of the law of limitation. There is not much said about limitation in the judgment under appeal, but the learned Judge

observed at the close of the judgment that it would be open to the defendant when the case went back to the Official Referee to show if he could that he was not accountable for the income but only for the corpus.

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Before us it has been argued that on the facts stated and under the present law of limitation the remedy against the trustee is barred both as to the corpus and income, the suit having been instituted some nine years after the property was finally lost to the trust by the operation of the statute of limitation.

The question of the interpretation of section 10 as amended in the Act of 1908 is one of considerable importance and we have had it fully argued before us. As is well known, the statutes of limitation were not applied in England to claims against trustees. There was a provision in the Judicature Act(1) which specially excepted from their operation suits for following trust property, and that section of the Judicature Act was very closely reproduced as section 10 of the Limitation Act of 1877. It provided—

“No suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property shall be barred by any length of time.”

There was some variance of opinion as to the scope of this section, and there were some cases which held that a claim for an account of property which had actually come into the hands of the trustee was not saved from the bar of limitation unless the property still continued in the hands of the trustee in one case it was said ‘in specie’ whereas a more liberal view was taken in some other cases that the section saved from the bar of limitation claims to property which had come into the hands of the trustee and for which he had become accountable. But we have not been referred to any case, and I am not aware of any, in which it was held that the bar of limitation under the old section was saved as regards cases where it was sought to render a trustee accountable not for property which had come into his hands, but for property which but for his wilful default or

(1) (1873) 36 and 37 Vic., Cap. 66, sec. 25 (2).

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neglect would have come into his hands. Mr. Justice SCOTT in *The New Fleming Spinning and Weaving Company, Limited v. Kessowji Naik*(1), expressly ruled that such claims were within the operation of the ordinary law of limitation. The next thing we observe is that the English legislature in 1888(2) departed from the policy till then followed as regards trustees, and afforded them the benefit of the operation of the statutes of limitation except in two specific cases, that is to say, except where a claim was founded on fraud or a fraudulent breach of trust, or—these are the important words—was

“to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use,”

So that, unless the claim is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use, the ordinary provisions of the Limitation Act are to apply in England. It is important to observe that the policy of the English legislature as shown in that provision clearly was to introduce a fresh protection for trustees by relieving them from an indefinite liability to account except in cases of fraud or fraudulent breach of trust or cases in respect of trust property or the proceeds thereof still retained by the trustees or previously received by them and converted to their own use.

That brings us now to the recent amendment of the Act of 1877 by section 10 of the Limitation Act of 1908 which amendment was effected by inserting in that section, after ‘following in his or their hands such property’, the words ‘or the proceeds thereof or for an account of such property or proceeds’.

Now it has been contended by Mr. Ramaswami Ayyar for the respondent that the effect of introducing the words ‘or for an account of such property or proceeds’ has been to make trustees liable for an indefinite time and without bar of limitation for breaches of trust consisting in failure to get in the trust property.

If this be the true construction, the Indian legislature has gone far beyond the authority of any Indian case in direct opposition to the recent legislation in England. It is impossible

(1) (1885) I.L.R., 9 Bom., 373 at p. 399.

(2) 51 & 52 Vict., Cap. 59, sec. 8.

in my mind to attribute to them such an intention unless most clearly expressed. It may be said that the words ‘suit for an account’ may cover a suit for an account of the proceeds the trustee had received or might have received but for his wilful default or neglect, that is to say, an account on the footing of wilful default or neglect. But to give that meaning to the words ‘suit for an account’ as introduced into section 10 of the Indian Limitation Act, 1908, would be entirely to alter the whole scope of the section and to run counter to the whole tendency of modern legislation. I cannot therefore accept that contention. It follows that the present claim both for failure to get possession of the corpus and income of the trust property falls within the operation of the ordinary law of limitation. If that be so, it is not suggested that the suit is not barred. In the result, on this ground the appeal must be allowed with costs of this appeal and with any extra cost incurred in the proceeding before the learned Judge which is now under appeal payable out of the temple funds.

OLDFIELD, J.—I agree.

OLDFIELD, J.

S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

MUTHIA NAICK AND TWO OTHERS (ACCUSED NOS. 1, 2 AND 5),
PETITIONER,

1917.
July 19.

v.

THE KING-EMPEROR (RESPONDENT) *

Criminal Procedure Code (Act V of 1898), sec. 345—Composition of an offence with one of several accused persons, effect of.

The composition of an offence under section 345 of the Criminal Procedure Code with one of several accused persons does not effect an acquittal of the others.

Chandra Kumar Das v. The Emperor (1902) 7 C.W.N., 176, dissented from.

PETITION under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898) praying the High Court to revise

* Criminal Revision Case No. 187 of 1917.
Criminal Revision Petition No. 149 of 1917.

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EMPEROR.

the judgment of F. H. SENNECK, the Sub-Divisional Magistrate of Sivakasi, in Criminal Appeal No. 45 of 1916, preferred against the judgment of S. AYYATHURAI AYYAR, the Second-class Magistrate of Virudupatti, in Calendar Case No. 100 of 1916.

A complaint of 'hurt' under section 323, Indian Penal Code, was preferred against five persons in the Sub-Magistrate's Court of Virudupatti. The complaint against two of them was not proceeded with as the offence was compounded with them and the Sub-Magistrate acquitted them under section 345 (6) of the Criminal Procedure Code. A charge of hurt was framed against the other accused and they were convicted of the offence. The conviction was confirmed on appeal by the Sub-Divisional Magistrate. The accused preferred a revision petition to the High Court and contended *inter alia* that, on the compounding of the offence with some of the accused, all the accused were entitled to an acquittal under section 345 of the Criminal Procedure Code.

S. Ranganadha Ayyar for Dr. S. Swaminadhan for the petitioner.

E. R. Osborn, the Acting Public Prosecutor, for the Crown.

ATLING AND
SADASIYA
AYYAR, JJ.

ORDER.—Petitioners' vakil contends that the composition of an offence under section 345 of the Code of Criminal Procedure with one of several accused persons has the effect of an acquittal of all the accused persons. We can find nothing in the section to support this interpretation and if this is really the meaning of the learned Judges in *Chandra Kumar Das v. The Emperor*(1), we must respectfully dissent. No other authority is quoted by petitioner.

The petition is dismissed.

K.R.

(1) (1902) 7 C.W.N., 176.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice
Kumaraswami Sastriyar.

LAGADAPATI VENKATA NAGABUSHANAM (FIRST
DEFENDANT), PETITIONER,

1917.
August 1.

v.

GARLAPATI MAHALAKSHMI AND TWO OTHERS (APPELLANTS,
AND RESPONDENTS NOS. 2 AND 3), RESPONDENTS.*

Agency Rules of Godavari district, rules 8 and 16†—Dismissal of suit, for default, by Assistant Agent—Order of Agent restoring suit—Revision petition to High Court, maintainability of—Decree under rule 8, construction of—Order setting aside dismissal without notice to defendant, validity of—Petition to Government, necessity for.

An order, passed by a Government Agent, directing that a suit dismissed by an Assistant Agent for default of appearance of the plaintiff be restored to file, is not a decree within the meaning of rule 8 of the Agency Rules for the Godavari district, and is not revisable by the High Court by a petition filed directly in the High Court.

Sri Pedda Vikrama Deo Garu v. The Maharaja of Jeypore (1916) 4 L.W., 499, followed.

PETITION under rule 8 of the Agency Rules for the Godavari district praying the High Court to direct Mr. COUCHMAN, the Government Agent in Godavari, to revise his order in D. Dis. No. 52/Ag., dated 4th February 1916, reversing in appeal the order of CHARLES HENDERSON, the Assistant Agent of Bhadrachalam Division, dated 19th July 1916, refusing to restore Original Suit No. 25 of 1913 on the file of this Court.

* Civil Miscellaneous Petition No. 319 of 1917.

† Rules framed by Government for the guidance of the Government Agent in Godavari under section 6 of the Scheduled Districts Act (XIV of 1874).

Rule VIII.—“All decrees passed by the Government Agent on appeal from decrees of his subordinates shall be final the High Court having the power on special grounds to require him to review his judgment as may be directed by them.”

Rule XVI.—“All petitions against the proceedings of the Government Agent must, in the first instance, be submitted to the Government, and will be referred, when necessary, either to the High Court or the Board of Revenue, as the case may be.”

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—
ABDUR
RAHIM
AND KUMARA-
SWAMI
SASTRIYAR,
JJ.

The facts of the case appear from the judgment.

P. Narayanamurti for the petitioner.

P. Somasundaram for the respondent.

The judgment of the Court was delivered by

ABDUR RAHIM, J.—The first respondent brought a suit against the petitioner in the Court of the Assistant Agent in the Godavari district for dissolution of partnership and other reliefs. The suit was dismissed for default. Then the plaintiff appealed to the Agent who, without hearing the defendant in the suit, set aside the order dismissing the suit for default and directed that the suit be restored to the file of the Assistant Agent to be heard and disposed of according to law. Against the order of the Agent the present civil miscellaneous petition has been preferred asking us to direct the Agent to review his order according to rule 8 of the Agency Rules. But that rule applies only to decrees passed by the Government Agent and to judgments leading to decrees.

A preliminary objection is taken that the order of the Agent directing that the suit be restored to file is not a decree within the meaning of the Agency Rules. We think that this contention is sound. The point has been decided in *Sri Pedda Vikrama Deo Garu v. The Maharaja of Jeypore*(1) following a number of other decisions of this Court. There a decree is understood as meaning the same thing as a decree under the Civil Procedure Code, for the Agency Rules themselves do not contain any definition of 'decree.' We see no reason for differing from that interpretation. What, however, was argued by the learned vakil for the petitioner was that though the order of the Assistant Agent dismissing the suit for default is not a decree yet the order of the Agent setting aside that order and directing the restoration of the suit is an adjudication of the rights of the parties within the meaning of the definition of 'decree' as given in the old Civil Procedure Code. But it is difficult to accept this contention. The right contemplated by that definition is not a right to the benefit of certain rules of procedure, that is to have an order of Court set aside by which the plaintiff's suit has been disposed of without trial. We may observe that rule 16 of the Agency Rules provides that all petitions against the

(1) (1916) 4 L.W., 499.

proceedings of the Government Agent must, in the first instance, be submitted to the Government and then it is open to the Government to refer the matter to the High Court or to the Board of Revenue, as the case may be. There can be no doubt that the Government Agent in this case was not justified in setting aside the order dismissing the suit for default without giving an opportunity to the defendant to be heard.

The proper remedy of the petitioner is to submit a petition to the Government and it is for the Government if it so chooses to refer the petition to the High Court for disposal. The present petition must be dismissed with costs.

K.R.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Kumaraswami Sastriyar.*

M. R. M. A. SUBRAMANIAN CHETTIAR (JUDGMENT-DEBTOR),
APPELLANT,

v.

HON. P. RAJARAJESWARA SETHUPATHI *alias* MUTHU-
RAMALINGA SETHUPATHI AVARGAL, RAJA
OF RAMNAD (DECREE-HOLDER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XLI, r. 5 (3)—Order under—Immoveable property given as security for decree by judgment-debtor, whether realisable in execution—Judgment-debtor taking advantage of a favourable order in execution—Estoppel.

Immoveable property given by a judgment-debtor as security for the due performance of a decree, pursuant to an order made under Order XLI, rule 5 (3), Civil Procedure Code, can be realized in execution without attachment, the matter being one relating to execution within section 47, Civil Procedure Code, and a separate suit does not lie.

Sadasiva Pillai v. Ramalinga Pillai (1875) 2 I.A., 219, applied.

Shyam Sundar Lal v. Bajpai Jainarayan (1903) I.L.R., 30 Calc., 1060, followed.

* Appeal Against Order No. 195 of 1917.

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NAGA -
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LAKSHMI.
—
ABDUR
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AND
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Mukta Prasad v. Mahadeo Prasad (1916) I.L.R., 38 All., 327, and *Saminatha Pathan v. Sornatha Ammal* (1912) 22 M.L.J., 190, referred to.

Tokhan Singh v. Girwar Singh (1905) I.L.R., 32 Calc., 494, distinguished.

Where a judgment-debtor who could have been arrested for the entire amount of a decree is on his objection ordered to be arrested only for a certain amount on the ground that the balance could be realized by the sale of the lands given by him as security for the decree amount, he is estopped from afterwards disputing the right of the decree-holder to sell the lands for all the then balance of the decree even though such balance may exceed the amount for which the lands were originally tendered as security.

Sadasiva Pillai v. Ramalinga Pillai (1875) 2 I.A., 219, followed.

APPEAL against, and Civil Revision Petition under section 115 of Civil Procedure Code (Act V of 1908) and section 107 of the Government of India Act of 1915, to revise, the order of P. SUBBAYYA MUDALIYAR, the Subordinate Judge of Ramnad at Madura, in Execution Application No. 515 of 1917 (in Execution Petition No. 91 of 1917 in Original Suit No. 6 of 1902).

A security bond given by the judgment-debtor for the purpose of staying the execution of the decree against him pending his appeal against the decree was in these terms :—

“Security bond, dated 12th October 1903, executed to the Court of the Subordinate Judge, Madura East, by Subramanian Chettiar, son of Devakottai M. R. A. Ramanathan Chettiar, Nattukottai Chetti, money-lender, residing in North Veli Street, Municipal sixth ward, Madura town. As the suit O.S. No. 6 of 1902 on the file of this Court in which I am the first defendant has been decided against me, I have now preferred an appeal to the High Court. I presented a petition in the High Court that the execution of the said decree be stayed till the disposal of the appeal. Thereupon the High Court passed on 31st August 1903 an order in C.M.P. 771 that I should give a security for the said decree appeal amount Rs. 39,087-8-4 and for interest thereon for two years at the current rate among the Madura Chetti people which interest was ascertained to be Rs. 6,967-1-4, that is, Rs. 46,054-9-8. For this sum of Rupees forty-six thousand and fifty-four, annas nine and pies eight, I have given as security the immoveable properties to which I am entitled, which are in my enjoyment and which are specified herein below. I have not subjected the said properties to any encumbrance whatever. In case the said High Court appeal be decided against me, I content to the plaintiff recovering the amount of this Court's decree from the undermentioned properties”

The facts of the case which are extracted from the judgment of the lower Court are as follows :—

“In this case decree was passed on 30th March 1903 for Rs. 39,000 odd against the first defendant. The first defendant preferred an appeal to the High Court and the plaintiff filed memorandum of objections. Pending disposal of the appeal, their Lordships ordered that the execution of the decree be stayed except with respect to costs, on first defendant giving security for the amount of decree of this Court together with interest for two years at the *Chetti Nadappu* rate. The first defendant executed a security bond in favour of the Court on 12th October 1903 for Rs. 39,000 and odd and two years' interest or in all for Rs. 46,054-9-8 on the security of two items of immoveable property valued at Rs. 50,000 and Rs. 20,000 respectively. The bond recites that if the appeal went against the first defendant, the latter agreed to the amount of the decree of this Court being recovered from the secured properties. On the 21st April 1909 the High Court modified the decree of this Court and passed a decree against the first defendant for Rs. 41,092-11-7 with interest thereon at 9 per cent per annum from the date of the plaint. Their Lordships also allowed Rs. 2,022-14-10 to the plaintiff for his costs of the appeal and Rs. 392-4-3 for his costs on the memorandum of objections. Then on 11th October 1909 the plaintiff applied for execution of the decree for the full amount due under the High Court's decree including costs, i.e., for Rs. 74,492-0-2 by arrest of the first defendant and by sale of the secured properties without attachment. Then the first defendant appeared by vakil and contested the execution petition only so far as it prayed for his arrest. After hearing both sides the following order was passed on Execution Petition No. 291 of 1909 on 20th October 1909 :—

“I can see no valid objection at all to this application. It is however seen that property accepted as worth Rs. 70,000 has been given as security for the satisfaction of the decree. That being so, I do not consider it necessary to allow both arrest and sale of the property at the same time, for the entire amount. But seeing that the decree amount now to be paid exceeds Rs. 70,000, I think it will be sufficient to safeguard the plaintiff's interest to direct arrest for Rs. 7,000 in the decree amount at present and postpone issue of arrest or other process for the balance, if any, remaining unpaid after the sale of the property Meanwhile arrest also will issue for the present for payment of Rs. 7,000 in the decree amount if the same is not paid in fifteen days; returnable 6th December 1909’.

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"The sale however did not take place. The defendant paid Rs. 7,000 and the petition was closed. Subsequently the matter went up before Privy Council and their Lordships dismissed the first defendant's appeal on 30th November 1915.

"Now the plaintiff's costs before the Privy Council have been recovered and he now seeks to recover the balance still due as per High Court's decree, by sale of the first defendant's secured properties without attachment. The first defendant took various objections to the plaintiff's execution of the decree."

The Subordinate Judge ordered, without effecting an attachment, the sale of the properties given as security for the entire balance of the decree amount.

The first defendant preferred this appeal.

A. Krishnaswami Ayyar (with M. Putanjali Sastriyar) for appellant.—A security bond making immoveable property liable for any decree that may be passed in the case operates as a mortgage, and such a bond requires to be registered; being unregistered it cannot be acted upon; *Nagaruru Sambayya v. Tangatur Subbayya*(1). Even if it can be acted upon the security can be realized only by a suit and not by a petition in execution. Section 99 of the Transfer of Property Act was in force when the security bond was given; hence, a suit alone is the proper remedy: see *Tokhan Singh v. Girwar Singh*(2). Even if it could be realized in execution, order to sell without an attachment is invalid. The security bond made the lands security only for Rs. 46,000 and they cannot therefore be sold for any higher amount. The prior order in execution does not operate either as estoppel or as *res judicata*. The questions now argued were not the subject of the prior order.

Hon. Mr. S. Srinivasa Ayyangar, the Advocate-General, with R. Krishnama Achariyar for the respondent.—Realization of security given for a decree is a matter relating to execution within section 47, Civil Procedure Code: *Sadasiva Pillai v. Ramalinga Pillai*(3), *Chutterdharee Lall v. Rambelashee Koer*(4), *Abdool Wahed v. Fareedoonnissa*(5), *Saminatha Pathan v.*

(1) (1908) I.L.R., 31 Mad., 330.

(3) (1875) 2 I.A., 219 at p. 233.

(5) (1889) I.L.R., 16 Cal., 323.

(2) (1905) I.L.R., 32 Cal., 494.

(4) (1878) I.L.R., 3 Cal., 318.

Sornatha Ammal(1), *Mukta Prasad v. Mahadeo Prasad*(2) and *Shyam Sundar Lal v. Bajpai Jainarayan*(3). Attachment is not necessary, as the property has been given as security. The sale can now be ordered not only for Rs. 46,000 but for the whole amount due under the decree. Rupees 46,000 was mentioned in the security bond as that was the whole amount then due. At the time of the previous execution when the judgment-debtor could have been arrested not only for the Rs. 70,000 for which he gave security but also for nearly Rs. 7,000 more, he was after his objection allowed to be arrested only for Rs. 7,000, the Court accepting his statement that the rest of the decree amount could be realized from the sale of the lands tendered as security. Having taken advantage of that order, the judgment-debtor is now estopped from contending that the property could not be sold for all the present balance of the decree amount. *Sadasiva Pillai v. Ramalinga Pillai*(4) *Subbaraya Ayyar v. Ramasawmi Pillai*(5), *Durga Prasad Bannerjee v. Lalit Mohan Singh Roy*(6) and *Gokhai v. Gones Lal*(7).

A. Krishnaswami Ayyar in reply.—*Sadasiva Pillai v. Ramalinga Pillai*(4) does not lay down that the security is realizable in execution. The decision therein turned upon the construction of the particular security bond given in that case.

The following judgment of the Court was delivered by

WALLIS, C.J.—The question raised in the appeal, which is of WALLIS, C.J. some importance is, when immoveable property has been given by the judgment-debtor as security for the due performance of a decree pursuant to an order made under Order XLI, rule 5 (3) (c), Civil Procedure Code, whether that property can be realized by the decree-holder in execution or can only be realized in a separate suit. We have been referred to a decision in *Tokhan Singh v. Girwar Singh*(8) that a separate suit is necessary. But the learned Judges who decided that case proceeded upon the prohibition in section 99 of the Transfer of Property Act, as it then was, against bringing mortgaged property to sale except by means of a suit under section 67 of that Act. That section has been repealed and the prohibition has been limited in Order

(1) (1912) 22 M.L.J., 190.

(3) (1903) I.L.R., 30 Cal., 1060.

(5) (1912) 22 M.L.J., 166.

(7) (1912) 16 C.L.J., 404.

(2) (1916) I.L.R., 38 All., 327.

(4) (1875) 2 I.A., 219 at p. 233.

(6) (1893) I.L.R., 25 Cal., 86.

(8) (1905) I.L.R., 32 Cal., 494.

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XXXIV, rule 14, Civil Procedure Code, and that decision is therefore inapplicable to the present case and affords no reason for refusing to follow the earlier decision of the same Court in *Shyam Sundar Lal v. Bajpai Jainarayan*(1). Further in that case the point was not taken before the learned Judges that such a sale comes within the provisions of section 47 (formerly section 244), Civil Procedure Code, which provides that

“all questions arising between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit.”

If we look at the question on principle and independently of authority, it is difficult to see how the realization of the security given to the Court pursuant to an order of the Court, for the purpose of satisfying the decree-holder can possibly be said to be a matter not relating to the execution, discharge or satisfaction of the decree, or not to be a question arising between the parties to the decree. The fact that the bond is given to the Court does not make it a question arising between the judgment-debtor and a third party so as to take it out of the section. The bond was given to the Court in *Sadasiva Pillai v. Ramalinga Pillai*(2), and yet the case was held to come within the section of the Code corresponding to section 47. If the section is applicable, then that being the special provision governing these matters, it would have overridden any general provision contained in section 99 of the Transfer of Property Act. We are therefore clearly of opinion that apart altogether from authority it is a matter arising in execution within the meaning of section 47, Civil Procedure Code. The effect of immovable property being given as security is something more than attachment because it makes the property applicable solely in discharge of the judgment-debt and not liable to rateable distribution among other judgment-creditors. But the realization by the Court of such security in execution is of the same nature as sale by the Court of the immovable property attached, that is to say, it transfers the right, title and interest of the judgment-debtor who has given security. There is no need in such a case that there

(1) (1903) I.L.R., 30 Cal., 1060.

(2) (1875) 2 I.A., 219 at p. 233.

should be anything in the nature of a mortgage suit for sale under section 67 of the Transfer of Property Act with all the expense and delay which would be thereby involved. It would be a most mischievous state of law if such a thing were necessary and it would fetter the discretion of the Court in accepting immoveable property as security for the execution of the decree. This view is in accordance not only with *Shyam Sundar Lal v. Bajpai Jainarayan*(1), but also with *Mukta Prasad v. Mahadeo Prasad*(2), and the dictum of two learned Judges of this Court in *Saminatha Pathan v. Sornatha Ammal*(3). What is more important is, that it is strongly supported by the decision of their Lordships of the Judicial Committee in *Sadasiva Pillai v. Ramalinga Pillai*(4), where security of immovable property given for mesne profits which were not awarded by the decree was held to be realizable in execution for such mesne profits, instead of leaving the parties to recover them in a separate suit. Their Lordships observe at page 232 that the security bonds were

“proceedings in Court importing a certain liability to be enforced in the suit against the defendant to that suit.”

They further observed at page 233 that the liability incurred under those bonds amounts to a “question relating to the execution of the decree” within the meaning of the latter clause of section 11 of Act XXIII of 1861. If the question in that case was one relating to the execution of the decree, *a fortiori* it is so in the present case where security has been furnished to the Court pursuant to an order of Court under Order XLI, rule 5 (3) (c), Civil Procedure Code. It is unnecessary in this case to deal with cases of security given by third parties under section 145, Civil Procedure Code, or with the decisions on that question.

The second objection taken to the order under appeal is that it was for the enforcement of the security for a larger amount than that provided for in the bond. Now we think that that bond has already formed the subject of adjudication because the property has been ordered to be sold for the full decree amount and that order was allowed to become final. Further on the basis that this security was enforceable for the full amount of

(1) (1903) I.L.R., 30 Cal., 1060.

(2) (1916) I.L.R., 38 All., 327.

(3) (1912) 22 M.L.J., 190.

(4) (1875) L.R., 2 I.A., 219.

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the decree, the Court refused to enforce the decree personally against the judgment-debtor as it would have otherwise been bound to do, except to the extent of Rs. 7,000, the balance of the decree amount over the estimated value of the immoveable property given as security. In these circumstances we think the appeal also fails on this point.

In the result, the appeal fails and is dismissed with costs. The Civil Revision Petition is dismissed. As regards the Civil Miscellaneous Petitions Nos. 1684 and 1685 of 1917 for stay no order is necessary.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling.

KOROTH MAMMAD AND ANOTHER (PRISONERS NOS. 1 AND 2),
APPELLANTS,

v.

THE KING-EMPEROR, RESPONDENT.*

*Penal Code (Act XLV of 1860), sec. 370—Buying and selling as a slave,
what amounts to.*

The appellants in these cases were convicted by the Sessions Court of North Malabar, under section 370, Penal Code, the second appellant having been found to have sold, and the first to have bought, a Pulayan named Vellan as a slave. The document recording the above transaction ran as follows:—
“I execute to you and give you this day this jenmam deed giving you Velandi's son Pulayan Vellan with his heirs. The sum that I received from you in cash to-day is ten rupees. For this sum of ten rupees, you should get work done for you by the said Vellan and his offspring that may come into being as your jenmam, and act as you please.”

On a difference of opinion between ABDUR RAHIM and NAPIER, JJ., as to whether the said transaction amounted to an offence under section 370, Indian Penal Code:

Held by AYLING, J., that the transaction in question was a sale of Vellan and his offspring as mere chattels and that the appellants were guilty of an offence under section 370, Penal Code.

Empress of India v. Ram Kuar (1880) I.L.R., 2 All., 723, and Amina v. Queen Empress (1884) I.L.R., 7 Mad., 277, referred to.

* Criminal Appeals Nos. 26 and 27 of 1917.

APPEAL against the judgment of H. D. C. REILLY, the Sessions Judge of North Malabar, in Calendar Case No. 35 of 1916.

The necessary facts are to be found in the opening paragraph of the judgment of ABDUR RAHIM, J.

The accused were not represented.

J. C. Adam, Crown Prosecutor, for E. R. Osborne, the Acting Public Prosecutor, for the Crown.

These appeals came on for hearing in the first instance before ABDUR RAHIM and NAPIER, JJ., who delivered the following judgments:—

ABDUR RAHIM, J.—These are appeals from the convictions of two persons under section 370, Indian Penal Code, the second accused having been found to have sold a Pulayan named Vellan and the first accused to have bought the said Vellan as a slave. The case comes from North Malabar; the two accused are Mappillas and Vellan, who is of the age of 25 years, is a Cheruman, a caste which until the abolition of slavery by different Acts, the last and most important of which was Act V of 1843, occupied the position of serfs or ‘rice slaves,’ as Pulayans are called in Gundert's Malayalam Dictionary. The transaction is evidenced by a document executed by the second accused in favour of the first accused in these terms:

“I execute to you and give you to-day the 27th Metam 1088 (this) jenmam deed giving you Velandi's son Pulayan Kurungot parkum Vellan, with his heirs. The sum that I received from you in cash to-day is Rs. 10. For this sum of Rs. 10, you should get work done for you by the aforesaid Vellan and his offspring that may come into being as your *jenmam* and act as you please.”

The use of the word *jenmam*, which means property, might, if it stood alone, imply that these two persons were dealing with Pulayan Vellan as a chattel. The nature and object of the transaction is however explained more explicitly as being to the effect that the first accused, the so-called purchaser, was to get work done by the said Vellan and his offspring.

The question is, was Pulayan Vellan sold and bought as a slave? This has to be determined not merely with reference to the language of the document, but with reference to the evidence and conduct of the parties. In this connexion, the consciousness and conduct of prosecution first witness himself who was a

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grown up person, at the date of the transaction and had been born and brought up in British India, must also be taken into consideration.

The word 'slave' is not defined in the Indian Penal Code or in any other Act, so far as I know. In Webster's Dictionary, a slave is defined as 'one who has no freedom of action, but whose person and services are wholly under the control of another'; in the Century Dictionary, as 'a person who is the chattel or property of another and is wholly subject to his will.' In Wharton's Law Lexicon, 'slavery' is defined as 'the civil relation in which one man has absolute power over the liberty of another.' In Roman Law, slavery, properly speaking, was, as stated by Mr. Hunter in his book on Roman Law, an institution of the *jus gentium* by which, contrary to nature, a man became the property of a master. Even under that system, the full rights incident to property, such as the right of destroying, ceased to be recognized during the Empire and the rescripts of the different Emperors afforded considerable protection to the life of a slave. But, as stated by Mr. Hunter, it must be taken to be inherent in the condition of slavery as conceived in the Roman Law that the master has a right to all the services the slave is capable of rendering and to everything that the slave, if free, would have acquired for himself, and conversely the slave himself has no right to property. In Muhammadan Law, the slave has a complete right to the protection of his person and life, just like a free man. The condition of slavery according to that law amounts to this, that he cannot own any property, his master being entitled to the full usufruct of his labour. In my opinion therefore the statement in *Empress of India v. Ram Kuar*(1), which is cited with approval in *Amina v. Queen-Empress*(2) that section 370, and the cognate sections of the Indian Penal Code

"were enacted for the suppression of slavery not only in its strict and proper sense, viz., that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but in any modified form where an absolute power is asserted over the liberty of another"

(1) (1880) I.L.R., 2 All., 723 at p. 727.

(2) (1884) I.L.R., 7 Mad., 277 at p. 279.

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is correct. The minimum requirement of the status of slavery would thus seem to be, that absolute power should be asserted over the liberty of the slave and on his personal services. As observed by STUART, C.J., in *Empress of India v. Ram Kuar*(1)

"the actual accomplishment of placing a human being in the condition of a slave could not have been contemplated, inasmuch as the possibility of accomplishing anything unknown to the law, cannot be supposed to have been meant or intended; section 370 therefore can only be understood as directed against attempts to place persons in the position of slaves, or to treat them in a way which is inconsistent with the idea of the persons so treated being free as to his property, services or conduct in any respect."

This, in my opinion, being the proper test, the question is, whether the accused attempted to treat Vellan in a way which is inconsistent with the idea of his being 'free as to his property, services or conduct in any respect.' In this connexion I shall take the following facts to be proved and that is practically what is found by the Sessions Judge. Vellan did not live on the land of either of the accused, but lived on the land of another person, with his mother and step-father, his own father having died when he was a child. None of his parents were ever treated as slaves and it appears from the evidence that his father worked not only for the second accused but also for other persons and he never lived on the land of the second accused. Vellan began to work for the second accused about three years before the date of Exhibit B and it is not suggested that the second accused bought or received him either from his mother or step-father or anybody else as a slave. There is also evidence that before the date of Exhibit B, Vellan sometimes worked for other employers and received daily wages which he was free to spend as he chose, though it may be taken as proved that during the three years before Exhibit B, Vellan worked practically exclusively for the second accused. The man married, borrowed money for this and other purposes on his own credit and paid off the debt with his earnings. He used to buy supplies from shops on credit and afterwards settle the account himself. The

(1) (1880) I.L.R., 2 All., 723 at p. 727.

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wages he used to get from the second accused were a measure of paddy a day, which he admits to be the usual payment for Cheruma labourers. The payment of prevalent wages to Vellan would in itself indicate that the relation between him and either of the accused was not that of a slave and a master. There is the further fact that just before the execution of Exhibit B, the first accused had agreed to lend Vellan Rs. 8. Even after the execution of Exhibit B, Vellan continued to live with his mother and step-father, was paid daily wages by his new master, the first accused. These facts make it clear that neither the accused nor Vellan himself ever thought or intended that Vellan was or should be incapable of acquiring property or of entering into contracts, and that both the first accused and the second accused in fact treated Vellan as if he was fully possessed of such capacity. The evidence of Vellan himself shows that he received wages from the second accused only on the days on which he worked, and the second accused never made himself responsible for his maintenance for the days that he did not work or could not work owing to sickness. It may also be presumed that this state of things continued when Vellan worked under the first accused. All these facts indicate that the second accused and after the date of Exhibit B, the first accused never understood that they were in any way responsible for the lodging and maintenance of Vellan which would have been the case if Vellan stood in the position of a slave.

As regards Vellan's liberty of movement, the effect of the evidence, in my opinion, is that so long as he worked for the second accused or for the first accused after the date of Exhibit B, it was understood that he was not at liberty to offer his services to another without the permission and consent of his employer for the time being. Once he obtained the permission of the second accused to go to Wynaad and work there, but it is not suggested that the second accused claimed any share in his earnings at Wynaad. He, sometimes, though not often, went to other places also for work, after obtaining the permission of the second accused. Similarly after he went over to the first accused, he apparently used sometimes to work elsewhere with the latter's consent. The legal relation which, the parties thought, subsisted between them, was that of employer and labourer and I do not think it makes any difference in this respect, that during the

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time Vellan worked for the second accused or the first accused, both Vellan and his employer thought that Vellan was not at liberty to work elsewhere without the consent of the second or the first accused.

The law does not allow contracts for personal service to be specifically enforced, but it recognizes such contracts as valid in law. If a person enters into a contract for personal service for a reasonable term and afterwards breaks it without lawful excuse, he is liable in damages to the promisee. And a contract for service by which a person competent to contract precludes himself from serving another person during a specified term, though it cannot be specifically enforced, is a legal and valid contract the breach of which will make the party guilty of the breach liable in damages to the other party. There may, however, be contracts for personal service, such as one for an unlimited period, which would be void on grounds of public policy and no rights which the Court could recognize, would arise under such a contract. For instance if a grown up person competent to contract enters into a contract with another agreeing to render him personal service throughout his life and not to serve any other person, such a contract would be unenforceable specifically and may be void on grounds of public policy, but it would, in my opinion, be going much too far to say that the relation sought to be created thereby, would be that of a 'slave' and a master. The inference to be drawn from the facts relating to Vellan's employment under the second accused before the date of Exhibit B imply at the highest nothing more than a contract of this nature. Every contract of personal service must necessarily be a restraint upon the liberty of the person who has agreed to render such service, but that is not the sort of restraint, which is implied in the status of a slave. Both *Empress of India v. Ram Kuar*(1) and in *Amina v. Queen-Empress*(2) make it clear that the control sought to be established over the liberty of person who is purported to be dealt with as a slave must be of an absolute character. This is a distinction which it is important to bear in mind. There is a very large class of domestic servants in this country—and I believe there are also such classes elsewhere—who ordinarily adhere to the same master throughout their

(1) (1889) I.L.R., 2 All., 723.

(2) (1884) I.L.R., 7 Mad., 277.

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lives and their offspring also continue as domestic servants in the same family. It may or may not be that such service had its historical origin in the status of slavery. Whatever that may be, it would be an outrage on one's common sense to suppose that domestic servants of this class occupy the position of slaves.

One of the prosecution witnesses, prosecution tenth witness, says :

"There are many Cherumas in my amsam. It is usual for particular Cherumas to go on working for particular families year after year. It is usual for them to obtain the permission of their masters before leaving them to work for other masters. So far as I have noticed, Cherumas leave their masters only after getting their permission to do so."

Upon that, the learned Sessions Judges rightly observes :

"that indicates little, if anything, more than a hereditary relation of master and servant such as in many societies is a wholesome relic of a traditional and perhaps very different relation in the past."

The facts of the case prove that the relation subsisting between Vellan and the second accused and that sought to be created between Vellan and the first accused was nothing more than what is described in prosecution tenth witness's evidence.

There cannot be the slightest doubt upon the evidence that Vellan who signed or put his mark on Exhibit B as an attesting witness knew of the nature of the transaction and gave his consent to it. He consented to his services being transferred by second accused to first accused. That is how he understood Exhibit B and so also the second and first accused ; none of the parties, I am persuaded, thought that any change was intended in the status of Vellan and I have already described what in my opinion is proved to have been the relation between the second accused and Vellan before the execution of Exhibit B. By Exhibit B, therefore, all that the second accused purported to transfer to the first accused was the right which he had or supposed he had to the services of Vellan. The use of the word '*jenmam*' and the mention of Vellan's offspring has been transferred, if they stood alone and were not to be interpreted in the light of the facts, would undoubtedly suggest that it was attempted to deal with Vellan as a slave. But if we read the document in the light of the evidence showing the intention and conduct of the parties, then

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it seems to me that the proper conclusion which is to be drawn is that nothing more was intended than a transfer of the right to the personal services of Vellan and his children which the second accused thought or pretended that he had. If a lawyer had drafted the document of transfer, he would be expected to know and make clear the distinction between a transfer of a right to the personal services of a man and a transfer of property. But I think it would be altogether unsafe to impute such technical knowledge to the second accused who wrote Exhibit B or to the first accused and convict them on the basis of certain expressions used in that document, which the second accused in all likelihood simply borrowed from ordinary documents relating to sales of property. In *Amina v. Queen-Empress*(1) the word '*Vellati*' which means 'slave' was used. No such word is to be found in Exhibit B and we have to ascertain what was actually intended and done in the light of the surrounding circumstances. That the accused themselves never thought that the transaction recorded in Exhibit B amounted to an offence of selling and buying a slave or to any offence at all, is evident from the fact that a suit was actually instituted on the basis of that document and a pleader was engaged to, and did in fact, conduct the plaintiff's case. I need hardly point out that if a labourer or domestic servant of this class is detained against his will, the person so detaining is liable to be prosecuted for wrongful restraint or wrongful confinement, or if he is ill-treated by the master, the latter would be liable for other offences under the Indian Penal Code. But any such high-handed proceedings alone would not be sufficient to show that the relation of master and slave was sought to be asserted.

I would therefore set aside the convictions and sentences against the prisoners and direct that they may be discharged from bail.

But as my learned brother holds a different opinion, the papers will be placed before the Chief Justice for reference to a third Judge or such other order as he may think fit to pass.

NAPIER, J.—The accused in this case have both been convicted under section 370 of the Indian Penal Code, the first accused

(1) (1884) I.L.R., 7 Mad., 277.

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with buying, and the second accused with selling, a person as a slave. The language of section 370 is as follows :—

“Whoever imports, exports, removes, buys, sells or disposes of any person as a slave shall be punished, etc.”

The transaction was effected by a document, Exhibit B, which is as follows :—

“Edavad Adharam executed by the second accused to the first accused, ‘I execute to you and give you this day this *jenmam* deed giving you Velandi’s son Pulayan Vellan with his heirs. The sum that I received from you in cash to-day is Rs. 10. For this sum of Rs. 10 you should get work done for you by the said Vellan, and his offspring that may come into being as your *jenmam*, and act as you please.”

The important words in this document are, first, the word ‘*jenmam*’ used twice over, secondly the word ‘heirs’ and thirdly the word ‘offspring.’

The document purports to be a deed of hereditary ownership and the granting of Pulayan Vellan and his heirs as *jenmam* can only mean the grant of that person and his heirs to the grantee and his heirs in absolute ownership. It is to be noted that the grant is not of the services of Pulayan Vellan, but the grant of the man himself and his heirs, the provision for getting work done for him being a second clause.

The Sessions Judge in convicting the accused states his opinion that such an assertion of the right to control the liberty of a Cheruman as the transaction implies is not so far divorced from the facts of life at present that it can be treated as a matter of no moment. He therefore thought that it was not an offence which could be treated lightly and sentenced the accused each to one year’s rigorous imprisonment. It is to be noted that the District Munsif of Quilandi before whom this document was filed in a suit and who is himself a Malayalee, speaks of the document as a very curious one. He of course dismissed the suit founded on it, holding the consideration to be illegal, immoral and opposed to public policy.

The first question that has to be considered is, what is the meaning of the phrase ‘selling as a slave.’ There is no definition of the word ‘slave’ in the Code, and our attention has been drawn to various elements of slavery extending over a period

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from early Roman history to modern times. To my mind we have nothing to do with ancient history but have only to consider what was in the mind of the framers of the Penal Code. The history of this section is dealt with in the judgment of SPANKEE, J., in *Empress of India v. Ram Kuar*(1) and he there refers to a report of the Commissioners in 1837 (the year of the first draft) which points out that ‘there is at present no law defining the extent of the power of a master over his slaves.’ It must be remembered, too, that at that time slavery was an established institution in the greater part of the United States and had only very recently ceased to exist in some British Colonies. The idea may seem remote to people of the present day, but thousands of people are alive who were born in slavery and thousands who witnessed the emancipation of slaves in the United States. There being no absolute standard of slavery and no uniformity of practice, it is, therefore, not surprising that when the first Act dealing with the condition of slavery was passed in India in 1843, it was not thought advisable to include any definition of the word. Act V of 1843 provides :—

“Section (1)—that no person, nor the right to the compulsory labour or services of any person on the ground that such person is in a state of slavery, shall be sold in execution of a decree of Court,

Section (2)—that no right arising out of an alleged property in the person and services of another as a slave shall be enforced by a Court,

Section (3)—that no person shall be deprived of any property on the ground that such person was a slave,

Section (4)—that any act which would be penal offence if done to a free man, shall be equally an offence if done to a person on the pretext of his being a slave.”

It is to be noted that this Act does not go nearly as far as the Penal Code, for it imposes no penal consequences whatsoever in connexion with slavery. It does not forbid the keeping of slaves or dealing in slaves; but only gives to such persons their right to hold property and to be protected by law. Such a transaction as is the subject of this conviction would not have

(1) (1880) I.L.R., 2 All., 723.

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been any offence against any law, though, as will be shown later, it was forbidden by proclamation prior to the passing of the Penal Code. It is therefore clear to my mind that the word 'slave' in the Penal Code does not connote anything more than a right to property in the person, a right to retain his services, and a right to dispose of his person and services. These conditions are dealt with by the Penal Code with the effect that slavery as then existing in India was made illegal. That being so, it cannot, I think, be disputed that this document, if taken by itself, offends against the provision of the section and the parties to it would be guilty of the offence. A similar case came before the High Court in 1884: vide *Amina v. Queen-Empress*(1). A document vouching the payment of Rs. 25 to one Supi in consideration of his transferring all his rights over a girl described as his *Vellati* whom he had purchased from Pakir Haji was given to one Amina. She refused to let the girl go until she got back the money she had paid for her. Supi and Pakir Haji were convicted of selling the girl as a slave and Amina of buying. The convictions were upheld by the High Court. The assessors in that case gave their opinion that the use of the word *Vellati*, as understood by the Mappillas of North Malabar, clearly showed that Bhima was sold as a slave. The learned Judges state their opinion as to the purview of sections 370 and 371 and adopt the language used by the High Court of Allahabad in the case already referred to, namely, that the sections were enacted for the suppression of slavery, not only in its strict and proper sense, viz., that condition whereby an absolute and unlimited power was given to the master, but also where an absolute power is asserted over the liberty of another, whereby one who claims to have a property in the person as a slave transfers that property to another. The same idea is expressed in other words in *Empress of India v. Ram Kuar*(2):

"The section is directed against attempts, etc., to place persons in the position of slaves or to treat them in a way that is inconsistent with the idea of the person so treated being free as to his property, services, or conduct in any respect."

I am not prepared for the reasons given earlier in this judgment to agree that the strict and proper sense of the word

(1) (1884) I.L.R., 7 Mad., 277. (2) (1880) I.L.R., 2 All., 723 at p. 727.

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'slavery' connotes an absolute and unlimited power over the life of another as was thought by the Judges in *Amina v. Queen-Empress*(1). I entirely accept the view taken by the Court as to the object of section 370. It is urged, however, that we have to look not so much to the language as to the intention of the parties to be gathered from the conditions which prevailed. I give a certain amount of weight to this contention though I am not prepared to say that even where servile conditions were unknown, a document executed with the intention that the subject of the document should be kept in a condition of slavery would not constitute an offence. I proceed, therefore, to examine the history and conditions of people of this class. The person sold is shown in the document to be a Pulayan. Exhibit A is the document executed by this Pulayan to the first accused. It shows that the Pulayan borrowed eight rupees from him and it provides that for the interest on this sum of eight rupees he shall make a hut in such place as is required by his master and live in it and do cooly work 'as you may require me to do'; receiving from his master a kalapadu dangali of paddy every day for his maintenance, while the balance of the profits of his work are to belong to his master. The value of a year's paddy which constitutes the entire amount that he is entitled to receive is stated in the document to be Rs. 20-1-8 which works out at Rs. 1-10-0 a month. There is, obviously, no room under this document for his working off the amount of the debt with the necessary result that unless he can get a sum of eight rupees elsewhere he must remain with his master for the rest of his life. The provision for payment in paddy only is to be especially noted. Turning to Gundert's Malayalam Dictionary which was published in 1872, I find that 'Pulayan' is translated as first an 'outcast,' secondly 'a caste of rice slaves.' This latter meaning seems to me to be singularly applicable to the conditions of service which this man undertook. The history of these people is set out in Logan's Manual of Malabar published in 1887, beginning at page 146 of volume I. The Pulayan is stated to be one of two sections of the Cherumas, the other being Iraya Cheruma. Speaking of the Cherumas Mr. Logan says as follows:—

"The next caste to be noticed is formed of the Cherumar or agrestic slaves."

(1) (1884) I.L.R., 7 Mad., 277.

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and he sets out the result of a census taken in 1857 of the slave population, showing their distribution over the district, the total number being 187,812, the largest number being in Ernad, Walluvanad and Ponnani; Kurumbranad taluk the place where this man lived having at that time 16,590 slaves. Mr. Logan then gives a very interesting account of the action of the East India Company in respect of slavery. As early as 1792, the year in which the British rule commenced, a proclamation was issued by the company against dealing in slaves, subject to this—

“that the superior castes were still to be permitted to buy the children of famine-stricken parents on condition that the parents may repurchase their children when they were in a position to do so.”

In 1819 the practice of selling slaves for arrears of revenue was forbidden. This prohibition is repeated in the Act of 1843 above referred to. The matter was allowed to drop until 1836 in which year Government was pleased to accede to the recommendation in favour of emancipating slaves on Government lands. This was however not to be proclaimed but to be carried out in such a manner as not to create alarm on the part of other proprietors or “premature hopes of emancipation on that of other slaves.” In 1839 a Collector stated his opinion that there are few or no slaves in North Malabar. But the incorrectness of this statement was demonstrated a few years later by a letter from Mr. Thomas, Judge of Calicut, in 1841 to the Sudder Adawlat pointing out facts which had come judicially to his notice. He referred to a sale in Court auction of an infant slave, and to a suit in which the right to 27 slaves was the sole matter of litigation and further stated that women in some taluks fetched higher prices in order to breed slaves. In the next year he returned to the same subject and stated that the number of slaves had increased in seven years from 144,000 to 159,000. In consequence of these letters apparently, the directors in dealing with the proposal to abolish slavery entirely, drew the attention of the Government of India to the fact that the evils connected with slavery in Malabar were aggravated as compared with other portions of India. After the passing of the Act in 1843, which, as noted above, did not abolish the status of slavery, the Collector of Malabar endeavoured to pave the way to eventual abolition by a proclamation to Cherumas and their masters, his action being

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approved of by the directors in 1845. Mr. Logan then states that in 1852 and 1855 the traffic in slaves still continued, that it was considered by Government but no further measures for the emancipation of the Cherumas were deemed to be necessary. He then sums up the position in the year 1887 in which he wrote:

“There is reason to think that they are still, even now, with their full consent, bought and sold and hired out, although of course the transaction must be kept secret for fear of the penalties in the Penal Code.”

It seems to me that this language used by Mr. Logan applies exactly to the transaction before us. This Pulayan was, on the evidence, sold and bought with his full consent. His personal history is as follows: He is 25 years of age. His father worked under the second accused. He himself began to work for the second accused when he was about 12 years of age receiving 3 nazhis of paddy on days when he worked; and he continued to work for this man until he executed Exhibit A to the first accused, except for a short time when he went to Wynaad under the orders of the second accused to work there ‘under the Sahib.’ He only stayed in the Wynaad a month and came back under orders from the second accused. That is his own account given in his evidence before the Court as prosecution first witness. His statement is corroborated by prosecution second witness, his uncle, who states that prosecution first witness began to work under the second accused between the age of 10 and 15, and remained with him until he went to the first accused. This man states his view of the position of his caste as follows:—

“I work under Kunnumayil Tambiran. I have never worked for any one else. All my sons and daughters work for Kunnumayil Tambiran. My father worked for Kunnumayil Tambiran. If any of us wished to go and work for any other master we could not do so. If Kunnumayil Tambiran consented, they could go and work for another master for a day. If Kunnumayil Tambiran made them over to a new master they could work under him. They need not go to a new master unless they liked. If they consented to go to a new master he would then be the permanent master and they would always have to obey his orders. I have never heard of our master handing over his Cherumas to another master like that.”

The *adhigari* endeavoured to minimize this condition of service, but even he, in answer to the Court, admits “so far as I

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have noticed, Cherumas leave their masters only after getting their permission to do so." Some light is thrown on the view taken by the first accused himself of his rights as purchaser by the evidence of prosecution eleventh witness. He states that, in consequence of a complaint made to him by prosecution first witness's wife who was working for him, he went to the house of the first accused and found prosecution first witness tied to the leg of a cot in the outer verandah. He asked him for an explanation and the first accused said "I tied him up because he does not come and work for me." Taking the evidence of prosecution second witness an old man as proving the custom among this caste, it appears to me that there is only one matter in which the condition of these people at the present day differs from that of slavery fifty years ago, namely, that the Pulayan need not go to a new master unless he likes. Even assuming that this right is generally recognized, we get the position stated by Mr. Logan to exist in 1887, that they are still, with their full consent, bought and sold and hired out. No evidence was given as to rights in the offspring of the Pulayan, but the evidence shows that the children do work for their father's master and it is difficult to suppose that the language used in this document "giving you Vellan with his heirs", "you should get work done for you by the aforesaid Vellan and his offspring" do not represent actual existing conditions. I am satisfied, therefore, that there is nothing in the conditions of service of these Pulayans to detract from the obvious intention of the document and in my opinion the case is on all fours with *Amina v. Queen-Empress*(1), and following that decision I am clear that the offence under section 370 has been made out. With regard to sentence, being satisfied as I am, that this document only puts on paper the general practice of dealing with these Pulayans, and that the amount of consideration for the sale was almost nominal, I consider the sentence unnecessarily severe. I have no doubt that the first and second accused believed that they were exercising their lawful rights. This is indeed proved by the fact that the first accused actually brought a suit against the second accused on this document and, what is still more extraordinary, found a pleader who was prepared to appear for him. In these

(1) (1884) I.L.R., 7 Mad., 277.

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circumstances, I would reduce the sentences to the period of imprisonment already undergone and a fine of Rs. 100 each, in default, two months' simple imprisonment.

The accused were not represented.

J. C. Adam, the Crown Prosecutor, for E. R. Osborne, the Acting Public Prosecutor, for the Crown.

These appeals coming on for hearing under section 429 of the Code of Criminal Procedure, the following judgment was delivered by

AYLING, J.—The case has been so exhaustively dealt with by the learned Judges who heard the appeals (not to mention the very careful judgment of the Sessions Judge) that it is unnecessary for me to set forth the particulars or the arguments for and against the convictions. I shall therefore confine myself to stating briefly the conclusions to which I have arrived after the best consideration I could give to the matter.

The difficulty of decision arises chiefly from the lack of definition of the term 'slave' as used in section 370 of the Indian Penal Code. Both the learned Judges have held (and I entirely agree) that it includes something very far short of slavery in its most extreme forms wherein the master has absolute and unlimited power over the life, fortune and liberty of the slave. This is clearly the view of the Courts in the two reported cases in which the question is discussed [*Empress of India v. Ram Kuar*(1) and *Amina v. Queen-Empress*(2).] What it does require is not so easy to say. To quote from the judgments of the Allahabad Full Bench in the first named case, OLDFIELD, J., says that section 370 of the Indian Penal Code and the cognate sections were intended for the suppression of slavery 'in any modified form, where an absolute power is asserted over the liberty of another.' STUART, C.J., puts it somewhat differently and regards section 370 as directed against

"Attempts to place persons in the position of slaves, or to treat them in a way which is inconsistent with the idea of the person so treated being free as to his property, services or conduct in any respect."

If much stress is laid on the word 'absolute' in OLDFIELD, J.'s definition, it may be argued that the latter is narrower and

(1) (1890) I.L.R., 2 All., 723.

(2) (1884) I.L.R., 7 Mad., 277.

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stricter than that of STUART, C.J. On the other hand the learned Judges do not seem to have been conscious of any material difference of view and their judgments are treated by a Bench of this Court in *Amina v. Queen-Empress*(1) as a consistent and homologous interpretation of the law which should be followed. I shall not venture on an independent definition of my own but would prefer to deal with the case in the light of both those above quoted—although this may involve somewhat detracting from the force of the word 'absolute' in the first and of the penultimate word 'any' in the second. As a matter of fact, the circumstances of this case as I view them would justify the application of either definition taken singly.

Mr. Adam, who appeared for the Public Prosecutor, has argued, and I think rightly, that in determining the nature of the transaction, the Court should look primarily to the terms of the document in which it is embodied and secondarily to the surrounding circumstances as indicating whether the parties had in mind something different from what is set forth in the document. In a Civil Court, section 91 of the Indian Evidence Act would probably be a bar to such a course, if the terms of the contract were in question: but in connexion with a criminal charge, in which the intention of the accused persons has to be established, it is surely legitimate to look outside the terms of the document, and this course has been followed both by the Sessions Judge and by the learned Judges in appeal.

Looking then to the words of Exhibit B, this document appears to me to evidence nothing more or less than the sale of Vellan and his offspring as mere chattels. The word 'jenmam' is defined in Gundert's Malayalam Dictionary as meaning 'hereditary proprietorship' and is the same term used in reference to land held in fee simple or subject only to the payment of Government revenue. The double reference to Vellan's 'heirs' and his 'offspring that may come into being' strengthens the conclusion. The phrases used, *mutatis mutandis*, would be not inapplicable to the sale of a cow and its calf, born or unborn: and I do not think this conclusion is affected by the clause specifying that the vendee should get work done by the said Vellan and his offspring.

(1) (1884) I.L.R., 7 Mad., 277.

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If we confine our attention to the terms of Exhibit B, I think it can only be viewed as a sale of the man as if he were a beast and as certainly satisfying either of the definitions of the learned Judges in the Allahabad case.

I pass to the other circumstances of the case, as throwing light on what the parties had in mind. In favour of appellants, may be mentioned the comparatively mild terms of Vellan's service under second accused as described by him in his evidence. I agree with ABDUR RAHIM, J., that there is nothing in second accused's treatment of Vellan up to May 1913, indicative of slavery in even a modified form. Vellan received the ordinary wages for his work, and spent them as he liked; he was not allowed to work for others, but his master prevented him from doing so by the simple expedient of giving him a job of work of his own whenever Vellan wanted to go elsewhere. This, however, is hardly conclusive. Second accused may have been a lenient master as long as things went smoothly: but it is of more importance to consider his conduct, when the servant chose to assert his independence. This happened in May 1913, when Vellan who had got into debt, executed a bond, Exhibit A, binding himself in consideration of a loan of eight rupees to work for first accused only instead of his old master. The terms of this document are so stringent as to practically bind Vellan to first accused's service for life without hope of redemption.

Now what was second accused's conduct at this juncture? It is described by Vellan himself as prosecution first witness: his evidence is accepted by the Sessions Judge and I do not gather that either of my learned brothers took a different view of the evidence of this or the other prosecution witnesses. Certainly for my own part, I see no reason to differ from the Sessions Judge's appreciation of the evidence. According to prosecution first witness, second accused at once objected to the payment of the rupees eight, the loan under Exhibit A, and announced his intention of selling prosecution first witness out and out to first accused ("I shall execute a jenmam document selling you to Koroth Mammad and get money for it"). Apparently no money at all was advanced under Exhibit A, then or later although an *ex parte* decree was subsequently passed on it (Exhibit J); but for the consideration therein provided for and an extra rupees two all paid to himself, second

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accused executed the jenmam sale, evidence by Exhibit B. Prosecution first witness says "after the sale, second accused said to me 'I have no more right in you.' He made me over to first accused and handed over the document." "Second accused said to first accused, I shall execute a jenmam deed to you for this Cheruman, you need not pay the consideration for the advance document" (Exhibit A). "After second accused received the money and went away, first accused said to me 'My fine fellow, I have bought you in jenmam.' I said 'I don't understand what you mean.' He said 'You don't understand because you are uneducated'."

If this account be true, there is nothing in the surrounding circumstances to detract from the effect of the terms of Exhibit B: and the intention of the parties at the time of the latter's execution is what we have to consider—not the treatment of prosecution first witness at an earlier period.

All the evidence on record as to what followed is adverse to the defence: it goes to show that first accused beat Vellan, tied him up like an animal that had strayed, and behaved generally in a manner not dissimilar to that of a master of a slave in the most primitive sense. I attached no undue weight to this; it has only very secondary bearing on first accused's intentions at the time of the bargain and none on that of second accused. But in so far as it is relevant at all it is certainly against the defence theory of the transaction set up on first accused's behalf. The fact that first accused was subsequently so foolish as to sue on Exhibit B has no significance. No doubt he had never heard of section 370 of the Indian Penal Code and did not realize that he had brought himself within the scope of the Criminal Law. But ignorance of law is no defence: and the only intention required by section 370 of the Indian Penal Code is in relation to the position of the persons bought and sold. Second accused has elected to deny the whole story—his execution of Exhibit B, and even the fact that Vellan was at any time his servant. I have no hesitation whatever in rejecting this defence as false.

I agree with Mr. Justice NAPIER, and concur in the order proposed by him.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

RAMANADHAN CHETTY (PLAINTIFF), APPELLANT,

v.

KATHA VELAN AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Promissory-note in favour of the managing trustee of a charity—The trustee succeeded by another—Latter's right to sue on the note without any assignment or endorsement.

1916,
November,
24, and
1917,
August, 30
and
September, 11.

A promissory-note executed in favour of a trustee can be sued on by his successor without endorsement or assignment, the Negotiable Instruments Act not affecting devolution of rights by operation of law.

Catherwood v. Chabaud (1823) 1 B. & C., 150, applied and followed.

Sowcar Lodd Govinda Doss v. Muneppa Naidu (1908) I.L.R., 31 Mad., 534, referred to.

APPEAL under clause 15 of the Letters Patent against the judgment of COURTS TROTTER, J., in Civil Revision Petitions Nos. 131 and 132 of 1915 praying the High Court to revise the decrees of GOVINDA RAO, the District Munsif of Pattukottai, in Small Cause Suits Nos. 1065 and 1067 of 1914.

Plaintiff sued as trustee of a charity on promissory-notes executed by the first defendant in favour of the second defendant who was the trustee at the time of execution. The defendants contended *inter alia* that the action was not maintainable for want of endorsement or assignment of the note in plaintiff's favour. The Court of first instance decreed the suit. The second defendant filed a Civil Revision Petition against the decree.

COURTS TROTTER, J., allowed this petition and dismissed the suit by the following judgment:—

I think that the decision in *Sowcar Lodd Govinda Doss v. Muneppa Naidu*(1) is in conflict with that in *Arunachalla Reddi v. Subba Reddi*(2) and the authorities therein referred to. Apart from authority I am very strongly of opinion myself that *Sowcar Lodd Govinda Doss v. Muneppa Naidu*(1) cannot possibly be supported as it amounts *pro tanto* to a repeal to the Negotiable Instruments Act. I therefore think that the present suit was unsustainable being

* Letters Patent Appeals Nos. 35 and 36 of 1916.

(1) (1908) I.L.R., 31 Mad., 534.

(2) (1907) 17 M.L.J., 393.

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a suit on a promissory-note which had not been endorsed to the plaintiff and I must hold that the District Munsif was wrong in decreeing the plaintiff's suit. I allow the petition and dismiss the suit with costs here and in the Court below.

The plaintiff filed these Letters Patent Appeals against the decision of COUTTS TROTTER, J.

T. V. Gopalaswami Mudaliyar for the appellant.

S. R. Muttuswami Ayyar for the respondents.

These Letters Patent Appeals coming on for hearing the Court made the following

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AYYAR, JJ.

ORDER.—We must call for a finding as to whether at the time of the suit the right to collect monies due to the trust had devolved solely on the plaintiff.

Fresh evidence may be adduced, if desired. The finding will be submitted within two months from this date, and the parties will be at liberty to file objections to the said finding within seven days after notice of the return of the same shall have been posted up in this Court.

In compliance with the above order of this Court, the District Munsif of Pattukkottai submitted the finding that at the date of these suits, the right to collect monies due to the trust had devolved on the plaintiff.

On the return of the above finding of the lower Court, the Court delivered the following

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JUDGMENT.—We must accept the finding that the promissory-note sued on was executed to Ulagappa Chettiar as trustee of the charity. The question whether the said payee could alone have maintained the suit without joining his co-trustees was not raised in the Court below. It would depend in each case upon the powers and duties of the managing trustee whether such a person is competent to represent the trust solely. That question has not been put in issue and we are not prepared to allow it to be debated now.

Another question which was argued at some length need not be discussed now, namely, whether if there is an assignment of the note by the act of parties, it should not be only in the mode prescribed by the Negotiable Instruments Act. There is a

considerable conflict of opinion on this question and it can only be settled by a reference to a Full Bench.

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The possibility of transfer of right in the note by operation of law has not been the subject of judicial pronouncements to any considerable extent. In this Presidency, apart from certain observations of MILLER, J., in *Sowcar Lodd Govinda Doss v. Muneppa Naidu*(1), the matter is *res integra*.

The Negotiable Instruments Act only deals with transfers by negotiation. Under the English Bills of Exchange Act the common law of the land is expressly saved (see section 97). It is a pity that there is no such saving clause in the Indian Enactment. Section 57 of the Act, by implication, seems to contemplate that the legal representatives of a deceased person can negotiate a promissory-note. The practice of allowing legal representatives in this country to sue on notes executed to their predecessors is apparently founded on the principle that the Act does not abrogate rules of devolution of rights in the properties of the deceased.

If a son, as legal representative, can sue on a note executed to his father, there could be no impediment in principle to other heirs or successors having a similar right. The case of trustees is, in some respects, stronger than that of other heirs. In the case of private trusts, section 75 of Act II of 1882 enacts that the property standing in the name of the predecessor shall vest in the successor. It is not necessary to obtain a transfer by an instrument or by endorsement. We fail to see why this principle should not be extended to public trusts. In Byles on Bills it is stated, "The executor of a deceased party to a bill or note has, in general, the same rights and liabilities as his testator." "The executors of every person", says Lord Macclesfield, "are implied in himself and bound without naming" . . . "On the death of the holder of a bill or note, his executors or administrators may indorse; and an indorsement by the executors or administrators is for all purposes as effectual as an indorsement by the deceased." The cases quoted by the author in support of the above propositions show that the English Bills of Exchange Act does not affect the

(1) (1908) I.L.R., 31 Mad., 534.

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common law right of devolution by operation of law. The same considerations are applicable to the construction of the Indian Enactment.

In *Catherwood v. Chabaud*(1) it was held that a note given to an administrator as such can be sued on without assignment by an administrator *de bonis non* to the original estate. BAYLEY, J., points out that 'the money recovered is applicable to the right fund, as assets of the first intestate.' The case of a trustee replacing another stands on the same footing.

Broadly speaking, trustees exercise rights and obligations as agents of the trust. The trust being the owner, succeeding trustees derive their rights and office by relation to the trust and not as the heirs of the last holder of that office. All of them form a chain of representatives in respect of the trust, as was once said by the Judicial Committee. In this view, each trustee by virtue of his appointment takes up the management of the trust properties at the place left by the previous trustee. It is not necessary that the authority or consent of such a person should be given to the successor. As pointed out by MILLER, J., in *Sowcar Lodd Govinda Doss v. Muneppa Naidu*(2) the predecessor being *functus officio* would have no power to endorse the note given to him in a capacity which he was divested of. Consequently the present plaintiff who has replaced Ulagappa Chetty is entitled to sue on the note without any assignment or endorsement.

We are, therefore, of opinion that the decision of the learned Judge must be reversed and that of the Court below must be restored. Appellant will get his costs from the second defendant in this Court.

S.V.

(1) (1823) 1 B & C., 150.

(2) (1908) I.L.R., 31 Mad., 534.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Kumaraswami Sastriyar.

A. T. VENKATA NARAYANA PILLAI (PLAINTIFF), APPELLANT,

v.

V. PONNUSAWMI NADAR AND SEVEN OTHERS (DEFENDANTS
Nos. 1 TO 4 AND 6 TO 9), RESPONDENTS.*

1917,
August,
29 and 30,
and
September,
3 and 12.

Religious Endowments Act (XX of 1863), sec. 14 Procedure to be followed by committee in the transaction of its business—Suspension of a temple trustee by a temple committee—Legality of procedure—Suit by the trustee for damages for illegal suspension—Liability of individual members of the committee in damages.

Notice of suspension was given to a temple trustee in accordance with the opinion of the majority of the members of the local temple committee, to each of whom one of the members sent a copy of his report recommending suspension, and in spite of the objection taken by one member that the matter should be disposed of at a meeting:

Held, that a temple committee under the Religious Endowments Act resembles a corporation and that the ordinary way to transact its business is at a meeting. Assuming that it can do some of its business in circulation, it cannot remove or suspend trustees in this manner.

Rez v. Taylor (1894) 3 Salk, 231; s.c., 91 E.R., 795, *Rez v. Sutton* (1711) 10 Mod., 74; s.c., 88 E.R., 632, *Thandavaraya Pillai v. Subbayyar* (1900) I.L.R., 23 Mad., 483 at p. 485 and *Ponnambala Pillai v. Muthu Chettiar* (1916) 30 M.L.J., 619, referred to.

The procedure being *ultra vires*, it is no answer to the trustee's suit for damages for illegal suspension that there were sufficient grounds for suspension.

In India individual members of a temple committee, who are parties to an illegal suspension of this kind are liable in damages.

Vijaya Raghava v. Secretary of State for India (1884) I.L.R., 7 Mad., 466 and *Ferguson v. Kinnocull* (1842) 9 Cl. & F., 251, followed.

Indian and English decisions considered.

APPEAL against the decree of C. V. VISWANATHA SASTRIYAR, Subordinate Judge of Kumbakonam, in Original Suit No. 44 of 1912.

The plaintiff was one of the trustees of a temple under the superintendence of the Kumbakonam Devasthanam Committee of

* Appeal No. 430 of 1915.

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which defendants Nos. 1 to 6 were members. After plaintiff had been given notice of certain charges of misconduct against him as temple trustee, the second defendant drew up a report (Exhibit B-1) and forwarded copies of the same to other members of the committee proposing that the plaintiff should be suspended until further orders. In the report the second defendant requested the other members simply to give their opinion and not to insist upon the matter being placed before a meeting. On receipt of this report the third defendant replied that the procedure adopted was illegal and that the matter should be disposed of at a meeting. The matter, however, was not placed before a meeting and as all the members, except the third defendant, assented to the course adopted by the second defendant and sent in their opinions agreeing with the proposal that the plaintiff should be suspended, an order (Exhibit A-1) was sent to the plaintiff by the second defendant as managing member informing him that he was suspended until further orders by the committee. On these facts the plaintiff filed this suit for a declaration of the illegality of the suspension and for damages for Rs. 5,200 against the defendants. Defendants Nos. 1, 2, 4, 5 and 6 pleaded *inter alia* that the order of suspension was proper and that the plaintiff was not entitled to any damages. The third defendant filed a written statement denying the correctness of certain allegations in the plaint and the plaintiff's right to get any damages or costs against him. The Subordinate Judge who tried the case dismissed the suit holding that the suspension was justifiable on account of the plaintiff's dereliction of his duty as a trustee and that he was not entitled to any damages. The plaintiff appealed.

Hon. Mr. S. Srinivasa Ayyangar, the Advocate-General (with S. Muttayya Mudaliyar, A. Krishnaswami Ayyar and K. Narasimha Ayyangar) for the appellant.—A temple committee has no power to suspend a temple trustee. *Seshadri Ayyangar v. Nataraja Ayyar*(1). The power of suspension, if it exists at all, exists only under circumstances which will validate a dismissal. A suspension can be decided upon only at a meeting and the majority's opinion prevails: *Anantanarayana Ayyar v.*

(1) (1898) I.L.R., 21 Mad., 179.

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Kuttalam Pillai(1), *Reg. v. Saddlers' Co.*(2), *Wilkinson v. Malin*(3) and *Raja v. Ali*(4). What was done in this case is this. One member of the committee (second defendant) styled the 'managing member' prepared a report and sent a copy of it to each of the other members recommending the dismissal of the plaintiff; and out of seven members of the committee, one returned an opinion that the procedure was illegal and wanted the matter to be discussed at a meeting; four others sent in their separate opinions agreeing to suspend. The matter was not disposed of even by circulation. Such a suspension is illegal: *Thandavaraya Pillai v. Subbayyar*(5), *Subba Naidu v. Gopalaswamy Naidu* (6) and *Ponnambala Pillai v. Muthu Chettiar*(7). Moreover no notice was given to the trustee; no charges were framed and no enquiry was held before suspending him. The cases of master and servant may be different; see *Seshadri Aiyangar v. Ranga Bhattar* (8) and *Tiruvambala Desikar v. Manikkavachaka Desikar*(9). In the present case the suspension was ordered as a punishment as no further enquiry was contemplated pending the suspension: *Sundararama Sastri v. Anantha Krishna Naidu*(10), *In re Great Northern Salt and Chemical Works, Ex parte Kennedy*(11), *In re Haycraft Gold Reduction and Mining Company*(12), *Mayor, etc., of Merchants of the Staple of England v. Governor and Company of Bank of England*(13) and *Hallows v. Fernie*(14). If all the members concur in an act, circulation may be sufficient; *In re Great Northern Salt and Chemical Works, Ex parte Kennedy*(11); but there was no circulation in the present case as each member's opinion was given without reference to the opinion of another.

T. Narasimha Ayyangar for Hon. Mr. T. Ranga Achariyar with T. V. Gopalaswami Mudaliyar and N. Kunjithapatham Ayyar for the respondent submitted that there was no prejudice to the plaintiff, that he was fully heard and he gave all his explanations

- (1) (1899) I.L.R., 22 Mad., 481.
 (2) (1863) 10 H.L.C., 404. (8) (1832) 37 E.R., 792; s.c., 2 Cr. & J., 636.
 (4) (1917) I.L.R., 40 Mad., 941. (5) (1900) I.L.R., 23 Mad., 483.
 (6) (1905) 15 M.L.J., 185. (7) (1916) 30 M.L.J., 619.
 (8) (1912) I.L.R., 35 Mad., 631. (9) (1917) I.L.R., 40 Mad., 177.
 (10) (1917) 5 L.W., 672 at p. 678.
 (11) (1890) 44 Ch. D., 472 at pp. 480 and 481.
 (12) (1900) 2 Ch., 280. (13) (1888) 21 Q.B.D., 160 at p. 165.
 (14) (1867) L.R., 3 Eq., 520 at pp. 536 and 537.

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to the charges framed and that all the committee members later on ratified the suspension at a meeting.

[Court—But that was after the suit.]

There is no by-law or statute compelling the committee to suspend a trustee only at a meeting. All depends upon what was the previous practice. A similar case is *Subba Naidu v. Gopalaswamy Naidu*(1). Disposal of business by circulation is only a less formal method than by meeting. Moreover a dismissal in a wrong manner can be justified otherwise, e.g., on the merits, during action: see *In re Great Northern Salt and Chemical Works, Ex parte Kennedy*(2), *Vijaya Raghava v. Secretary of State for India* (3) and *Seshadri Ayyangar v. Nataraja Ayyar*(4). Mere irregularity in procedure does not affect the legality of the eventual order especially if the order is just on the merits: Halsbury's Laws of England, Volume 8, page 330. *The King v. Mayor, etc., of London*(5), *Seshadri Ayyangar v. Ranga Bhattar* (6) and *The King v. Griffiths*(7).

Hon. Mr. S. Srinivasa Ayyangar, the Advocate-General, in reply was asked to argue the question of quantum of damages.

The judgment of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—This is an appeal from a decree of the Subordinate Judge of Kumbakonam dismissing the suit brought by the plaintiff for a declaration that his suspension from the office of temple trustee by the Kumbakonam Devasthanam Committee was illegal and for damages. The decision as to the legality of the suspension depends mainly in this case on the question whether the procedure adopted by the committee can be supported. What happened was that, after the plaintiff had been given notice of some or all of the charges against him, the second defendant, a member of the committee, drew up a report (Exhibit B-1) and forwarded copies of it to the other members of the temple committee proposing that the plaintiff and some other trustees should be suspended until further orders. In it he stated that, though the subject had been for a long time before

(1) (1905) 15 M.L.J., 185.

(2) (1890) 44 Ch. D., 472 at pp. 480 and 481.

(3) (1884) I.L.R., 7 Mad., 468.

(4) (1898) I.L.R., 21 Mad., 179 at pp. 186 and 206.

(5) (1787) 8 T.R., 209; s.c., 100 E.R., 66. (6) (1912) I.L.R., 35 Mad., 631.

(7) (1822) 5 B. and Ald., 731; s.c., 106 E.R., 1358.

the meeting, it had not been concluded; "It is therefore sent in circulation. I request that instead of writing 'meeting' in this you will write your opinion." Defendants Nos. 1, 4 and 6 are proved to have assented to the course. The fifth defendant died after suit, and defendants Nos. 7, 8 and 9 were not in office at the date of suspension. The third defendant on receipt of Exhibit B-1 sent an answer (Exhibit C) in which he stated "It is not legal to take this step by circulation, much less by taking individual opinions as you are now doing. The procedure adopted is wrong from beginning to end; I request you therefore to call a meeting for the purpose." Ignoring this request the second defendant wrote to the plaintiff the letter (Exhibit A-1) in which he stated that the plaintiff had been suspended for the reasons set forth in the accompanying proceedings order and asked him to hand over to another of the trustees. The proceedings (Exhibit A-1) recorded the opinion of the majority that the plaintiff should be suspended and disclosed the fact that the matter had been dealt with in circulation. Now the temple committee are a statutory body to which the powers formerly exercised by the Board of Revenue under Regulation VII of 1817 have been transferred as regards certain temples by the Religious Endowments Act and these powers, it may now be taken as settled, include a power of suspending or dismissing the temple trustees for sufficient cause. It has, however, been held that in exercising these powers they are to a large extent in the position of a corporation and that their actions must be tried by the same tests. Now it is well settled that the ordinary way for bodies in the position of a corporation to transact their business is at a meeting; and, assuming that it is open to them to transact some of their business in circulation, I think they have no such power as regards matters such as suspension, or dismissal of freehold officers under their superintendence as to which their authority must be strictly pursued: *Rex v. Taylor*(1), *Rex v. Sutton*(2), *Thandavaraya Pillai v. Subbayyar*(3), and *Ponnambala Pillai v. Muthu Chettiar*(4). Even if the matter could properly have been dealt with in circulation, that

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(1) (1694) 3 Salk, 231.

(2) (1711) 10 Mod., 74.

(3) (1900) I.L.R., 23 Mad., 483 at p. 485.

(4) (1918) 30 M.L.J., 619.

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could only have been by consent of all members, and any one of them would have had the right to insist on the matter being dealt with at a meeting, as the third defendant endeavoured to do in this case. See the observation of PAGE WOOD, V.C., in *Hallows v. Fernie*(1), which were approved by STERLING, J., in *In re Great Northern Salt and Chemical Works, Ex parte Kennedy*(2). Here there was not even what is ordinarily known as circulation, as the second defendant merely sent copies of his proposals to each of the other members and obtained their individual assents to his proposals. In these circumstances we are clearly of opinion that the action of the committee in suspending the plaintiff was *ultra vires*.

It is then said that we ought to enquire whether there were valid grounds for suspending the plaintiff and, if so, to dismiss his suit. Certain observations of Mr. Justice SHEPARD in *Seshadri Ayyangar v. Nataraja Ayyar*(3) were referred to, but these observations appear to have been *obiter* and no authority was cited. There are similar observations by Mr. Justice SUNDARA AYYAR in *Seshadri Aiyangar v. Ranga Bhattar*(4). The case cited by him—*The King v. Mayor, etc., of London* (5)—is no authority that his is a good answer to a suit, as in that case the Court merely refused to issue the discretionary writ of mandamus and observed that

“no case has been cited to show that an assize will not lie for such an office as the present; or that he could not maintain an action for money had and received during his suspension.”

Further the office with which Mr. Justice SUNDARA AYYAR was dealing was that of archaka and other considerations may possibly apply to it. On the other hand in *Willis v. Sir G. Gipps*(6), the Privy Council recommended that an order of amotion made without due notice should be set aside, although they at the same time reported that there were sufficient grounds for making the order. We are therefore of opinion that it would not be a good answer to the present suit to show that there were

(1) (1867) L.B., 3 Eq., 520 at p. 537. (2) (1890) 44 Ch. D., 472.

(3) (1898) I.L.R., 21 Mad., 179 at pp. 186 and 187.

(4) (1912) I.L.R., 35 Mad., 631.

(5) (1787) 8 T.R., 209; s.c., 100 E.R., 66.

(6) (1846) 5 Moo., P.C., 379.

sufficient grounds for suspending the plaintiff. In this view it is unnecessary to consider the further objection that the plaintiff was removed without due notice, as we have held that the action was *ultra vires* on the other ground.

As regards the liability of the defendants or some of them for damages, there can be no doubt that the decision of a Bench of three Judges sitting on the original side in *Vijaya Raghava v. Secretary of State for India*(1) is authority at any rate for the proposition that a person in the enjoyment of a public office who is wrongfully removed is ordinarily entitled to damages from the authority removing him. In *Seshadri Ayyangar v. Nataraja Ayyar*(2) a trustee who was illegally suspended recovered Rs. 1,000 against the temple committee, COLLINS, C.J., being influenced by the fact that the committee were actuated by an indirect motive, the fact that the plaintiff was a vadagalai. In *Thandavaraya Pillai v. Subbayyar*(3) the plaintiff recovered damages before the District Munsif, and to this extent the decree seems to have been reversed by the District Judge, and the plaintiff did not appeal. As early as *Syed Amin Sahib v. Ibram Sahib*(4), it seems to have been assumed that damages might be recovered by a temple trustee for wrongful dismissal. On the other hand there does not seem to be any instance of an action of this kind having been successfully maintained in England. In *The King v. Mayor, etc., of London*(5) already cited, the suggested remedies of the removed officer were an assize or an action for money had and received to his use during the period of suspension, and not an action against the corporation for wrongfully suspending him; and in *Osgood v. Nelson*(6) it was thought well for the removed officer to proceed by action for money had and received against his successor. In *Harman v. Tappenden*(7), where a freeman of the corporation was alleged to have been illegally removed from his office, it was held that an action did not lie against individual corporators for acts erroneously done by them in their corporate capacity, at least not without proof of malice. This case was relied on by KELLY, C.B., in *Mill v.*

(1) (1884) I.L.R., 7 Mad., 466.

(2) (1898) I.L.R., 21 Mad., 179 at pp. 186 and 187.

(3) (1900) I.L.R., 23 Mad., 483.

(4) (1868) 4 M.H.C.R., 112.

(5) (1787) 8 T.R., 209.

(6) (1872) L.R., 5 H.L., 636.

(7) (1801) 1 East, 555.

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Hawker(1), who held that for a tort committed by a corporation it could only be sued as a body. On the other hand *CLEASBY and PIGOTT, BB.*, held that the individual members who exceeded their authority by ordering a trespass to the plaintiffs' land were liable in damages. In *Mill v. Hawker*(2), the same case in the Exchequer Chamber, *BLACKBURN, J.*, said that the question whether the corporators were liable was one of considerable importance and great difficulty. It would, he said, require time for consideration and probably the decision would not be unanimous. Accordingly he declined to decide it at that stage, and it has not been decided since in any English case. It had however long previously been ruled by the House of Lords in a Scotch appeal, *Ferguson v. Kinnoull*(3), that where the law imposes a duty on any person or body of persons and they fail or neglect to perform that duty they are answerable in damages to those whom their failure or neglect injures. The appeal was from Scotland, but the judgments proceeded on grounds common to the laws of England and Scotland, as was expressly stated, and they contain general expressions which are rather in favour of extending liability of individual corporators at any rate to cases of excess of jurisdiction such as the present. It is also to be observed that it has been held by the Judicial Committee on appeal from India in *Calder v. Halket*(4), that even judicial acts at any rate of inferior Courts are actionable, in the absence of statutory provision, if done wholly without jurisdiction. *Ferguson v. Kinnoull*(3) is also important because it lays down that it is only corporators who are parties to the failure or neglect of duty who can be held answerable in damages. It is also clear that section 14 of the Religious Endowments Act contemplates that members of temple committees should be sued individually in cases under that section. On the whole, it does not appear that the Madras cases are opposed to any settled rule of English Law, or that there is sufficient reason for calling them in question.

As regards damages it is not shown that the plaintiff sustained any substantial damage by reason of the suspension though it was of course annoying to have the suspension tom-tommed in the neighbourhood. On the whole we assess the damages at

(1) (1874) L.R., 9 Ex., 321.
(3) (1842) 9 Cl. and F., 251.

(2) (1875) 10 Ex., 92.
(4) (1839) 3 Moo. P.C., 28.

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Rs. 50 and reverse the decision of the lower Court and give the plaintiff a declaration that his suspension was illegal and a decree against defendants Nos. 1, 2, 4 and 6 who must be considered as parties to the suspension, for Rs. 50 damages and for costs here and below calculated on that amount.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Bakewell and Mr. Justice Kumaraswami Sastriyar.

ASA BEEVI AND TWO OTHERS (DEFENDANTS
Nos. 5 TO 7), APPELLANTS,

1917,
September,
11 and 12.

v.

S. K. M. KARUPPAN CHETTY (PLAINTIFF), RESPONDENT.*

Muhammadan Law—Contingent right to inherit, transfer or renunciation of, whether prohibited.

A transfer or renunciation of a contingent right of inheritance is prohibited under Muhammadan Law.

Mussummant Khanum Jan v. Mussummant Jan Bee-bee (1827) 4 S. D. A., 210, followed.

Kunhi Mamod v. Kunhi Moidin (1896) I.L.R., 19 Mad., 176, considered.

Mussamut Hurmatt-Ool-Nissa Begam v. Allahdia Khan and Hajee Hidayat (1871) 17 W.R., 108 (P.C.), explained.

APPEAL under clause 15 of the Letters Patent against the judgment of SADASIYA AYYAR, J., in *Asa Beevi v. Karuppan Chetty*(1).

The following statement of facts is taken from the judgment of SADASIYA AYYAR, J. :—

"One Pachakanni had two children, a son and a daughter, by his wife Vellayammal. The son's name was Mira Moideen and the

* Letters Patent Appeal No. 47 of 1917.

(1) Second Appeal No. 1471 of 1915 against the judgment of R. GOPAL Rao, the Temporary Subordinate Judge of Sivaganga, in Appeal No. 301 of 1914, preferred against the decree of N. KAILASAM AYYAR, the Additional District Munsif of Sivaganga, in Original Suit No. 96 of 1913.

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daughter's name is Nagoor Ammal. Pachakanni married two other wives. About 25 years after her marriage, Vellayammal and her son Mira Moideen executed a release deed, Exhibit I, on the 28th April 1902, in favour of Pachakanni. The daughter Nagoor Ammal did not join in this release deed, Exhibit I. Under this release deed, Exhibit I, Vellayammal and her son Mira Moideen received Rs. 500 from Pachakanni. The operative portion of the deed is 'as we have received the said Rs. 500 we make a release of the rights and connections of ourselves and our heirs to all the properties or liabilities of yours and your heirs.' It is not denied that, on the true construction of this document, the mother and the son released their rights of inheritance also to Pachakanni.

Pachakanni died about the middle of 1908. Shortly afterwards his son Mira Moideen and his daughter Nagoor Ammal by his first wife sold their father's properties to the plaintiff as if they were the sole heirs of their father, ignoring the release deed, Exhibit I, by which one of them had relinquished his interest in the inheritance and ignoring also the fact that the father had left a widow at his death. Defendants Nos. 5, 6 and 7 represent the heirs of the second wife of Pachakanni who was the only heir left by him at his death (besides his daughter and his son by his first wife). The fourth defendant is the alienee from one of the heirs of the widow. Defendants Nos. 1 to 3 disclaimed all interest.

The District Munsif found (a) that Nagoor Ammal, one of the plaintiff's vendors, was not proved to be the legitimate daughter of Pachakanni by his first wife Vellayammal; (b) that the other vendor of the plaintiff had given up all rights of inheritance in his father's properties by Exhibit I; and (c) that the plaintiff therefore got no title under his sale-deed, Exhibit A. On these findings the District Munsif dismissed the suit with costs.

On appeal, the learned Subordinate Judge held (a) that Nagoor Ammal was the legitimate daughter of Pachakanni, (b) that the release deed, Exhibit I, was legally inoperative both under the Muhammadan Law and by and on the analogy of section 6 of the Transfer of Property Act and that therefore the plaintiff was entitled to $\frac{3}{4}$ th share under the Muhammadan Law in Pachakanni's estate, such $\frac{3}{4}$ th ($\frac{1}{2}$ and $\frac{1}{4}$) being the sum of the fractional shares belonging to his two vendors in that estate."

Defendants Nos. 5 to 7 preferred a second appeal to the High Court which was heard by SADASIYA AYYAR and SPENCER, JJ. SADASIYA AYYAR, J., agreed with the Subordinate Judge and

holding that the renunciation of the contingent right of inheritance was prohibited by the Muhammadan Law and that there was no estoppel created by such renunciation beforehand though the renunciation had been for a consideration, dismissed the second appeal; while SPENCER, J., allowed the second appeal holding on the authority of *Mussamut Hurmutt-Ool-Nissa Begam v. Allahdia Khan and Hajee Hidayat*(1), that the renunciation was not repugnant to Muhammadan Law, that it was good as a family settlement and that an estoppel was created by receipt of consideration, and gave a decree to the plaintiff to the extent of three-eighths of the deceased's estate. In the result the second appeal was dismissed with costs under section 98, Civil Procedure Code.

Defendants Nos. 5 to 7 preferred this Letters Patent Appeal.

A. Krishnaswami Ayyar (with E. Duraiswami Ayyar) for the appellants.—I contend for the view of SPENCER, J. Section 6 of the Transfer of Property Act does not in terms apply to Muhammadans. The Muhammadan Law alone applies. A release or renunciation of a right to inherit to a living propositus, for a consideration is valid under that law. I rely on *Mussamut Hurmutt-Ool-Nissa Begam v. Allahdia Khan and Hajee Hidayat*(2). See also *Kunhi Mamod v. Kunhi Moidin*(3) and *Nasir-ul-Haq v. Fazil-ul-Rahman*(4). The case against me is *Sumsuddin v. Abdul Hussain*(5). This point did not directly arise in *Marangami Rowther v. Nagur Meera Labbai*(6). There is at least a personal estoppel so far as the executant of the release is concerned: *Har Chandi Lal v. Sheoraj Singh*(7), *Rangappa Naik v. Kamti Naik*(8), *Raghupathy v. Kannamma*(9), *Nachiappa Gounden v. Rangasami Gounden*(10), *Muhammad Hashmut Ali v. Kaniz Fatima*(11) and *Barati Lal v. Salik Ram*(12). Tyabji's Muhammadan Law, page 285; Ameer Ali in his Muhammadan Law, Volume 2, page 50, doubts the correctness

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- (1) (1871) 17 W.R., 108 (P.C.). (2) (1871) 17 W.R., 108, at p. 112 (P.C.).
(3) (1898) I.L.R., 19 Mad., 176. (4) (1911) I.L.R., 33 All., 457.
(5) (1907) I.L.R., 31 Bom., 165. (6) (1913) 24 M.L.J., 253 at p. 262.
(7) (1917) I.L.R., 39 All., 179 at p. 184 (P.C.).
(8) (1908) I.L.R., 31 Mad., 366 at p. 371.
(9) (1912) 23 M.L.J., 363. (10) (1914) 28 M.L.J., 1.
(11) (1915) 13 A.L.J., 110. (12) (1915) 13 A.L.J., 1141.

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of *Kunhi Mamod v. Kunhi Moidin*(1). *Sri Jagannada Raju v. Sri Rajah Prasada Rao*(2), does not touch the present question.

C. V. Anantakrishna Ayyar for the respondent.—Under Muhammadan Law there can be no release of a prospective heirship or reversionary right to the owner or to the other heirs; such a renunciation is null and void: *Mussummant Khanum Jan v. Mussummant Jan Bee-bee*(3); Macnaughten's Precedents, page 89 (Precedent No. 11) and Wilson's Anglo-Muhammadan Law, page 268. *Kunhi Mamod v. Kunhi Moidin*(1) is wrong and is also distinguishable. In *Muhammad Hashmut Ali v. Kaniz Fatima*(4) no rule of Muhammadan Law or authorities are quoted. There is no specific decision of this point in *Mussamut Hurmutt-Ool-Nissa Begum v. Allahdia Khan and Hajee Hidayat*(5), and it deals only with a release of a vested right after the inheritance opened. See Ameer Ali's Muhammadan Law, Volume 2, pages 50 and 51. See also *Marangami Rowther v. Nagur Meera Labbai*(6) and Tyabji's Muhammadan Law, page 568.

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JUDGMENT.—We agree with the conclusion arrived at by Mr. Justice SADASIVA AYYAR in this case on the ground that a transfer of an expectancy of this kind is not permitted by the Muhammadan Law. That was decided in accordance with the opinion of the numerous law officers consulted in *Mussummant Khanum Jan v. Mussummant Jan Bee-bee*(3). Case No. 11 cited at page 89 of Macnaughten's Principles and Precedents of Muhammadan Law is to the same effect. This view has also been taken by the text-writers on Muhammadan Law. (Sir Roland Wilson's Digest of Anglo-Muhammadan Law, page 268, and more particularly Volume 2, pages 50 and 51 of the third edition of Mr. Ameer Ali's Muhammadan Law where the subject is more fully dealt with.) Mr. Tyabji's Principles of Muhammadan Law is to the same effect.

On the other hand, reliance has been mainly placed on the decision of the Privy Council in *Mussamut Hurmutt-Ool-Nissa Begum v. Allahdia Khan and Hajee Hidayat*(5) by which Mr. Justice SPENCER appears to have been mainly influenced in

(1) (1896) I.L.R., 19 Mad., 176.

(3) (1827) 4 S.D.A., 210.

(5) (1871) 17 W.R., 108 at p. 112.

(2) (1916) I.L.R., 39 Mad., 554.

(4) (1915) 13 A.L.J., 110.

(6) (1913) 24 M.L.J., 258 at p. 262.

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dissenting from the conclusion come to by Mr. Justice SADASIVA AYYAR. On examining that case, we do not think that their Lordships intended to lay down that a Muhammadan could renounce his right of inheritance before that right had become vested on the death of the person to whom he was entitled to succeed. In that case there had been very great delay in putting forward the plaintiff's claim to succeed as heir of the deceased and their Lordships observe at page 112:

"They may further remark that, according to the Muhammadan Law, there may be a renunciation of the right to inherit, and that such a renunciation need not be expressed but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another."

Having regard to the words 'right to inherit' and the words 'prosecuting a claim' which claim would only arise after the succession had opened, we think that these observations of their Lordships may be taken as dealing with a renunciation after the right of inheritance has vested, and are not authority for the proposition that a prior renunciation is authorized by the Muhammadan Law. Mr. Ameer Ali in the passage referred to deals with renunciation after the inheritance has vested.

Reliance has also been placed on a decision of this Court in *Kunhi Mamod v. Kunhi Moidin*(1). That decision has been questioned by all the text-book writers who have since dealt with the subject. As pointed out in Wilson's book, the recital that all the law officers were not agreed in *Mussummant Khanum Jan v. Mussummant Jan Bee-bee*(2) is not accurate. Further, the respondent was not represented and therefore the case was not so fully argued. The learned Judges also proceeded upon the footing that the right of inheritance had vested. We are not prepared to accept this case as an authority for the proposition that under the Muhammadan Law a right of inheritance can be renounced before it vests. The decision in *Mussummant Khanum Jan v. Mussummant Jan Bee-bee*(2) has since been referred to with approval by this Court in the judgment of BENSON and SUNDARA AYYAR, JJ., in *Marangami Rowther v. Nagur Meera*

(1) (1896) I.L.R., 19 Mad., 176.

(2) (1827) 4 S.D.A., 210.

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Labbai(1), and the same view appears to have been expressed by Sir LAWRENCE JENKINS, C.J., in *Sumsuddin v. Abdul Hussain*(2), though the judgment in that case proceeded upon the construction of the provisions of the Transfer of Property Act. Reliance has also been placed upon the decision in *Muhammad Hashmat Ali v. Kaniz Fatima*(3), but there is no discussion of the authorities in that case.

On the whole, we think that there is a large preponderance of authority in favour of the view that a transfer or a renunciation of the right of inheritance before that right vests is prohibited under the Muhammadan Law. The rules of Muhammadan Law are not affected by the Transfer of Property Act and it is, therefore, unnecessary to consider whether this transfer or renunciation would not also be invalid under the provisions of section 6 of the Transfer of Property Act itself.

For these reasons, the Letters Patent Appeal fails and is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Bakewell
and Mr. Justice Kumaraswami Sastriyar.

1917,
September
12.

VEMA RANGIAH CHETTY (DEFENDANT), APPELLANT,

v.

V. M. VAJRAVELU MUDALIAR (PLAINTIFF),
RESPONDENT.*

Provincial Small Cause Courts Act (IX of 1887), Sch. II, art. 7—Suit involving apportionment of rent, whether a suit of small cause nature—Transfer of Property Act (IV of 1882), ss. 2 (d) and 36, applicability of, to transfer in execution.

A suit the determination of which involves apportionment of rent by the Court, falls within article 7 of the second schedule of the Provincial Small Cause Courts Act and is exempted from the cognizance of a Provincial Small Cause Court.

(1) (1913) 24 M.L.J., 258.

(2) (1907) I.L.R., 31 Bom., 165.

(3) (1915) 13 A.L.J., 110.

* Letters Patent Appeal No. 57 of 1917.

Though according to section 2 (d) of the Transfer of Property Act, the Act does not apply to sales in execution, yet the principle of section 36 of the Act which embodies a rule of justice, equity and good conscience can be applied and rent apportioned from day to day as between a lessor and the transferee of his right in execution in the course of a year of the lease.

APPEAL under clause 15 of the Letters Patent against the judgment of SADASIVA AYYAR, J., in *Rangiah Chetty v. Vajravelu Mudaliar*(1).

Plaintiff gave on lease two properties on 27th February 1901 to the defendant's father for ten years at a fixed rent for each year and the rent of each year was made payable in three equal instalments, on the 15th of May, 15th November and 15th February. Plaintiff lost the first of the two properties early in 1901 and the second by virtue of a court-sale held in April 1907 in execution of a decree against him, the sale being confirmed in December 1907. In this suit the plaintiff claimed that he was entitled to a rateable amount of each year's rent (viz., one-third of the whole rent) in respect of the second property for the instalments payable in February, May and November 1907 and February and May 1908. The plaintiff stated in his evidence that the defendant's father apportioned the rent for the suit property at one-third of the whole rent. The defendant denied the truth of the lease and stated that the rent was discharged by his father and the rateable amount claimed was excessive. The District Munsif held that the plaintiff was entitled to rent only up to April 1907 (the date of sale) but that the rent was discharged and that there was no apportionment. On appeal the Subordinate Judge held that there was no apportionment by defendant's father, that there was no discharge, that the plaintiff was entitled for the ten months' rent in 1907, viz., from February 1907 to December 1907, when the sale was confirmed and that the purchaser in court-sale was entitled to rent thereafter.

The defendant preferred a second appeal which was heard by SPENCER and SADASIVA AYYAR, JJ. A preliminary objection was raised that no second appeal lay. SPENCER, J., held that there was no apportionment prior to suit, that as the suit involved an

(1) Second Appeal No. 1431 of 1915 preferred against the decree of K. KRISHNAMAACHARIYAR, the Subordinate Judge of North Arcot, in Appeal No. 142 of 1914, preferred against the decree of M. A. KRISHNA RAO, the District Munsif of Sholinghur, in Original Suit No. 140 of 1913.

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apportionment of rent it was not a suit of a small cause nature, so as to preclude a second appeal, but that as the rent for the third instalment of 1907 was not due in December 1907 when plaintiff lost possession but was due only in February 1908, he was not entitled to ten months' rent but was entitled only to the rent of the two out of the three instalments of 1907. SADASIVA AYYAR, J., held that there was an apportionment by defendant's father, that even if there was no apportionment, the suit was of a small cause nature as the plaintiff claimed a specific mount as rent on the basis of an equitable apportionment, that the determination of the apportionment which was not prayed for in the plaint was only incidental to the main relief and that hence no second appeal lay. In the result the second appeal was dismissed with costs under section 98, Civil Procedure Code.

The defendant preferred this Letters Patent Appeal.

T. V. Muttukrishna Ayyar for the appellant.—On both the questions raised in the case I contend for the view taken by SPENCER, J.: (1) The suit is not of a small cause nature. There was no contract of apportionment between the parties of the rent payable on the loss of one of the two properties. Whatever apportionment there was before, it was all one-sided and not with my consent. It is in this suit that the apportionment has to be made by the Court for the first time and hence this suit falls under clause (7) of the second schedule to the Provincial Small Cause Courts Act. (2) One of the two properties leased passed to a stranger in a court-sale. Section 36 of the Transfer of Property Act does not apply to execution sales—see section 2 (d) of the Transfer of Property Act. Rent cannot be apportioned from day to day—see *Mathewson v. Shyam Sunder Sinha*(1). *Kunhi Sou v. Mulloli Chathu*(2) and *Lakshminaranappa v. Melothraman Nair*(3) are against me.

K. Yegnanarayana Adiga for *K. P. Lakshmana Rao* for the respondent.—The suit is of a small cause nature. It is the frame of the plaint that determines the *forum*. No apportionment is prayed for in the plaint but only a money rent; and even if rent has to be apportioned by the Court on account of

(1) (1906) I.L.R., 33 Calc., 786.

(2) (1915) I.L.R., 38 Mad., 86.

(3) (1903) I.L.R., 26 Mad., 540.

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eviction from a portion of the leased premises (for which see *Foa's Landlord and Tenant*, page 170), it arises only incidentally. The vakil was not called upon to argue on the merits.

The following judgment of the Court was delivered by

WALLIS, C.J.—The learned Judges have differed on the question whether a second appeal lies to this Court and that depends upon the question whether the present suit is one of a small cause nature, and if it be a suit for the apportionment of rent it is not of a small cause nature; see article 7 of second schedule of the Provincial Small Causes Courts Act. The plaint in this case recites that the lessee failed to get possession of a portion of the demised premises by reason of a decree against the lessor. The plaintiff who sues for rent claims only a rateable amount, namely, one-third of the stipulated rent or Rs. 116-10-8 a year. He does not allege that the rent had been apportioned at this figure by consent of the parties but only that the defendant had settled the claim for rent up to 1904—on what terms he does not say. The finding is that there was no agreement about it, and therefore it is quite clear that the suit did involve an apportionment of rent and could not have been decided without it, that, therefore, it was not a suit of a small cause nature, and that a second appeal lies. The Letters Patent Appeal must be allowed with costs and we must proceed to dispose of the second appeal.

The only ground taken is that the lower Courts were wrong in apportioning the rent between the original lessor and the purchaser of his interest in execution at a court-sale. Section 36 of the Transfer of Property Act provides for such apportionment, and although it is no doubt true that, under section 2 (d) of the Act, it does not apply to sales in execution, yet the section embodies a rule of justice, equity and good conscience which we think should be applied. That appears to be the view taken by this Court in *Kunhi Sou v. Mulloli Chathu*(1) following *Lakshminaranappa v. Melothraman Nair*(2). The case reported in *Satyendra Nath Thakur v. Nilkantha Singha*(3) was a case of a transfer of the lessee's interest, and it is unnecessary for us to consider it. With great respect we are unable to follow the

(1) (1915) I.L.R., 38 Mad., 86.

(2) (1903) I.L.R., 26 Mad., 540.

(3) (1894) I.L.R., 21 Calc., 383.

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decision in *Mathewson v. Shyam Sunder Sinha*(1). In this case the question may depend upon the terms of the contract of sale and neither the sale proclamation nor the sale certificate have been produced and in the absence of any evidence we must presume that what was sold was simply the land. The second appeal therefore fails and is dismissed with costs.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Kumaraswami Sastriyar.

KUMARAPPA REDDI (PLAINTIFF), APPELLANT,

v.

MANAVALA GOUNDAN (DEFENDANT), RESPONDENT.*

1916,
September,
5, 6 and 20
and 1917,
May, 3,
August, 7 and
15 and
November,
12 and 23.

Civil Procedure Code (Act V of 1908), sec. 100—Custom or usage having the force of law—Extent of jurisdiction of High Court in second appeal in deciding custom or usage—Mirasidar in Chingleput district, right to thunduvaram by custom from Government ryots—Onus of proving custom on Mirasidar—Civil Procedure Code, sec. 103—Power of High Court to decide facts under—Admissions of a party, binding nature of, unless explained—Provincial Small Cause Courts Act (IX of 1887), Sch. II, art. 13—Thunduvaram, dues within—Burden of proving abandonment of customary right—Non-exercise of right for a long time, effect of.

*Held by the Full Bench:—*The existence of a custom or 'usage having the force of law' is a mixed question of fact and law. Section 100, Civil Procedure Code, precludes the High Court from interfering in second appeal with the findings arrived at by the lower Court of actual facts from which the existence of the custom has been inferred; the inference as to the existence and the decision as to the validity, of the custom being matters of law, revisable by the High Court in second appeal.

Kakarla Abbaya v. Raja Venkata Papayya Rao (1908) I.L.R., 29 Mad., 24, overruled. *Kailas v. Padmakisur* (1917) 25 C.L.J., 613 and *Pankajammal v. The Secretary of State for India* (1917) I.L.R., 40 Mad., 1108, followed. *Palaniappa Chetty v. Sreemath Devasikamony Pandarasannadhi* (1917) I.L.R., 40 Mad., 709 (P.C.), referred to.

Held further, (a) that in a suit by an *ekaboga mirasidar* in a village in the Chingleput district, for certain customary dues called *thunduvaram* from the

(1) (1906) I.L.R., 33 Calc., 786.

* Second Appeal No. 1660 of 1913.

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non-mirasidar Government ryots in the village the onus of proving the custom was on the mirasidar, (b) that on the facts found he had established the custom, (c) that express admissions of a party to a suit are strong evidence against him unless and until explained and (d) that the onus of proving discontinuance of the custom was on the ryot.

Per SADASIVA AYYAR, J.—The High Court can, under section 103, Civil Procedure Code, decide in second appeal the genuineness or otherwise of the material documents in the case in the absence of a finding by the lower Appellate Court.

Held by the Division Bench (SADASIVA AYYAR and NAPIER, JJ.) Mirasi right is an interest in the village lands though not a proprietary interest therein. The *thunduvaram* payable to the mirasidar by a ryot according to custom is not in the nature of 'rent' but falls under 'dues' within article 13 of the second schedule to the Provincial Small Cause Courts Act (IX of 1887) and in a suit for such dues a second appeal lies to the High Court.

SECOND APPEAL against the decree of P. A. BOOTY, the District Judge of Chingleput, in Appeal No. 542 of 1911, preferred against the decree of A. VENKATARAMAYYA PANTULU, the District Munsif of Chingleput, in Original Suit No. 12 of 1910.

The plaintiff in this case, an *ekaboga mirasidar* in a village in Chingleput district, brought this suit for Rs. 168 being the value of *thunduvaram*, perquisites alleged to be due to him from the defendant, a non-mirasidar ryot in the village holding under a patta from the Government certain waste lands and other lands relinquished by the mirasidar. The plaintiff claimed the right not only by reason of a registered agreement executed by the defendant in his favour (Exhibit B) on 26th January 1905 but also by virtue of a customary right in him as mirasidar. The defendant pleaded that he was not liable, on the grounds (a) that there was no consideration for the agreement and (b) that there was no such custom as alleged by the plaintiff. The Munsif and the District Judge on appeal upheld both the above pleas of the defendant and dismissed the suit. The plaintiff preferred this second appeal to the High Court.

Further facts are to be found in the first judgment of the High Court (dated 20th September 1916) calling for a finding on certain issues from the District Court (for which see *infra*, page 376) and from the ORDER OF REFERENCE of SADASIVA AYYAR, J. (at page 381).

L. A. Govindaraghava Ayyar and D. V. Nilamegha Achariyar
for the appellant.

T. R. Ramachandra Ayyar for the respondent.

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This Second Appeal came on for hearing in the first instance before SADASIVA AYYAR and NAPIER, JJ., who delivered the following

JUDGMENT.—The plaintiff is the appellant. He brought the suit to recover *thunduvaram* alleged to be due to him as mirasidar by the defendant who is a Government ryot in a mirasi village. A preliminary objection was raised by the respondent's learned vakil (Mr. T. R. Ramachandra Ayyar) that no second appeal lies as the suit was of a small cause nature and the value of the claim is less than Rs. 500. In our opinion, mirasi right is an interest in the village lands, though it may not now be a proprietary interest therein. The *thunduvaram* payable to the mirasidar (assuming it to be payable) might have once been part of the *kudivaram* produce, but it is now claimed merely as the fee due to the mirasidar as such by custom. Hence it is not of the nature of 'rent' (like *jodi*), but comes under the general expression 'dues' in article 13 of the Provincial Small Cause Courts Act.

We therefore overruled the above preliminary objection. We are unable to agree with the learned District Judge that the plaintiff's claim to obtain *thunduvaram* (a part of the mirasidar's *swatantram*) from the defendant became barred in 1890, because the Government refused some time prior to 1878 to recognize the custom under which the mirasidar claimed such dues. Evidently the learned District Judge has applied article 131 of the Limitation Act as he states that 'there must have been a refusal' (by the defendant to pay the *thunduvaram* to the mirasidar) 'prior to 1878.' The learned Judge then, on this sole ground of the Government's disinclination in 1878 to recognize the custom in favour of the mirasidar, considered that he would be legally justified in finding that 'there must have been a refusal' (by the defendant) 'prior to 1878.' We think that such a finding must be treated as one based on no legal evidence and cannot be accepted. The recent Full Bench decision in *Seshachala Chetty v. Chinnasami*(1) does not deal directly with the mirasidar's right to *thunduvaram* (the question directly in issue in that case being the mirasidars' alleged right to eject occupiers of *nattam poramboke* land (sites held under

(1) (1917) I.L.R., 40 Mad., 410 (F.B.).

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pattas). There are, however, passages in two of the judgments in that case which relate to *thunduvaram* and which are entitled to great respect. We therefore refer to them. Mr. Justice AYLING says—

"There are undoubtedly certain incidents, which have been claimed as attaching to it" (the mirasi tenure) "from ancient times, and have to some extent been recognized, one of such incidents being the right to certain fees (*thunduvaram*) on lands granted for cultivation to non-mirasi cultivators (*payakaris*) by the Government."

Then the learned Judge says that this right also requires to be separately established by the mirasidar and that he ought to adduce proof of the existence of the custom to pay such dues, and he refers to *Sakkaji Rau v. Latchmana Gaundan* (1). Mr. Justice KUMARASWAMI SASTRIYAR refers to the opinion of the Collector of Chingleput in 1839 which admitted the mirasidars' right to collect *thunduvaram*, *swatantrams*, etc., in the *sheikal* lands. In another place, the learned Judge quotes the opinion of the Board of Revenue in 1892 as follows:—

"Briefly, the system, as it at present exists, rests on the claims of the mirasidars to all the waste lands in their villages and to the levy of *swatantram* or fees from *payakaris* or non-mirasidars who may take up land for cultivation. This claim was fully recognized in the new settlement carried out in 1876—78 (*vide* G.O. No. 221, dated 15th February 1876) and after full consultation with the mirasidars, a memorial fee *swatantram*, fixed at an average rate of two annas on every rupee of Government assessment, was declared to be leviable by the mirasidars not only on every field lying waste in each village, but also on all lands now held by the mirasidars themselves and included in their pattas, should such land be subsequently relinquished and taken up by a non-mirasidar. The fee claimable on each field was duly entered in the settlement registers against every field liable to it. The only lands against which fees were not entered were those which had already been obtained by strangers and which were held under lease or patta from Government."

Then the learned Judge refers to the Government orders passed on the 19th October 1909 about *swatantrams* as follows:—

"The right of the mirasidars to levy a fee at the rate of two annas in the rupee of the assessment of both dry and wet lands has been recognized by Government except in the case of the

(1) (1880) I.L.R., 2 Mad., 149 (F.B.).

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undermentioned fields which are free of *swatantrams* so long as they are held under the terms of the original grants."

Next the learned Judge referred to *Sakkaji Rau v. Latchmana Gaundan*(1) in which it was held that

"where the right was denied there should be enquiry whether by custom it prevails on the estate or if there are not sufficient instances on the estate to afford grounds for a decision, on similar estates in the neighbourhood."

In the result, following the decision in *Sakkaji Rau v. Latchmana Gaundan*(1) which was recognized as good law by the Judges who decided the above Full Bench case, we hold that where (as in this case) the tenant denies the right of the mirasidar to *thunduvaram*, the burden of proof is on the mirasidar to prove the existence in himself of the right by establishing a custom to pay such dues.

Now the learned District Judge in considering the evidence in this case as to custom has fallen into several material errors. He thinks that documents relating to other than the plaint lands which establish the claim of the mirasidar to *thunduvaram* are not of much value. But the decision in *Sakkaji Rau v. Latchmana Gaundan*(1) which states that evidence even as to neighbouring villages and estates is admissible is clearly against the District Judge's view. Then he seems to think that Exhibits H, E and K do not relate to plaint lands, but it has been shown that they do relate to some of the lands against which no *swatantram* is shown as due in Exhibit J. It is contended for the respondent that the lands to which those documents refer were waste lands granted by Government after the year 1878 when an arrangement was made between the Collector and the mirasidars by virtue of which they were to be allowed *swatantrams* on such lands in consideration of their waiving their claim in respect of lands already granted by Government and lands taken up by the mirasidars themselves and abandoned. This may or may not be so, but we are at present only concerned with the question how these documents have been dealt with by the District Judge and there is no doubt that he has fallen into an error of fact. Then he thinks that the omission in the documents (Exhibits III to V (b) and VII to VIII (b) of any reference to *thunduvaram* is

(1) (1880) I.L.R., 2 Mad., 149 (F.B.).

strong evidence in the defendant's favour. Most of them are, however, sale-deeds and it is not usual or necessary in such deeds to insert a recital that a purchaser should thereafter pay the *thirvai* or *thunduvaram* payable on the lands sold. It is the duty of the purchaser to do so, whether it is mentioned in the sale-deed or not. The District Judge has declined to give any weight to old documents on the ground that it is admitted that mirasidars had many more privileges in the old days. (vide paragraph 5). This method of dealing with a question of custom is not correct. The evidence covering the whole period must be examined. It may be that the earlier evidence is not sufficient to establish the custom: it may be that it is sufficient but that later evidence establishes a discontinuance—all these aspects must be considered which admittedly has not been done in this case. The agreement (Exhibit B) again is brushed aside by the District Judge as a document executed without consideration. If, of course, we assume that the mirasidar has no right to *thunduvaram*, Exhibit B was executed without consideration. But that is the very point in issue. Anyhow, Exhibit B is a clear acknowledgment by the tenant of the mirasidar's right to *thunduvaram* and must be given whatever consideration it is worthy of in arriving at a conclusion on the question of the mirasidar's right by custom to claim *thunduvaram*. The Diglott Register (Exhibit VII) read with Mr. Puckle's report and the subsequent conduct of the mirasidar in not claiming *thunduvaram* for sixteen years before 1905 may afford evidence that the mirasidar had no right by custom to claim *thunduvaram* on waste lands which he had not been cultivating and which had been granted as waste by Government to outside *payakari* tenants and it can even afford evidence that he abandoned his customary right so far as those lands are concerned. But as regards those lands in respect of which the right to *thunduvaram* is recognized in the Diglott Register itself, it is for the defendant to prove that the mirasidar has abandoned such customary rights and mere non-receipt of the dues will afford very weak evidence of such abandonment. There are other matters in which the judgment is unsatisfactory, notably the statement in paragraph 4, line 35, that the defence witnesses deny payment of *thunduvaram*. This is not correct. They admit payment but seek to explain it away.

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We cannot accept findings based on incorrect tests as to custom and mistakes of fact as to the effect of documents. We therefore send back the records to the District Judge for fresh findings on issues 1 and 2 with reference to the above observations and for findings on the third and fourth issues. The time for submission of findings will be four weeks from the receipt of records and ten days for objections.

The issues and the findings thereon are given below:

In compliance with the order contained in the above judgment, the District Judge of Chingleput, submitted the following

FINDINGS:—The High Court has called for findings on issues 1, 2, 3 and 4.

2. This was a suit to recover arrears of *thunduvaram* or mirasi perquisites alleged to be due to the plaintiff from the defendant, a ryot of Sittampur village.

3. Sittampur is a Government village in Madurantakam taluk. It is undoubtedly a mirasi village and it is not disputed that the plaintiff is the sole mirasidar.

4. The plaintiff bases his right (1) on custom, and (2) on Exhibit B, an agreement alleged to have been executed by the defendant in his favour in 1905. In his written statement the defendant denied the plaintiff's right. As laid down in *Sakkaji Rau v. Latchmana Gaundan*(1) and the remand order of the High Court in the present case, the main question for consideration is whether by custom prevailing in the village the plaintiff is entitled to *thunduvaram*. The defendant's holding consists of A and B Schedule lands attached to the plaint, the former being wet lands and the latter dry. As regards the wet lands, in the settlement register (Exhibit J) no *swatantram* fee is entered, but in respect of the first seven fields, viz., Nos. 5, 6, 20, 22, 24, 46, 48 and 129 in B Schedule it is entered and against No. 114-B the remark is, no *swatantram* is due until resigned.

* * * * *

12. I therefore hold that the plaintiff is not entitled by custom to collect *thunduvaram* and this applies even to the lands in the B Schedule some of which are liable to *swatantram* fees according to the settlement register, and I find accordingly on issue 2.

(1) (1880) I.L.R., 2 Mad., 149 (F.B.).

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13. Issue 1—Whether the plaint agreement bears no consideration. Exhibit B is the plaint agreement. The defendant brought a suit in 1905 to declare that it was not genuine. Both the Courts of first instance and the Appellate Court found it to be genuine. The consideration for it is said to be the pre-existing liability of the defendant to pay *thunduvaram*. In the view I have taken, I hold that there was no consideration for it, and find accordingly.

14. Issue 3—Whether the plaintiff's right to the dues became barred by limitation to any and to what extent. The contention raised on behalf of the plaintiff is that the plaint claim is not one for rent but for a customary due and that the article of the Limitation Act which applies to it is article 120. On behalf of the defendant it is urged that *thunduvaram* is in the nature of rent as the mirasidar is a middleman between the tenant and the Government. The plaintiff relies on the observations in the remand judgment in the present case. Following *Venkatavaraga v. District Board of Tanjore*(1) and *Rathna Mudaliar v. Tiruvenkata Chariar* (2) I hold that it is not rent but a customary due. I find that the article applicable is 120 of the Limitation Act, and therefore the suit is not barred by limitation.

15. Issue 4—What sum, if any, is due to the plaintiff? If it is held that the plaintiff is entitled to *thundu*, I hold that, according to Exhibits B and D, he is entitled to it at 15 *marakals* per *cawni* of wet for the first crop and 7½ *marakals* for the second crop, and 3½ annas per *cawni* of dry land and that he is not bound to collect only at the rate of 2 annas in the rupee as laid down in the settlement register. I find accordingly on issue 4.

This Second Appeal again came on for hearing before SADASIVA AYYAR and PHILLIPS, JJ., who made the following ORDER OF REFERENCE TO A FULL BENCH:—

SADASIVA AYYAR, J.—The plaintiff is the appellant. This litigation commenced in December 1909 (nearly eight years ago) but I have felt it advisable that the whole matter of this second appeal should be referred to a Full Bench as some questions of law of more than ordinary importance are involved in its decision. Without expressing a final opinion on any of the questions involved or as to what should be the final result of the second appeal, I shall set out the material questions of fact and law making provisional comments here and there.

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(1) (1883) I.L.R., 16 Mad., 305.

(2) (1899) I.L.R., 22 Mad., 351.

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The suit was brought for recovery of Rs. 168-11-3 being the amount of *thunduvaram* perquisites due to the plaintiff as *ekaboga* mirasidar of Sittampur village (in the Madurantakam taluk, Chingleput district) from the defendant who is a ryot in the village, the *thunduvaram* being claimed at 15 *marakals* per *cawni* of wet land for the first crop, 7½ *marakals* per *cawni* for the second crop and 3½ annas per *cawni* of dry land. The *thunduvaram* was claimed by the plaintiff by virtue of his mirasi right over the village and also by reason of an agreement, that is, a registered *muchilika*, dated 26th January 1905 (Exhibit B), executed by the defendant. The District Munsif held (a) that the mirasidar's right to collect the plaint perquisites 'fell into disuse' about 1870, that 'it was too late in the day for him now to seek its enforcement as a subsisting right on the basis of the general custom in the village'; (b) that the defendant executed the *muchilika* (Exhibit B of 1905) possibly 'in order to help the plaintiff in his endeavours to resuscitate the plaintiff's primitive right which had fallen into disruption' and that it was also possible 'that the defendant executed a document under a misapprehension as to the exact right of plaintiff to enforce the fee at present' and the District Munsif finally thought that 'on the whole there was no legal consideration' for the plaint agreement. He therefore dismissed the plaintiff's suit.

On appeal, the learned District Judge (Mr. Booty) held that as in the Settlement Register (Exhibit J of 1878) it was recorded that 'the lands for which pattas had been given by Government to *payakaris* or on darkhast to mirasidars [were exempted from *swatantram* fees' and as the plaintiff had failed to prove that the plaint lands fell under the category of lands other than those exempted from *swatantram* fees according to that Settlement Register and as the defendant had probably refused prior to 1878 to pay *thunduvaram* to the mirasidar on the strength of the statement in the Settlement Register, 'the mirasidar's right was dead by limitation in 1890.' He further held that the *muchilika* (Exhibit B of 1905) had absolutely no consideration to support it. He therefore dismissed the appeal.

When this second appeal first came on for hearing on the 17th December 1914 before a Divisional Bench of this Court, it

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was adjourned *sine die* for the decision of the Full Bench to which the general question of mirasidars' rights were referred in *Seshachala Chetty v. Chinnasami*(1). The opinions of the Full Bench in that case were pronounced on the 17th February 1916 and they are reported in *Seshachala Chetty v. Chinnasami*(1) (see from page 447). The present second appeal then came on for hearing before myself and Mr. Justice NAPIER in September 1916. We found ourselves unable to accept the finding of the District Judge 'that the plaintiff's claim to obtain *thunduvaram*' (a part of the mirasidar's *swatantram*) 'became barred in 1890.' Then as regards the right of the mirasidar to collect *thunduvaram*, I shall here quote from my above order of the 20th September 1916 concurred in by Mr. Justice NAPIER:

"Mr. Justice AYLING (in *Seshachala Chetty v. Chinnasami*(1) says: 'There are undoubtedly certain incidents which have been claimed as attaching to it' (the mirasi tenure) 'from ancient times, and have to some extent been recognized,' one of such incidents being 'the right to certain fees (*thunduvaram*) on lands granted for cultivation to non-mirasi cultivators (*payakaris*) by the Government' . . . 'In the result, following the decision in *Sakkaji Rau v. Latchmana Gaundan*(2) which was recognized as good law by the Judges who decided the above Full Bench case, we hold that where (as in this case) the tenant denies the right of the mirasidar to *thunduvaram*, the burden of proof is on the mirasidar to prove the existence in himself of the right by establishing a custom to pay such dues." (See pages 377 and 378 *supra*.)

After thus indicating our opinion that the custom of paying *thunduvaram* when set up by the mirasidar is one to be proved by the mirasidar by adducing proofs of instances of levy of such fees in his own estate and similar estates in the neighbourhood, we sent back the records to the District Court for fresh findings on issues Nos. 1 and 2, pointing out some of the errors which, in our opinion, occurred in the judgment of the District Judge. The issues Nos. 1 and 2 are as follows:—

- (1) Whether the plaint agreement (Exhibit B) bears no consideration?
- (2) Whether the plaintiff is entitled to the dues claimed even apart from the agreement?

(1) (1917) I.L.R., 40 Mad., 410 (F.B.). (2) (1878) I.L.R., 2 Mad., 149 (F.B.).

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On remand, the case was heard in the District Court by another District Judge (Mr. VENUGOPALA CHETTI) and he recorded findings against the plaintiff, his material conclusions being as follows :—

(a) In the Settlement Register (Exhibit J of 1878) *swatantram* fee due to the mirasidar is entered only in respect of some fields, namely, Nos. 5, 6, 20, 22, 24, 46, 48 and 129 in the plaint B schedule (which relates to dry lands in defendant's patta). Against 114-B in that same schedule, the remark in the Settlement Register is that no *swatantram* is due until the land was relinquished, that is, until it was given up by the then pattadar and taken up by another. Against the wet lands in the A schedule, no *swatantram* fee is entered in the appropriate column as due to the mirasidar.

"The Settlement Register must be regarded as a record-of-rights showing how far the Government were prepared to recognize the claims of the mirasidars." "The ryots knowing as they did that there was a conflict between the mirasidar and the Government, would have naturally refrained from paying all the dues claimed by the mirasidar. The Settlement Register coupled with the oral evidence shows that there was interruption in the enjoyment of the mirasidar's right to *thunduvaram*. There is no evidence that the mirasidar has attempted to enforce his right in a Court of Law during all these years. Under these circumstances, the interruption raises a presumption against the existence of the custom."

(b) Exhibits L and LI of the year 1826 relate to litigation between the plaintiff's grandfather and certain *manyamdars* (not *sukhawasi* tenants). Though the plaintiff's predecessor's right to collect *thunduvaram* and other mirasi dues was recognized therein, the dispute there was not between the mirasidar and the *sukhawasi* ryots and the question of the right to collect mirasi dues was not formally adjudicated upon by the Court. (Though the District Judge does not expressly say that these ancient documents of 1826 are therefore not of much value, he evidently means to suggest it.)

(c) The documents (Exhibits C-2 to C-15) beginning with 1864 are debt-bonds executed to the mirasidar by *sukhawasi* tenants. Some of them are for arrears of village *adaya* (income) and others expressly state that they are debt bonds for arrears of *thunduvaram*. "It is possible that they refer only to lands leased

by the mirasidar." "The practice in the case of such lands cannot be invoked in proof of a customary right to mirasi dues from tenants introduced by the Government." (The reasoning in this part of the learned District Judge's judgment is not quite clear, but he evidently means that as the Settlement Register (Exhibit J) does not mention the *swatantram* fees with reference to most of the plaint lands, the defendant's predecessor in title must be deemed to have been a tenant introduced to those lands by the Government and a customary right to collect mirasi dues from such lands can only be proved by evidence of payment made specifically for such lands.)

(d) As regards Exhibits F and G, Exhibit F was a statement prepared by the then karnam and the agent of the plaintiff's grandfather at the time of the settlement in 1878. Having regard to the fact that the Government did not act upon it as is clear from the Settlement Register (Exhibit J), not much importance can be attached to it. As regards Exhibit G, it is not signed by any one and does not convey any information as to what lands are included in it and it is therefore doubtful whether it included also lands not included in the mirasidar's patta (that is, lands for which Government issued pattas directly to the tenants).

(e) Exhibits E, H and K (two of them executed to the defendant himself) no doubt refer to the right of the mirasidar to receive *melvaram thundu* from certain lands in the village. They are of the years 1885, 1887 and 1889, long after the Settlement Register, and though in the Settlement Register (Exhibit J) *swatantram* is not entered against the lands mentioned in these mortgage deeds, the right of the mirasidar is acknowledged in these documents. The District Judge, however, held that there was 'considerable force in the defendant's argument that these documents are not sufficient to prove a general custom, especially as they relate only to a small extent of the lands.'

(f) As regards B and D series, Exhibit B being the plaintiff agreement executed by the defendant himself in 1905 and the other exhibits, agreements, taken from other tenants, though attested by the defendant himself, the District Judge thinks that no importance should be attached to these documents of 1905 as they were 'recent.'

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(g) Then the District Judge refers to some documents on defendant's side on which it was argued that the omission to expressly mention *thunduvaram* in those documents was against the plaintiff's claim and to the fact that no *thunduvaram* has been collected for several years before suit. (The question whether Exhibit B was supported by consideration or not is so closely interwoven with the question whether the mirasidar has a right by custom to recover *thunduvaram* that it might be said to stand or fall with it. As regards the rate of the *thunduvaram*, the District Judge decided that if the plaintiff was entitled to it at all, he was entitled at the rates claimed by him.)

Mr. Govindaraghava Ayyar, the learned vakil for the appellant, strenuously contended (a) that he was entitled to argue on the whole evidence adduced as to custom just as if it were a question of fact, the finding on which might be attacked in a regular appeal preferred to this Court, (b) that even if he was bound to accept particular facts and pieces of evidence which the lower Court held to be not established or false as conclusive, he was entitled to argue that on the facts held to be established and the pieces of evidence accepted as genuine by the District Judge, the District Judge ought to have found as a matter of law that the custom set up by the plaintiff was established, (c) that the learned District Judge was mistaken in his statement that Exhibit G is not signed by any one and (d) that he was not justified in making a distinction between the right to collect mirasi dues from tenants introduced by the Government and tenants introduced by the mirasidar and in rejecting the evidence indicating the collection of *thunduvaram* on the mere ground that it was not specifically shown that that evidence related to the former class of lands.

I shall deal now with the first question, namely, that as this second appeal relates to a question of custom we are entitled to consider the whole evidence ourselves including the evidence which was not believed by the District Judge to be true or genuine. As I said in the very beginning I do not intend to deal finally with any of these questions as I have considered it advisable that the whole case should be decided by a larger Bench.

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In *Kakarla Abbayya v. Raja Venkata Papayya Rao* (1), Sir S. SUBRAHMANYA AYYAR, Officiating Chief Justice, and BODDAM, J., refer to *Hanumantamma v. Rami Reddi* (2), *Mirabivi v. Vellayanna* (3) and *Vishnu v. Krishnan* (4) (the last of which was decided by a Full Bench) as establishing that a finding as to the non-existence of an alleged local custom could be revised by the High Court on second appeal *on the evidence*. They then refer to the language of section 584 of the old Civil Procedure Code [corresponding to the present section 100(a)] which contains the words 'the decision being contrary to (some specified) law or usage having the force of law.' The learned Judges then continue —

"This language is so explicit as to render superfluous the seeking for the reason of the provision though that is not difficult to discover, viz., that a usage of the kind mentioned, being in its nature such as must necessarily affect not only parties to the particular litigation and their privies, but whole bodies of people, stands on a footing similar to a matter of law derived from other sources than usage. The very limited scope which is allowed to usages in England, due to special historical causes (see Pollock and Maitland's History of English Law, 1st Edition, Vol. I, page 163), accounts for questions as to their existence being treated as falling under the category of questions for the jury. Of course, it is otherwise in this country where from the days of Manu it has been laid down that 'custom is transcendent law.' It is clear, therefore, both upon authority which is binding upon us as the opinion of a Full Bench, and as the right interpretation of the provision in question of section 584 of the Civil Procedure Code, that though the section disallows a second appeal with reference to findings of facts, yet the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of this Court, when it has to pronounce upon that question, to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it." "Accordingly we heard Mr. Rangachariar upon the evidence in support of the alleged usage."

(1) (1916) I.L.R., 29 Mad., 24.
(3) (1885) I.L.R., 8 Mad., 464.

(2) (1882) I.L.R., 4 Mad., 272.
(4) (1884) I.L.R., 7 Mad., 3 (F.B.).

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Thus according to this decision even the credibility of pieces of evidence adduced in support of local usage can be considered by the High Court on second appeal. In *Muhammad Meeran Bibi v. Sheik Muhammad Rowther*(1) SPENCER and PHILLIPS, JJ., have held that the question whether the parties in a suit are governed by the Hindu or Muhammadan Law is a question of fact and does not relate to any usage having the force of law. The parties in that case were Muhammadan Labbais of the Trichinopoly district. It seems to me fairly arguable with the greatest respect to the above decision, that the question whether the local usage among these Labbais had the force of a law which made their rights of succession governed by the rules of Hindu Law comes under section 100 of the Code of Civil Procedure, though the rules of both the Hindu and Muhammadan laws always have the force of law. (The learned Judges refer to a prior decision in *Kunhambi v. Kalanthar*(2) decided by TYABJI and SPENCER, JJ.) The most recent case which I have come across in this Court (decided in November 1916 is *Pankajammal v. The Secretary of State for India*(3) by AYLING and SESHAGIRI AYYAR, JJ. That related to the custom as to the order of succession of trustees of a particular kattalai in the Conjeeveram temple. The following observations occur:—

“ Before we send the case down, it is desirable to advert to the extreme contention that was put forward in this Court that in all cases where evidence as to custom has been let in, we are bound to weigh such evidence and decide for ourselves upon the materials. Mr. Ramachandra Ayyar who came in at a later stage of the case conceded that this contention is not supported by authority. The learned vakil argued that a question whether on the facts as found, the Courts below were justified in saying that a custom has not been proved is a point on which the High Court is entitled to draw its own inference. To the proposition thus advanced we see no objection. But we must point out that the value to be attached to the evidence let in, its reliability and, in a measure, its relevancy are all matters for the Court below and that the High Court would not be justified in weighing the evidence, as if it were sitting to hear a

(1) (1917) M.W.N., 98.

(2) (1914) 27 M.L.J., 156.

(3) (1917) I.L.R., 40 Mad., 1108.

first appeal.” “ It is open to doubt whether the expression, ‘ a usage having the force of law ’ in section 100 (a) of the Civil Procedure Code should not be confined to the usages of the country or of the community as suggested by PETHERAM, C.J., in *Nivath Singh v. Bhikki Singh*(1); customs like pre-emption, the law merchant and usages like those referred to in section 11 of Act VIII of 1865 seem to have been in the contemplation of the legislature. It seems doubtful whether a private right, like the one we are considering, falls within section 100, clause (a). However that may be, we feel no doubt that the High Court should not be called upon to examine the oral and documentary evidence relating to a private custom as if it were hearing a first appeal.”

I must, however, say that the decision of this Court in *Kakarla Abbayya v. Raja Venkata Papayya Rao*(2), following the Full Bench decision in *Vishnu v. Krishnan*(3), is not adverted to by the learned Judges who refer to *Nivath Singh v. Bhikki Singh*(1), which seems to have never been followed in this Court as law. I shall now refer to a very recent decision of the Privy Council in *Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi*(4). There, a custom of granting permanent leases of the property of a particular temple was set up. Their Lordships of the Privy Council say at page 721 :

“ It has, however, been pressed on behalf of the appellants that there are two findings: one by the Munsif and one by the Subordinate Judge, who agrees with him that the ancient custom relied upon has been proved, and that, as that is an issue of fact, it must be accepted. No doubt, two findings upon question of pure fact must be accepted by this Board, but questions of the existence of an ancient custom are generally questions of mixed law and fact; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact ”.

I think that this case gives to the expression ‘ local usage ’ a much wider meaning than Sir C. PETHERAM, C.J., was inclined to allow in the case of *Nivath Singh v. Bhikki Singh*(1). I shall now turn to the case of *Kailas v. Padmakisor*(5), decided

(1) (1885) I.L.R., 7 All., 649.

(2) (1906) I.L.R., 29 Mad., 24.

(3) (1884) I.L.R., 7 Mad., 3 (F.B.).

(4) (1917) I.L.R., 40 Mad., 709 (P.C.).

(5) (1917) 25 C.L.J., 613.

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in April 1917. Here MOOKERJEE, J., reviews the authorities, dissents from *Kakarla Abbayya v. Raja Venkata Papayya Rao*(1) and *Vishnu v. Krishnan*(2) and sums up as follows : —

" But this does not entitle the High Court in second appeal to determine whether the evidence of the existence of the alleged usage is or is not credible, *though the High Court is competent to determine, whether the usage, proved by evidence to exist, does or does not possess the force of law.* The substance of the matter is that, while the question *whether a given state of facts established a binding custom or usage is a question of law*, the question whether such a state of facts has been proved by the evidence is a question of fact."

In this conflict of authorities, in view of the facts that *Vishnu v. Krishnan*(2) was decided by a Full Bench of this Court consisting of four very learned Judges (TURNER, C.J., INNES, J., KINDERSLEY, J., and MUTTUSWAMI AYYAR, J.) and was followed in *Kakarla Abbayya v. Raja Venkata Papayya Rao*(1), and having in view the fact that this question of mirasi rights is reaching its final stage, I think that not only the mere questions of law, namely, whether the High Court in second appeal can go into the credibility of the evidence, whether it can consider the weight to be given to the evidence which is believed by the lower Appellate Court and whether the evidence taken as a whole is legally sufficient to establish the custom and the legality and binding force as law of the custom, etc.), but even the decision of the whole matter might be left to a larger Bench.

The Appellate Side Rules of the High Court, page 3, rule 2, says : " The following matters shall ordinarily be heard and decided by two Judges," and then among the matters are mentioned " appeals from the decree of a Civil Court " which, I take it, includes a second appeal. So, a second appeal is treated as one of the ' matters ' to be heard by a Bench of two Judges. Then it says :

" Provided both Judges agree that the determination involves a question of law, they may order that the *matter*, or the question of law, be referred to a Full Bench."

(1) (1906) I.L.R., 29 Mad., 24.

(2) (1884) I.L.R., 7 Mad., 3 (F.B.).

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I think that this empowers us to refer not only a question of law but the whole ' matter ' of the Second Appeal to a Full Bench. If a question of law alone is referred, then Rule 3 (page 4) would apply and the ' matter ' (or the case) would ultimately come back to us.

I have thus dealt with the contentions (a) and (b) of Mr. Govindaraghava Ayyar. As regards contention (c) about the learned District Judge's alleged mistake in his statement that Exhibit G is not signed by any one, Mr. Govindaraghava Ayyar has not printed the whole of Exhibit G and I think it is better to leave it to the Full Bench to decide whether they would allow him to have it printed in order to prove his contention.

As regards the last contention (d), I think there is much force in his argument that the District Judge ought not to have rejected the evidence afforded by Exhibit C series on the ground that such evidence is valueless unless it was shown to specifically relate to lands granted by Government. I am also inclined to hold that the Government's non-recognition in the settlement register of the mirasidar's right to collect *swatantrams* from such lands cannot be said to detract in any appreciable manner from the weight of the other evidence relating to the mirasidar's right by custom to collect such dues having regard to the history of the mirasi tenure rights and to the fact that the Government has been trying to gradually restrict such rights. I might also state that as at present advised (assuming that this Court is entitled to weigh the evidence) I should be inclined to hold that the learned District Judge has not given sufficient weight to Exhibits E, H, K, B and the old legal records Exhibits L and LI. (I would accept the rate of *thunduvaram* found by the District Judge if the plaintiff is held entitled to collect *thunduvaram*.) I am inclined further to doubt very much the soundness of the view of the District Judge that even as regards the plaint lands, fields Nos. 5, 6, 20, 22, 24, 46, 48 and 129 which are specially mentioned in the Settlement Register itself as liable to pay *swatantram* fee to the mirasidar, the custom set up should be held to be not proved because the custom is not (in the learned Judge's view) proved as regards the other lands also and because there has been an interruption

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for several years. However, as I said, I would, having regard to the difficulty and importance of all the questions involved, refer the whole matter to a Full Bench.

PHILLIPS, J.

PHILLIPS, J.—This suit was remanded for a finding on several issues the most important of which is issue No. 2 'whether the plaintiff is entitled to the dues claimed even apart from the agreement.' The dues claimed consist of what is called *thunduvaram*, and the plaintiff alleges that, as mirasidar, he is, according to custom, entitled to levy those dues from the defendant. The District Judge has tried the issue and has found that no custom has been proved to exist under which the plaintiff is entitled to make this claim. This finding is a finding on custom and it is now sought to impeach it upon the evidence.

No doubt, a question of the existence of a custom is a question of mixed law and fact, and under section 100 of the Code of Civil Procedure a second appeal may lie to the High Court on the ground that the decision is contrary to law or to some usage having the force of law. The question of custom has been repeatedly considered and it has been held that the question of the mere existence of a custom is a question of fact—vide *Hureehur Mookerjee v. Judoonath Ghose*(1) and *Synd Ali v. Gopal Doss*(2)—and this has also been the view of the Judicial Committee in *Muhammad Kamil v. Imtiaz Fatima*(3) and in *Anant Singh v. Durga Singh*(4). In *Ramratan Sukal v. Nandu*(5) it was held by the Judicial Committee that

"no Court of Second Appeal can entertain an appeal upon any question as to the soundness of findings of fact by the Court of First Appeal, and if there is evidence to be considered, the decision of the Court, however unsatisfactory it might be, if examined, must stand final."

In *Ramgopal v. Shamskhaton*(6) this principle was approved, although it was held that in that particular case, which related to a custom, the facts found need not be questioned, but the soundness of the conclusions from them was in question and that was a matter of law. In *Mohesh Chunder Dhal v. Satrugan*

(1) (1868) 10 W.R., 153.

(2) (1870) 13 W.R., 420.

(3) (1892) I.L.R., 31 All., 557 (P.C.).

(4) (1910) I.L.R., 32 All., 363.

(5) (1892) I.L.R., 19 Cal., 249.

(6) (1898) I.L.R., 20 Cal., 93 (P.O.).

Dhal(1) it was held that the question of the existence of a custom of lineal primogeniture as the rule of succession was a question of fact. In *Kunhambi v. Kalanthar*(2) it was held by this Court that

"whether an alleged custom can be enforced at all or whether it is uncertain, irregular or unreasonable and as such ought not to be recognized is a question of law, but the question whether the custom exists and if it exists, it applies to a particular person or set of persons is a question of fact;"

and this seems to me to correctly describe the principle laid down by the Judicial Committee in the above cases. In the present case, the question that has to be decided is whether the plaintiff is entitled to collect *thunduvaram* from the defendant, the right claimed being based upon an alleged custom. The existence of this custom in certain places has been held to be true and the right has been held to rest in certain mirasidars as such. The Full Bench decision in *Seshachala Chetty v. Chinnasami*(3) has recognized this customary right of levying *thunduvaram*, but the Court was of opinion that its existence in any particular case was a matter of proof. When, therefore, it is not a question as to whether a certain set of circumstances forms a custom having the force of law, but where the question is whether a custom which has already been recognized by Courts as having the force of law exists in a particular locality or between particular parties, it seems to be a question of fact, and if the matter were *res integra* I should feel inclined to hold that the present finding of the District Judge, to which exception has been taken, is a finding of fact with which this Court cannot interfere in Second Appeal. In *Kakarla Abbayya v. Raja Venkata Papayya Rao*(4), however, it was held that when the finding was as to an alleged local custom, the finding could be examined in second appeal and a conclusion arrived at. The decision was based upon the decisions in *Hanumantamma v. Rami Reddi*(5), *Vishnu v. Krishnan*(6) and *Mirabivi v. Vellayanna*(7), in all of which cases a question of custom has been considered by this Court in Second

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(1) (1902) I.L.R., 29 Cal., 343.

(2) (1914) 27 M.L.J., 153.

(3) (1917) I.L.R., 40 Mad., 410.

(4) (1906) I.L.R., 29 Mad., 24.

(5) (1882) I.L.R., 4 Mad., 272.

(6) (1884) I.L.R., 7 Mad., 3.

(7) (1885) I.L.R., 8 Mad., 461.

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Appeal, but in which the contention had not been put forward that such a question could not be raised in Second Appeal. In *Kakarla Abbayya v. Raja Venkata Papayya Rao*(1), this Court went, as it seems to me, considerably further than the dictum laid down by the Privy Council in *Ramgopal v. Shamskhaton*(2), which was that the facts found need not be questioned but the question of the soundness of the conclusion arrived at was a matter of law, for it held that where the existence or non-existence of a usage having the force of law was in question

"it is the duty of this Court . . . to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it."

If this be accepted as correct law, a Court in Second Appeal would be bound to examine the whole evidence relating to an alleged custom and to see what weight is to be attached to each particular portion of it, and decide whether the evidence was reliable and witnesses worthy of credit. This appears to be somewhat inconsistent with the usual understanding that in a finding of fact upon the evidence, the lower Appellate Court's decision is final; and in *Kilas v. Padmakisor*(3), *Kakarla Abbayya v. Raja Venkata Papayya Rao*(1) has been expressly dissented from. In a recent case in *Pankajammal v. The Secretary of State for India*(4) another bench of this Court remarked that the contention put forward that, in all cases where evidence as to custom had been let in, the Court was bound to weigh such evidence and decide upon the materials was not supported by authority but apparently the decision in *Kakarla Abbayya v. Raja Venkata Papayya Rao*(1) was overlooked. The learned Judges proceeded to say that the question whether, on the facts as found, the Courts below were justified in saying that the custom had not been proved was a point on which the High Court was entitled to draw its own inference, and that is in accordance with the abovementioned dictum of the Privy Council in *Ramgopal v. Shamskhaton*(2). In *Palaniappa*

(1) (1906) I.L.R., 29 Mad., 24.

(3) (1917) 25 C.L.J., 613.

(2) (1893) I.L.R., 20 Cal., 93 (P.C.).

(4) (1917) I.L.R., 40 Mad., 1103.

Chetty v. Sreemath Devasikamony Pandara Sannadhi(1), the Judicial Committee also remarked that

"questions of the existence of an ancient custom are generally questions of mixed law and fact, the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact."

If we apply this principle to the present case it would appear that the finding that the custom of levying *thunduvaram* does not exist as between plaintiff and defendant is a finding of fact. In view, however, of the decision in *Kakarla Abbayya v. Raja Venkata Papayya Rao*(2) I agree that it is advisable that the question should be submitted to a Full Bench, and, as my learned brother wishes to refer, not an abstract question, but the whole of this case, I concur.

On this REFERENCE—

L. A. Govindaraghava Ayyar (with *D. V. Nilameghachariyar*) for the appellant.—It is competent to the High Court in a second appeal to decide on the evidence whether a certain usage or custom alleged to govern the parties to the suit has been proved or not. Section 100, Civil Procedure Code, puts such usage or custom on the same footing as a question of law: compare section 110, Civil Procedure Code, last paragraph. Reliance was placed on *Kakarla Abbayya v. Raja Venkata Papayya Rao*(2), *Vishnu v. Krishnan*(3), *Mirabivi v. Vellayanna*(4), *Hanuman-tamma v. Rami Reddi*(5), *Vayidinada v. Appu*(6), *Bai Shirinbai v. Kharshedji*(7), *Desai Ranchhodas v. Rawal Nathubhai*(8), *Hureehur Mookerjee v. Judoonath Ghose*(9), *Wuzeerooddeen v. Sheobund Lall*(10) and *Syud Ali v. Gopal Doss*(11). Reference was made to *Ramgopal v. Shamskhaton*(12) and sections 4 and 11 of Rent Recovery Act. He referred to and distinguished *Kunhambi v. Kalanthar*(13), *Mohesh Chunder Dhal v. Satrugan*

(1) (1917) I.L.R., 40 Mad., 709 (P.C.).

(2) (1906) I.L.R., 29 Mad., 24.

(4) (1885) I.L.R., 8 Mad., 464.

(6) (1886) I.L.R., 9 Mad., 44 (F.B.).

(8) (1897) I.L.R., 21 Bom., 110.

(10) (1869) 11 W.R., 285.

(3) (1884) I.L.R., 7 Mad., 3. (F.B.)

(5) (1882) I.L.R., 4 Mad., 272.

(7) (1898) I.L.R., 22 Bom., 430.

(9) (1868) 10 W.R., 153.

(11) (1870) 13 W.R., 420.

(12) (1893) I.L.R., 20 Cal., 93 at p. 99 (P.C.).

(13) (1914) 27 M.L.J., 156.

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Dhal(1), *Muhammad Kamil v. Imtiaz Fatima*(2), *Anant Singh v. Durga Singh*(3), *Pankajammal v. The Secretary of State for India*(4) and *Muhammad Meeran Bibi v. Sheikh Muhammad Rowther*(5). Desuetude or discontinuance of a usage or its non-exercise does not put an end to it: *Scales v. Key*(6) and Halsbury's Laws of England, volume 10, pages 235 and 272. Then evidence to show admission and recognition of liability to pay *thunduvaram* was referred to. Evidence to show that the custom was not discontinued was then referred to. The recent decision of the Full Bench in *Seshachala Chetty v. Chinnasami*(7) has recognized this as a well-known incident of the mirasi tenure.

T. R. Ramachandra Ayyar for respondent.—Existence of a usage having the force of law, is a question of fact. He submitted that *Kakarla Abbayya v. Raja Venkata Papayya Rao*(8), was wrong. In *Hanumantamma v. Rami Reddi*(9) *Vishnu v. Krishnan*(10) and *Mirabivi v. Vellayana*(11) this point was not considered. He relied on *Kailas v. Padmakisor*(12), *Subraya Poi v. Appu Bhandary*(13), *Muhammad Meeran Bibi v. Sheikh Muhammad Rowther*(5), *Kumhambi v. Kalanthar*(14) and *Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi*(15). Then he dealt with facts to show non-existence of the custom, for which he referred *inter alia* to *Sakkaji Rau v. Latchmana Gaundan*(16) and *Chinnan v. Kondam Naidu*(17).

WALLIS, C.J. The Court delivered the following OPINIONS:—

WALLIS, C.J.—As regards the question of law referred to us I am of opinion that the decision in *Kakarla Abbayya v. Raja Venkata Papayya Rao*(8) must be overruled. In the cases to which SIR CHARLES TURNER was a party the Court no doubt examined the evidence in detail to see if it was sufficient to support the custom, but in no case did they interfere with the

- (1) (1902) I.L.R., 29 Cal., 343. (2) (1909) I.L.R., 31 All., 557 (P.C.).
(3) (1910) I.L.R., 32 All., 363 at p. 372.
(4) (1917) I.L.R., 40 Mad., 1108. (5) (1917) M.W.N., 98.
(6) (1840) 11 Ad. & E., 819; s.c., 118 E.R., 825.
(7) (1917) I.L.R., 40 Mad., 410 (F.B.).
(8) (1906) I.L.R., 29 Mad., 24. (9) (1882) I.L.R., 4 Mad., 272.
(10) (1884) I.L.R., 7 Mad., 3 (F.B.). (11) (1885) I.L.R., 8 Mad., 464.
(12) (1917) 25 C.L.J., 613. (13) Second Appeal No. 773 of 1881.
(14) (1914) 27 M.L.J., 156. (15) (1917) I.L.R., 40 Mad., 709 (P.C.).
(16) (1880) I.L.R., 2 Mad., 149 (F.B.). (17) (1914) 26 M.L.J., 169 at p. 180.

findings except in *Mirabivi v. Vellayanna*(1) and there after referring to the findings they observed that the question before them was 'whether there is evidence on which such custom could reasonably have been found to exist.' They came to the conclusion that the evidence was not reasonably sufficient to support the custom. No question of the limits of the Court's right of interference in Second Appeal was raised or decided in these cases. As regards *Kakarla Abbayya v. Raja Venkata Papayya Rao*(2), I am unable with great respect to agree with the observations of SUBRAHMANYA AYYAR, J., as to the effect of the words 'usage having the force of law' in that section. This section has a long history going back to the days of Sudder Court. Act XVI of 1853 gave a special appeal to the Sudder Courts from any decision passed on a regular appeal in any of the Subordinate Civil Courts

"first on the ground that the decision hath failed to determine all material points in difference in the cause, or hath determined the same or any of them contrary to law or usage having the force of law."

Under that section, as under this, where one of the "material points" in the case was the existence of a custom, that, as the Privy Council has recently laid down, is a mixed question of fact and law; and the Sudder Court was only entitled to interfere if the Subordinate Court had determined the point 'contrary to law or usage having the force of law,' and not, also, as in ordinary appeals, on the ground that the Subordinate Court had determined the point contrary to the weight of the evidence. The words 'usage having the force of law' in the section appear to me to be little more than words of amplification, and in any view not to give the Court any larger powers of interference with findings as to custom in so far as they are findings of fact than with any other findings of fact. This section was reproduced in the successive Codes of Civil Procedure with alterations that in no way affect its scope so far as the present question is concerned. The more recent decisions of AYLING and SESHAGIRI AYYAR, JJ. in *Pankajammal v. The Secretary of State for India*(3), and of MOOKERJEE and BEACHCROFT, JJ., in *Kailas v.*

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- (1) (1885) I.L.R., 8 Mad., 464. (2) (1906) I.L.R., 29 Mad., 24.
(3) (1917) I.L.R., 40 Mad., 1108.

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Padmakisor(1), where all the cases are exhaustively reviewed, take the same view.

Even so, I am of opinion that the finding of the District Judge that the custom is inapplicable to this estate cannot be accepted. He does not find that there has been in law a discontinuance of the custom, but uses the fact that *swatantrams* are not proved to have been paid for a long time as evidence against the existence of the liability. He gives no effect to the record in the Settlement Register of 1878 that the lands in B schedule were liable to pay *swatantrams*. This is a strong instance of the assertion of the right on the estate and entitled to great weight, while on the other hand the refusal of the Settlement Officers to register the *swatantram* as payable in support of the lands in A schedule is not conclusive as they had no authority to determine the question. As regards Exhibits E, H, K, the District Judge finds that they indicate a right to *thunduvaram* even in suit lands against which no *swatantram* is entered in the register, but observes that they relate only to a small extent of land. Lastly we come to the documents Exhibit B in which the defendant agrees to pay *swatantrams* and Exhibit D series to the same effect which were taken from the other tenants. These are strong admissions against interest, and the District Judge was not justified in dismissing them as of no importance because they are recent. The liability to pay *swatantrams* is a well known incident of mirasi tenure in Chingleput; but, as it is not universally applicable, it has been held by the Full Bench in *Sakkaji Rao v. Latchmana Gaundan*(2) that it is for the mirasidar to show that he is entitled to it "by the custom of the estate or the neighbourhood." The above findings of fact by the District Judge are, in my opinion, sufficient to raise a presumption in the plaintiff's favour which is not rebutted by any other findings, and I would reverse the decrees and decree the suit with costs throughout.

SADASIWA
AYYAR, J.

SADASIWA AYYAR, J.—I confess that I have felt great hesitation in arriving at a conclusion on the question whether in second appeal, the High Court has got a right to itself examine the evidence with reference to which the finding of the District

(1) (1917) 25 C.L.J., 613.

(2) (1878) I.L.R., 2 Mad., 149 (F.B.).

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Judge on the issue of custom was given. On the one side, there are the decisions of this Court in *Hanumantamma v. Rami Reddi*(1), *Vishnu v. Krishna*(2), and *Mirabivi v. Vellayanna*(3) where several learned Judges of this Court (including Sir CHARLES TURNER, C.J., and MUTHUSWAMI AYYAR, J.) have assumed as indisputable that this Court has got such a right. I agree with Sir S. SUBRAHMANYA AYYAR (Officiating Chief Justice) in *Kakarla Abbayya v. Raja Venkata Papayya Rao*(4), that

"it is impossible to believe that the learned Judges who decided" those cases "overlooked so obvious an objection."

In *Kakarla Abbayya v. Raja Venkata Papayya Rao*(4), Sir S. SUBRAHMANYA AYYAR (Officiating Chief Justice) and BODDAM, J., directly decided that whatever may be the English law, where a question of 'usage having the force of law,' is concerned, the High Court in second appeal ought to have and has the power to consider even the oral evidence as regards facts, incidents and instances on which the parties relied in the lower Courts to prove or to disprove the alleged usage. The tendency of recent decisions in this Court has been to follow the Calcutta decisions. In *Kailas v. Padmakisor*(5) that very learned Judge, Sir ASHUTOSH MUKERJEE who was one of the Bench which decided the case, very exhaustively deals with the question and I shall extract from that judgment the material conclusions arrived at therein:—

(1) "The question of the existence of an alleged custom is a question of fact."

(2) The finding of the lower Appellate Court "is liable to attack on the ground that irrelevant evidence has been received" or "that relevant evidence has been excluded."

(3) "also on the ground that there is no evidence of the alleged custom" or "that the finding is based on *legally insufficient evidence*" or "that the facts found do not constitute evidence of the alleged custom."

(4) also, "on the ground that legal principles or tests have been erroneously applied or that the Court has not correctly appreciated the essential attributes of a custom," or "has overlooked the distinction between a custom and a usage."

(1) (1882) I.L.R., 4 Mad., 272.

(2) (1884) I.L.R., 7 Mad., 3 (F.B.).

(3) (1885) I.L.R., 8 Mad., 464.

(4) (1906) I.L.R., 29 Mad., 24.

(5) (1917) 25 C.L.J., 613.

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(5) "consequently, the question whether the facts found prove the existence of the essential attributes of a custom is a question of law which may be discussed in second appeal."

I am naturally very loth to differ from the opinion of Sir S. SUBRAHMANYA AYYAR, J., especially as he gives very cogent reasons for his conclusion in *Kakarla Abbayya v. Raja Venkata Papayya Rao*(1), but I think that there are certain *dicta* of their Lordships of the Privy Council which are more binding upon me. In *Ramgopal v. Shamskhaton*(2), their Lordships quote their own decision in *Ramratan Sukal v. Nandu*(3) and lay down as regards the construction of sections 584 and 585 of old Civil Procedure Code (re-enacted practically in the same terms in the new Code) that

"it has now been conclusively settled that the third Court cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court; and if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final."

Now, the findings as to instances of usage, as to the genuineness of documents put forward as regards usage and the credibility of witnesses are clearly findings of fact. But as pointed out by their Lordships of the Privy Council themselves in *Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi*(4), the Judge's findings as to 'what were the things actually done in alleged pursuance of custom' may be findings of fact, but whether the facts so found satisfy the requirement of the law is a question of law. The decision in *Kakarla Abbayya v. Raja Venkata Papayya Rao*(1) is not expressly referred to in *Pankajammal v. The Secretary of State for India*(5). Mr. T. R. Ramachandra Ayyar who appeared in the latter case assures us that *Kakarla Abbayya v. Raja Venkata Papayya Rao*(1) was in the minds of the learned Judges who decided the latter case and that it was quoted to them. Of course, I accept his statement. The position laid down in *Kakarla Abbayya v. Raja Venkata Papayya Rao*(1), namely, that the evidence can be gone into

(1) (1906) I.L.R., 29 Mad., 24. (2) (1893) I.L.R., 20 Cal., 98.

(3) (1892) I.L.R., 19 Cal., 249.

(4) (1917) I.L.R., 40 Mad., 709 at p. 721 (P.C.).

(5) (1917) I.L.R., 40 Mad., 1108.

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in detail in the High Court in second appeal is characterised in the judgment in *Pankajammal v. The Secretary of State for India*(1), as an 'extreme contention.' The learned Judges proceeded to say that

"the value to be attached to the evidence let in, its reliability and in a measure, its relevancy are all matters for the Court below."

They again indicate their inclination to the view that the usage having the force of law mentioned in section 100 (a) of the Civil Procedure Code should be confined to the usages referred to by PETHERAM, C.J., in *Nivath Singh v. Bikki Singh*(2). While the reliability of evidence let in is for the lower Appellate Court, I think (with the greatest respect) that the value to be attached to the evidence (provided it is not mere 'opinion' evidence) supposing it is accepted as true and the relevancy of evidence are questions to be considered by the High Court also. If notwithstanding uncontradicted instances ranging over a long period and recognised judicially in several cases, the lower Appellate Court finds against the existence of a proper custom on the ground that in its opinion the instances are insufficient in number, the High Court is clearly entitled to hold that on the facts found by the lower Appellate Court, the custom is legally established. As regards the observations of PETHERAM, C.J., in *Nivath Singh v. Bikki Singh*(2) they have been expressly overruled by their Lordships of the Privy Council in *Ramgopal v. Shamskhaton*(3). However, as I said already, I feel (though after some hesitation) that I should follow the principles laid down in *Kailas v. Padmakisor*(4) in preference to the conclusions in *Kakarla Abbayya v. Raja Venkata Papayya Rao*(5) as the former decision seems to be more in consonance with the *dicta* of the Privy Council in *Ramgopal v. Shamskhaton*(3) and in *Muhammad Kamil v. Imtiaz Fatima*(6) and in *Anant Singh v. Durga Singh*(7).

In the present case, accepting the facts as found, I agree with my Lord that they do satisfy the requirements of the law as to the existence and validity of the custom. I am inclined also

(1) (1917) I.L.R., 40 Mad., 1108. (2) (1885) I.L.R., 7 All., 649.

(3) (1893) I.L.R., 20 Cal., 98 at p. 90. (P.C.).

(4) (1917) 25 C.L.J., 613.

(5) (1906) I.L.R., 29 Mad., 24.

(6) (1909) I.L.R., 31 All., 557.

(7) (1910) I.L.R., 32 All., 363.

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to hold that we are entitled, under section 103 of the Civil Procedure Code to go into the genuineness of the documents in Exhibit C series (except C-1), the District Judge, in my opinion, having not given a finding about the genuineness of the documents (except C-1) and I would find that they are genuine. They strongly corroborate the other evidence as to custom.

Further, the document Exhibit B executed by the defendant is a clear admission of the existence of the custom in 1905 and of the defendants' liability to pay *thunduvaram* according to that custom. Their Lordships of the Privy Council in *Chundra Kunwar v. Chaudhri Narpat Singh*(1), quoting from English cases state :

"What a party himself admits to be true may be reasonably presumed to be so". "The express admissions of a party to the suit are evidence, and strong evidence against him."

No explanation was given by the defendant from the box as to his admission in Exhibit B and

"unless and until he explains such admission the fact admitted must be taken to be established"—(page 195).

The lower Courts merely argue in a circle when they find that Exhibit B has no consideration because the liability by custom to pay *thunduvaram* is not established. Further the lower Courts have ignored the consideration that as regards the right to *thunduvaram*, the mirasidar has a far less heavy burden to discharge than when he lays claim to nattam poramboke lands, etc. [See judgments in the Full Bench case in *Seshachala Chetty v. Chinnaasami*(2).]

I therefore agree in reversing the lower Court's decrees and allowing the appeal as proposed by my Lord.

KUMARA-
SWAMI
SASTRIYAR, J.

KUMARASWAMI SASTRIYAR, J.—I agree with the conclusions arrived at by my learned brother SADASIVA AYYAR, J., and have nothing useful to add.

N.B.

(1) (1907) I.L.R., 29 All., 184 at pp. 184 and 195 (P.C.).
(2) (1917) I.L.R., 40 Mad., 410 at pp. 473, 487 and 522.

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Auction-purchaser, whether a representative of decree-holder.] Where an order passed under Order XXI, rule 90 of the Civil Procedure Code refusing to set aside a sale held in execution of a decree, was reversed on appeal but the auction-purchaser was not made a party to the proceedings for setting aside the sale or to the appeal therefrom and the judgment-debtor subsequently applied for restitution against the auction-purchaser: *Held* (1) that section 144 of the Civil Procedure Code did not in terms apply, as no decree was varied or reversed but only an order under Order XXI, rule 90, was reversed on appeal; (2) that, assuming that section 151 allowed an order for restitution in appropriate cases not falling under section 144, such an order could not be made unless the auction-purchaser was a party before the Appellate Court which set aside the sale; and (3) that a Court auction-purchaser was not a representative of the decree-holder. *Manicka Udayan v. Rajagopala Pillai* (1907) I.L.R., 30 Mad., 507 and *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (1911) I.L.R., 34 Mad., 417, referred to, *Subbamma v. Chennayya* ... (1918) I.L.R., 41 Mad., 467

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Venkatachellamayya v. Nilakanta Girjee ... (1918) I.L.R., 41 Mad., 474

CONTRACT—*Third party's right to sue on—Limitation Act (IX of 1908), sec. 18, arts. 62, 115 and 116—Suit for rent by the third party to contract—Date from which limitation begins.*] Contrary to his undertaking to redeem a prior *kanam* and to collect and pay the *jenmi*, arrears of rent due by the *kanamdar* a *melkanamdar* assigned his rights and liabilities under the *melkanam* to the *kanamdar* by the registered deed in 1909 without the knowledge of the *jenmi* and thus enabled the *kanamdar* to continue in possession for a further period. The *jenmi* who came to know of the assignment in 1912

at once recognized it, demanded arrears of rent from the *kanomdar* and brought the suit in 1913 against the *kanomdar* and the *melkanomdar* for all the rent due during the periods of the *kanom* and the *melkanom*. *Held* by WALLIS, C.J., and KUMARASWAMI SASTRIYAR, J. (BAKKWELL, J., dissenting) that (a) the *jenmi* was entitled to recover from the *kanomdar* the arrears of rent as moneys had and received to the plaintiff's use and that the suit was not barred by limitation by reason of Article 62, and section 18 of the Limitation Act. *Per* WALLIS, C.J. and BAKKELL, J.—The *jenmi* was not entitled to sue on the assignment to which he was not a party. *Per* KUMARASWAMI SASTRIYAR, J.—The *jenmi* was entitled to sue on it. *Jamna Das v. Ram Autar Pande* (1912) I.L.R., 34, All., 63 (P.C.) and *Tweedle v. Atkinson* (1855) 30 Ch. D., 57 and other cases considered.

Itti Panku Menon v. Dharman Achan ... (1918) I.L.R., 4, Mad., 498

CONTRACT ACT (IX of 1872) SEC. 28.—*Agreement to pay money to the Vakil's clerk for giving special attention to a case, whether opposed to public policy.*] An agreement by which a litigant binds himself to pay his vakil's clerk a certain amount for giving special attention to his legal business which his vakil was bound to see to in consideration of his fee, is opposed to public policy and is void and unenforceable. *Ex parte Cotton* (1846) 9 Beav., 107, referred to.

Suryanarayana v. Subbayya ... (1918) I.L.R., 41 Mad., 471

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HEREDITARY VILLAGE OFFICES ACT (MADRAS ACT III OF 1896), SEC. 5:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 47, EXPL.

HINDU LAW—*Joint family—Suit for Partition on behalf of minor—Death of minor before the filing of written statement—Severance of the joint status, if effected—Legal representative of minor, right of, to continue the suit.*] The rule that the institution of a suit for partition of joint family property effects a severance of the joint status is not applicable to a suit instituted on behalf of a minor; for in such a suit it is for the Court to determine whether a decree for partition will be beneficial to the minor. Where a minor plaintiff dies during the pendency of the suit his legal representatives are not entitled to continue the suit. *Girja Bai v. Sadashiv Dhundira* (1916) I.L.R., 43 Cal., 1931; *Sundara Rajan v. Arunachalam Chetti* (1916) I.L.R., 39 Mad., 159, referred to.

Chelimi Chetty v. Subbamma ... (1918) I.L.R., 41 Mad., 442

LIMITATION—*Admission of appeal after period of limitation has expired without notice to respondent—Power of Court to grant reconsideration of order admitting it at instance of respondent—Practice of Courts in India—Suggestion by Privy Council that such practice should be altered by the Indian Courts with the view of securing final determination [of any question of limitation at time of admission of appeal—Limitation Act (IX of 1908), sp. 4 and 5.]* The admission of an appeal after the period of limitation has expired deprives the respondent of a valuable right by putting in peril the finality of the order in his favour. When an order admitting an appeal has been made

in the absence of the respondent, and without notice to him, to preclude him from questioning its propriety would amount to a denial of justice. Such an order, so made, should therefore be treated as open to reconsideration at the instance of the respondent. This view is sanctioned by the practice of the Courts in India. *Held* also, that the Court was not exceeding its jurisdiction in permitting the question of limitation to be re-opened when the appeal came before it for hearing, and under the circumstances it had power to reconsider the sufficiency of the cause shown for the delay. That practice was not peculiar to Madras, but prevailed in other Courts in India. Such a practice, however, was in their Lordships' opinion open to grave objection, and it was urgently expedient that in place of such a practice, a procedure should be adopted by Courts in India which would secure, at the stage of the admission of an appeal, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal.

Krishnaswami Panikondar v. Ramaswami Chettiar ... (1918) I.L.R., 41 Mad.

LIMITATION ACT (IX OF 1908), ss. 4 AND 5:—*See* LIMITATION.

ss. 13, 19 AND 20—*Loan to a partnership—One of the partners absent from British India—Suit for loan more than three years after loan but within three years after return of partner, whether barred and against whom—Release by some partners of a partnership debt, whether binding on legal representative of a deceased partner—Entries in debtor's accounts, whether payment of interest or acknowledgment.* The plaintiff's father was a partner along with the third, the sixth and eighth defendants, of a firm at E, which advanced certain loans in 1903 and 1904 to a firm at S of which the first defendant and the former defendants were partners; the first defendant was out of British India from 1908 to 1908. The plaintiff sued in 1909 to recover his share of the loans from the partners of the firm at S. The defendant pleaded that the suit was barred by limitation; the plaintiff relied in bar of limitation on section 13 of the Limitation Act and also on certain unsigned entries in defendants' account books in which the interest accruing due were added to principal from time to time; the first defendant further pleaded a release by defendants Nos. 3, 6 and 8 of the claim against him as binding on the plaintiff: *Held*, that the suit was not barred by limitation against the first defendant as the plaintiff was entitled to a deduction of the time during which the first defendant was out of British India but was barred against the other defendants under section 13 of the Limitation Act; that the entries in the debtor's accounts could not be treated as payments of interest under section 20 of the Limitation Act, or as acknowledgments under section 19 of the Act as they were not signed by the debtors. *Held* also, that a partner can release a partnership claim, and, after the death of a partner, the surviving partners have a right to release such a claim; that, if a release by any of the partners is fraudulent the other partners can avoid it and seek to recover their share of the released debt, but the legal representative of a deceased partner is not entitled to avoid it as the right to do so is personal to the partners; *Held* (on the

facts) that the release of the first defendant by the third, sixth and eighth defendants was *bona fide* and binding on the plaintiff.

Palaniappa Chettiar v. Veerappa Chettiar ... (1918) I.L.R., 41 Mad., 446

LIMITATION ACT IX OF 1908, SEC. 18, ARTS. 62, 115 AND 116:—*See* CONTRACT.

ss. 21 (2), 19 AND 20—*Partnership—Acknowledgment of liability or payment by one partner, when binding on others.* Direct evidence that one of several partners or co-contractors had authority to acknowledge liability or make payments so as to save limitation as against his partners or co-contractors is not necessary, but such authority can be inferred from surrounding circumstances such as the position of other co-contractors or partners. *Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar* (1909) I.L.R., 32 Mad., 421 and *Shaik Mohideen Sahib v. The Official Assignee of Madras* (1912) I.L.R., 35 Mad., 142 at p. 145, considered.

Veeranna v. Veerabhadraswami ... (1918) I.L.R., 41 Mad., 427

LIS PENDENS—*Transfer of Property Act (IV of 1882), sec. 52—No contest between defendants—Alienation by one defendant to a stranger pending suit, whether affected by lis pendens.* The rule of *lis pendens* enunciated in section 52 of the Transfer of Property Act does not differ from the English rule and it protects parties to litigation against alienations by their opponents pending suit; and the prohibition contained in the section is like *res judicata* inapplicable between parties to the suit who are ranged on the same side and between whom there is no issue for adjudication. 'Any other party' in section 52 means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation. *Bellamy v. Sabine* (1857), De. G. & J., 566 and *Faiyas Husain Khan v. Prag Narain* (1907) I.L.R., 29 All., 839 at p. 845 (P.C.), applied. In a previous suit by A to set aside a sale made by him to B as void and invalid and consequently to set aside a mortgage made by B to C also as invalid, the plea of B and C that both the sale and mortgage were good was upheld. Pending the suit D bought B's rights in a Court auction. In a subsequent suit by C to enforce the mortgage, *Held* that D's purchase was not affected by *lis pendens* as there was no contest between B and C in the previous suit as to the validity of the mortgage and that D was entitled to plead that the mortgage was invalid as having no consideration.

Krishnaya v. Malliya ... (1918) I.L.R., 41 Mad., 458

MINOR, suit for partition, on behalf of:—*See* HINDU LAW.

MORTGAGE—*Suit for sale of mortgaged property—Decree not in accordance with section 88, Transfer of property Act (IV of 1882)—Sale in execution of decree—Confirmation of sale—Purchase by mortgagee at auction sale with leave of the Court—Right of redemption by mortgagor—Suit to redeem against auction-purchaser—Parties—Civil Procedure Code (Act XIV of 1882), sec. 244—Question in execution of decree.* In a suit to enforce a mortgage and for sale of the mortgaged property the decree made was not in accordance with the provisions of section 88 of the Transfer of Property Act (IV of 1882), no day being fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due. In execution of the decree the mortgaged property was attached, sold, and purchased,

- with the leave of the Court by the mortgagee decree-holder, and the sale was duly confirmed. In a suit by the mortgagor for redemption of the mortgage, which was one of ancestral property made by the plaintiff's father before the birth of his sons, *Held* that whether or not the decree was in accordance with the provisions of the Act, the property, and all the right title and interest of the defendant were in fact sold in execution of the decree of a Court which had jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed from; and that consequently the mortgagor had no right of redemption. *Held* further, that the question now raised could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court executing the decree, and that the suit was therefore barred by section 244 of the Code of Civil Procedure (Act XIV of 1882). *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1892) I.L.R., 19 Cal., 683; s.c., L.R., 19 I.A., 166, followed.
- Ganapathy Mudaliar v. Krishnamachariar* ... (1918) I.L.R., 41 Mad. (P.C.) 403
- MORTGAGE—*Transferee from benamidar—Right of suit*. A transferee-mortgagee can maintain a suit on the mortgage though the mortgagee named in the bond is only a benamidar and though the beneficial owner is not added as a party. *Kirtibas Das v. Gopal Jiu* (1914) 19 C.L.J., 193, and *Parameswar Dat v. Anardan Dat* (1915) I.L.R., 37 All., 113, followed.
- Singu Pillay v. Govinda Reddy* ... (1918) I.L.R., 41 Mad., 435
- MORTGAGEE, purchase by, with leave of Court:—See MORTGAGE.
- MORTGAGOR, right of, to redeem property purchased by mortgages with leave of Court at an auction sale:—See MORTGAGE.
- PARTITION, suit for, on behalf of a minor, death of minor pendente lite, joint status, whether severed—Legal representative's right to continue suit:—See HINDU LAW ... 442
- PARTNERSHIP, acknowledgment of liability or payment by partner, when binding on others:—See LIMITATION ACT (IX of 1908), ss. 21 (2), 19 AND 20.
- by manager of joint Hindu family with strangers—*Right of other members of family to institute suits in respect of partnership*.] A contract of partnership entered into by the manager of a joint Hindu family with strangers does not *ipso facto* make the other members of the family partners; and not being partners, the other members whether divided or undivided cannot institute any suit in respect of partnership (e.g.), a suit for dissolution of partnership. *Sokkanadha Vannimundar v. Sokkanadha Vannimundar* (1905) I.L.R., 28 Mad., 344 and *Ramanathan Chetty v. Yegappa Chetty* (1916) 30 M.L.J., 241, applied. *Joopoddy Sarayya v. Lakshmanaswamy* (1913) I.L.R., 36 Mad., 185 (P.C.), distinguished.
- Gangayya v. Venkataramiah* ... (1918) I.L.R., 41 Mad., 454
- POLICE ACT (XXIV of 1859), sec. 46—'Threat,' meaning of—Demand by a police constable of mamul or customary payment, whether an offence under the section.] A demand by a police constable, of a 'mamul' (customary payment made to obtain his favour), is a 'threat' within section 46 of the Police Act (XXIV of 1859) and obtaining money by such a threat is an offence under the section.
- The King Emperor v. Lal Bage* ... (1918) I.L.R., 41 Mad., 465

- PROPRIETARY ESTATES VILLAGE, SERVICE ACT (MADRAS ACT II of 1894):—See CIVIL PROCEDURE CODE (ACT V of 1908), sec. 47, *EXPL.*
- PROVINCIAL INSOLVENCY ACT (III of 1907), ss. 20 AND 47—Sale by receiver of property alleged to belong to an insolvent—Property in possession of third person—Obstruction by such third person—Summary enquiry by District Judge—Order directing delivery of possession, legality of—'Proceedings' in section 47 of the Act, meaning of.] Certain property alleged to belong to an insolvent was sold by the receiver under section 20 of the Provincial Insolvency Act. The purchaser whilst attempting to take possession, was obstructed by the appellants who claimed to be in possession of the property as owners thereof. The District Judge, purporting to act under section 47 of the Act, after a summary enquiry, ordered possession to be given to the purchaser: *Held*, that the District Judge had no jurisdiction to pass such an order as section 47 only lays down the procedure to be followed by the Insolvency Judge with regard to proceedings under the Act. *Held*, also, that the word 'proceedings' in section 47 of the Act means the proceedings of the Court and not the act of the receiver under section 20 of the Act. *Minatoonnassa Bibee v. Khatoonassa Bibee* (1924) I.L.R., 21 Cal., 479 and *Gulam Hossain Cassim Arif v. Fatima Bagam* (1919) 6 I.O., 300, explained. *Chela Lal v. Luchman Parshad* (1917) 37 L.O., 830, approved.
- Narasimhaya v. Viraraghavulu* ... (1918) I.L.R., 41 Mad., 440
- REDEMPTION:—See MORTGAGE ... 435
- RENT, suit for, by a third party—Limitation:—See CONTRACT.
- STAMP ACT (II of 1899), sec. 25—Marupat—Counterpart of lease—Document giving a charge on improvements for arrears of rent—Stamp duty, whether payable both as counterpart and as mortgage.] Where a tenant executed a marupat in favour of a landlord, agreeing therein that the arrears of rent, if any, should be a charge on the improvements that might be made by him: *Held*, that a marupat is the counterpart of a lease or a deed executed by a tenant promising to pay a certain rent, and that the document in question must be stamped both as a counterpart and as a mortgage.
- Govindan Nambudiri v. Moidin* ... (1918) I.L.R., 41 Mad., 469
- TRANSFER from benamidar, right of, to sue:—See MORTGAGE ... 435

PRIVY COUNCIL.*

GANAPATHY MUDALIAR (PLAINTIFF),

v.

KRISHNAMACHARIAR AND OTHERS (DEFENDANTS).

1917,
November
12 and 13,
and
December,
14.

[On appeal from the High Court of Judicature
at Madras.]

Mortgage—Suit for sale of mortgaged property—Decree not in accordance with section 88, Transfer of Property Act (IV of 1882)—Sale in execution of decree—Confirmation of sale—Purchase by mortgagee at auction sale with leave of the Court—Right of redemption by mortgagor—Suit to redeem against auction-purchaser—Parties—Civil Procedure Code (Act XIV of 1882), sec. 244—Question in execution of decree.

In a suit to enforce a mortgage and for sale of the mortgaged property the decree made was not in accordance with the provisions of section 88 of the Transfer of Property Act (IV of 1882), no day being fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due. In execution of the decree the mortgaged property was attached, sold and purchased, with the leave of the Court by the mortgagee-decree-holder, and the sale was duly confirmed in a suit by the mortgagor for redemption of the mortgage, which was one of ancestral property made by the plaintiff's father before the birth of his sons,

Held, that, whether or not the decree was in accordance with the provisions of the Act, the property, and all the right, title and interest of the defendant were in fact sold in execution of the decree of a Court which had jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed from; and that consequently the mortgagor had no right of redemption.

Held further, that the question now raised could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court executing the decree, and that the suit was therefore barred by section 244 of the Code of Civil Procedure (Act XIV of 1882).

Prosunno Kumar Sunyal v. Kali Das Sunyal (1892) I.L.R., 19 Cal., 683; s.c., L.R., 19 I.A., 166, followed.

APPEAL No. 155 of 1915 from a judgment and decree (17th February 1914) of the High Court at Madras, which affirmed a judgment and decree (9th February 1910) of the District Judge of North Arcot.

One Kumarasami Mudaliar, a Hindu governed by the Mitakshara law, executed three mortgages of ancestral property;

* *Present* :—Lord BUCKMASTER, Sir JOHN EDGE, Sir WALTER PHILLIMORE, Bart. and Sir LAWRENCE JENKINS.

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on 12th December 1876 in favour of one Varadappa; on 7th January 1879 in favour of one Vijayaraghava Chariar, the father of the first respondent Krishnama Chariar; and on 10th May 1881, in favour of one Narasingha. Subsequently to the mortgage of 1881, two sons were born to the mortgagor, namely, Ganapathy Mudaliar, the appellant, in September 1881, and Ramasami (since deceased) in May 1882. On 20th January 1886 Narasingha, the third mortgagee, assigned his mortgage to Vijayaraghava, and on 19th March 1886 Vijayaraghava filed a suit on that mortgage in the District Court of North Arcot against the mortgagor and his two minor sons, describing the latter as "infants maintained by their father." No mention was made of the first and second mortgages in the plaint, and the first mortgagee was not made a party to the suit. It was alleged in the plaint that most of the properties were the self-acquired properties of the mortgagor.

The mortgagor did not contest the suit himself, but at the hearing he appeared and denied that he was the guardian of his sons. The Court however decided that he was the guardian, and on 15th April 1886 the District Judge made a decree against all three defendants for the amount of the mortgage debt, with interest at 6 per cent and costs "to be recovered from the mortgagor personally, and by sale of the mortgaged property." No time was fixed for payment of the amount decreed, and no further order was made as directed by the Transfer of Property Act, sections 88 and 89, but on 16th August 1886, Vijayaraghava applied for execution of the decree by attachment and sale of the mortgaged properties, and with his application filed a schedule of the properties to be sold in which he for the first time mentioned the fact that there were two other mortgages on the properties, and asked that the sale should be subject to the claims under those mortgages.

On 28th September 1886, one Govindaraju, an uncle of the two minors, applied in the suit to be appointed their guardian, and that the decree might be set aside as against them on the ground that their father was not, and had not consented to be their guardian *ad litem*. On the hearing of this application on 10th November 1886 the District Judge held that the appointment of the father as guardian was illegal, and appointed Govindaraju to be guardian in his place, set aside the decree as

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against the minors, and ordered Govindaraju to file a written statement on their behalf on the 15th November 1886. Govindaraju never filed any written statement, nor did he appear, and the Judge then made an *ex parte* decree against all three defendants in the same terms as before, except that the two sons were described as 'minors by their maternal uncle and guardian Govindaraju.'

No execution was ever taken out under that decree, but on 24th January 1887 a proclamation of sale of the mortgaged properties was issued under the execution of August 1886 already taken, the minors being described as 'under the protection of their father,' and this proclamation was duly published and returned to the Court.

On 15th September 1887 a sale warrant was issued by the District Court in pursuance of the proclamation and the properties were subsequently sold in execution and were purchased by the decree-holder with leave of the Court.

The mortgagor died in May 1894; the appellant, on 10th June 1904, obtained a release from his brother of the latter's rights in the equity of redemption; and in September 1904 the younger brother died.

On 16th November 1907 the appellant brought the present suit to redeem the mortgages in suit.

The District Judge held that the plaintiff had been properly represented in the suit to enforce the mortgages, and was bound by the decree and the execution proceedings, and that the suit was barred by section 244 of the Civil Procedure Code, 1882.

On appeal the High Court (MILLER and TYABJI, JJ.), affirmed, that decision, and dismissed the suit.

On this appeal—

Sir W. Garth for the appellant contended that the sale took place in execution of the decree of 15th April 1886 which had been set aside as regards the appellant and his brother, to which decree therefore they were not parties, and consequently their interests in the mortgaged properties and in the equity of redemption could not and did not pass on the sale under the decree. The attachment was made under the application of 16th August 1886, and in the proceedings which led up to the sale the minors were described as being 'under the protection

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of their father.' They were not properly represented in those proceedings, and the sale was therefore not binding on the plaintiff. *Khizarajmal v. Daim*(1) and *Rashidunnissa v. Muhammad Ismail Khan*(2) were relied upon. The right to redeem, it was submitted, was not extinguished by the sale, for the necessary decree for the sale, and an order absolute for sale were not made by the Court as required by the provisions of sections 58, 60, 85, 86, 88 and 89 of the Transfer of Property Act (IV of 1882). The legislature having provided that certain steps must be taken in order to make a valid sale, a sale made without such requirements would be invalid, and ineffective to extinguish the plaintiff's right of redemption.

Reference was made to *Mallikarjunadu v. Lingamurti*(3).

Sir H. Erle Richards, K.C., and Kenworthy Brown for the respondent contended that the sale of 1887 and the purchase thereat by Vijayaraghava, the father of the first respondent and assignee of the mortgage who had previously obtained leave to bid at the sale, was valid and effectual for all purposes, and the appellant had no right of redemption. The sale bound the sons having regard to what had taken place in the suit. There were not really two separate decrees; the second decree was really substituted for the first. The proceedings show that the guardian had knowledge of the proposed sale. In any case the sale being of ancestral property binds the sons in the absence of immorality or fraud: *Sripat Singh Dugar v. Prodyot Kumar Tagore*(4). The minors, it was submitted, were properly represented in the suit and the execution proceedings. The effect of the substitution of the decree of 15th November 1886 for the decree of 15th April 1886 was that the attachment and sale took place under the second decree. The plaintiff, moreover, was a party to the retrial of the suit, and was bound by the proceedings therein. The present suit was barred by section 244 of the Civil Procedure Code (Act XIV of 1882); *Prosunno Kumar Sanyal v. Kali Das Sanyal*(5). The questions now raised might have been raised before the sale was confirmed.

(1) (1904) I.L.R., 32 Calo., 296 at 332; s.c., L.R., 32 I.A., 23 (35).

(2) (1909) I.L.R., 31 All., 572; s.c., L.R., 36 I.A., 168.

(3) (1902) I.L.R., 25 Mad., 244.

(4) (1916) I.L.R., 44 Calo., 524; s.c., L.R., 44 I.A., 1.

(5) (1892) I.L.R., 19 Calo., 683 at p. 689; s.c., L.R., 19 I.A., 166 at p. 169.

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Sir W. Garth in reply:—In order to see what was sold in execution of a decree, the proceedings which led up to the sale must be looked at: *Thakur Bashma v. Jiban Ram Marwari*(1). Section 244 of the Civil Procedure Code, 1882, was not applicable to the present suit so far as the minors were concerned, as they were not parties to the execution proceedings not having been properly represented therein.

The JUDGMENT of their Lordships was delivered by

SIR JOHN
EDGE.

Sir JOHN EDGE.—This is an appeal from a decree of the High Court at Madras, dated the 17th February 1914, which affirmed a decree, dated the 9th February 1910, of the District Judge of North Arcot, by which the suit was dismissed. The plaintiff is the appellant.

The suit was brought in the Court of the District Judge of North Arcot on the 16th November 1907 to redeem three mortgages, dated respectively the 12th December 1876, the 7th January 1879 and the 10th May 1881. The mortgages were of ancestral property, and were made by the father of the plaintiff before the plaintiff or his brother, since deceased, were born. The mortgage of the 7th January 1879 was in favour of N. Vijayaragavachariar, a vakil, to whom their Lordships will refer as the vakil. The mortgages of the 12th December 1876 and the 10th May 1881 vested by assignment in the vakil. The plaintiff in this suit was born in September 1881; his brother was born in May 1882.

On the 19th March 1886, the vakil brought in the District Court of North Arcot a suit for sale on the mortgage of the 10th May 1881, against the plaintiff's father, the plaintiff, aged 4 years, and his brother, aged 3 years, the brothers being described as 'maintained by the first defendant,' who was their father. The suit was entered on the files of the Court as Original Suit No. 5 of 1886. Their father, who had not been appointed as their guardian for the suit, objected that he was not their guardian, but the District Judge overruled the objection, and, on the 15th April 1886, made a decree in the following terms:—

"It is ordered that plaintiff do recover Rs. 10,891 together with further interest at 6 per cent per annum from date of plaint to

(1) (1913) I.L.R., 41 Calo., 590 at p. 599; s.c., L.R., 41 I.A., 38 at p. 43.

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date of payment and costs, to be recovered from the first defendant personally, and by sale of the mortgaged property."

That decree was doubtless intended to be in compliance with the provisions of 'The Transfer of Property Act, 1882,' but it did not comply with those provisions.

On the 16th August 1886, the vakil presented to the District Court his petition, under section 230 of the Code of Civil Procedure, 1882, for execution of the decree of the 15th April 1886. The petition was entered on the files of the Court as 'Execution Petition No. 57 of 1886 in O.S. (Original Suit) No. 5 of 1886,' and by it the petitioner prayed 'that the amount may be recovered with further costs, together with further interest, by the attachment and sale of immovable property set out in the schedule herewith filed.' In that petition the present plaintiff and his brother were described as minors, defendants 'by their guardian, the first defendant.' In the schedule the vakil disclosed the fact that there existed the mortgages of the 12th December 1876 and the 7th January 1879. On the 18th August 1886, the warrant of attachment was issued, and on the 13th September 1886 a notice of sale was issued.

On the 28th September 1886, one Govindaraju Mudali, who was a maternal uncle of the present plaintiff, and his brother, applied to the District Court to be appointed their guardian and to have the decree of the 15th April 1886 set aside, on the ground that their father was not their proper guardian. Govindaraju Mudali apparently contended in support of his application that the debt, in respect of which the mortgage of the 10th May 1881 had been given, was not one which the minors or the properties were liable to discharge. On the 10th November 1886, the District Judge held that the appointment of the father as guardian had been illegal, and in his place appointed Govindaraju Mudali as guardian of the minors, and set aside the decree of the 15th April 1886 as against them. Govindaraju was ordered to put in a written statement on the 15th November 1886 on behalf of the minors, but he failed to do so and did not appear. On the 15th November 1886, the District Judge made a decree that the plaintiff (the vakil) 'do recover Rs. 10,891 together with further interest at 6 per cent per annum from date of plaint to date of payment, and

costs to be recovered from the first defendant personally and by sale of the mortgaged property.' That decree did not comply with the provisions of 'The Transfer of Property Act, 1882,' but it was not appealed and it became final. It was obviously intended to be in supersession of the decree of the 15th April 1886, and must be regarded as having superseded that decree.

On the 24th January, 1887, the Court of the District Judge caused a proclamation of the intended sale to be made under section 287 of the Code of Civil Procedure, 1882. The proclamation is described on the face of it as in Original Suit No. 5 of 1886, application No. 57 of 1886, and proclaimed that—

"Whereas the immovable property mentioned in the list attached hereto and belonging to the said defendants (the father and his two sons) has been attached upon a petition being presented for execution of the decree passed in the above suit. Take notice that if the amounts specified below be not paid into this Court, or if no other steps be taken to satisfy the decree, the said property shall be sold in public auction in this Court on the 19th September, 1887, and that in that sale the right, title and interest possessed by the above defendants alone in respect of that property shall be sold."

So far as appears from the documents in the record, the only attachment which had issued was that of the 18th August 1886.

It appears that Govindaraju Mudali, as the guardian of the minors, had appealed to the High Court at Madras from some order which the District Judge had made on the 20th December, 1886, in Original Suit No. 5 of 1886. What the order appealed from does not appear, nor is there anything in the record which suggests what the nature of the order was. However, that appeal not having been disposed of, Govindaraju Mudali, at some time between the 24th January, 1887, and the 2nd March, 1887, applied to the High Court for an order to stay the sale of the property attached in execution of the decree of the District Court of North Arcot in Original Suit No. 5 of 1886. That application was dismissed by the High Court on the 1st August, 1887.

On the 28th February, 1887, the District Court made an order permitting the vakil to bid at the sale. On the 19th September, 1887, the immovable properties in question were sold,

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subject to incumbrances, by public auction, and the vakil became the purchaser.

The sale was confirmed by the District Judge on the 13th December, 1887, and he, on the 1st February, 1888, gave the sale certificate under his hand and the seal of the Court. The vakil died before this present suit; the first respondent is his son. The other respondents are purchasers from the vakil. The father of the present plaintiff died in May 1894. The plaintiff's brother died in September 1904. The present plaintiff, his brother and their father had constituted a Hindu joint family.

On behalf of the appellant here it was contended that the sale took place in execution of the decree of the 15th April, 1886, and not in execution of the decree of the 15th November, 1886, and that under such circumstances only the right, title and interest of the father were sold. That contention is based on the fact that the attachment of the 16th August, 1886, was made under the decree of the 15th April, 1886. The sale must have been under the decree of the 15th November, 1886. No one was or could have been misled as to the decree under which the sale was taking place. The proclamation of sale of the 24th January, 1887, was made subsequent to the decree for sale of the 15th November, 1886, and must have been made consequent on that decree, with the knowledge of all parties and without challenge, and that proclamation shows that what was to be sold by auction was the right, title and interest in the property of the defendants to the suit of the 19th March, 1886, and the certificate of sale shows that the right, title and interest in the property of the defendants to that suit were sold to the vakil. The present plaintiff and his brother were defendants to that suit, under the guardianship of Govindaraju Mudali, at the time when the decree of the 15th November, 1886, was made and at the time when the sale took place, and thence until the sale was confirmed and the certificate of sale was made.

It has also been contended on behalf of the appellant here that as the provisions of 'The Transfer of Property Act, 1882,' were not complied with in the suit for sale of the 19th March, 1886, and as no day was fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due, the defendants to the suit of the 19th March, 1886, were not debarred from a right to redeem. It

appears to their Lordships that the answer to the contention is that whether or not the provisions of 'The Transfer of Property Act, 1882,' were complied with, the property and all right, title and interest of those defendants in it were in fact sold to the vakil in execution of a decree of a Court which had jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed.

By section 244 of the Code of Civil Procedure, 1882, it was enacted that:—

"244. The following questions shall be determined by order of the Court executing a decree and not by a separate suit (namely):—

"(c) Any other question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, or to the stay of execution thereof."

This Board decided in *Prosunno Kumar Sanyal v. Kali Das Sanyal*(1), that section 244 had been rightly held in India to apply in a case in which the question raised concerned the auction purchaser at an auction sale as well as the parties to the suit. In this case the vakil was the auction purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court which was executing the decree of the 15th November, 1886.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed.

The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitors for first respondent: *Chapman, Walker and Shephard.*

J.V.W.

(1) (1892) 1 L.R., 19 Calc., 683; s.c., L.R., 19 I.A., 166.

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CHARIAR.
—
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PRIVY COUNCIL.*

KRISHNASAMI PANIKONDAR (DEFENDANT No. 1)

v.

RAMASAMI CHETTIAR (PLAINTIFF).

[On appeal from the High Court of Judicature at Madras.]

Limitation—Admission of appeal after period of limitation has expired without notice to respondent—Power of Court to grant reconsideration of order admitting it at instance of respondent—Practice of Courts in India—Suggestion by Privy Council that such practice should be altered by the Indian Courts with the view of securing final determination of any question of limitation at time of admission of appeal—Limitation Act (IX of 1908), ss. 4 and 5.

The admission of an appeal after the period of limitation has expired deprives the respondent of a valuable right by putting in peril the finality of the order in his favour. When an order admitting an appeal has been made in the absence of the respondent, and without notice to him, to preclude him from questioning its propriety would amount to a denial of justice. Such an order, so made, should therefore be treated as open to reconsideration at the instance of the respondent. This view is sanctioned by the practice of the Courts in India.

Held also that the Court was not exceeding its jurisdiction in permitting the question of limitation to be re-opened when the appeal came before it for hearing, and under the circumstances it had power to reconsider the sufficiency of the cause shown for the delay. That practice was not peculiar to Madras, but prevailed in other Courts in India.

Such a practice, however, was in their Lordships' opinion open to grave objection, and it was urgently expedient that in place of such a practice a procedure should be adopted by Courts in India which would secure, at the stage of the admission of an appeal, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal.

APPEAL No. 119 of 1915 from an order (4th November, 1908) of the High Court at Madras, which dismissed an appeal presented by the appellant against a decree (8th February, 1905) of the Subordinate Judge of Tanjore in Original Suit No. 52 of 1904.

The suit, which was brought to recover possession of a zamindari, was decided by the Subordinate Judge in favour of the plaintiff, the present respondent; and the first defendant, now the appellant, was desirous of appealing from that decree.

* Present :—Lord PARKER OF WADDINGTON, Lord WRENBURY, Sir JOHN EDGE, Mr. AMER ALI and Sir LAWRENCE JENKINS.

His account of the matter was that his agent understood that the time for appealing had expired during the vacation of the Madras High Court, and that it was necessary therefore that the appeal should be presented on the day the High Court re-opened. The ninety days allowed by the Limitation Act, 1877, for such an appeal expired on 9th July 1905, but that being a Sunday, the appeal would have been in time if presented on 10th July, and it was arranged that the presentation of the appeal should be made on the 10th. The agent arrived at Madras on Sunday 9th and learnt that the office of the High Court had been open on Saturday 8th for the reception of appeals, and that his memorandum of appeal would be rejected unless an affidavit explaining the delay were presented with it. On hearing of this the present appellant came at once to Madras on the 11th July, and the memorandum of appeal was presented by his counsel on 12th together with affidavits of the appellant and his agent with an explanation of the delay. On 31st July the matter came, according to the rules of the High Court, for disposal by the Judge (SANKARAN NAIR, J.) sitting for that purpose. His order was, "Delay excused in the circumstances, and the appeal admitted." Thereupon the preparation of the appeal and the printing of the record were begun.

Counter-affidavits were lodged by the respondent on 22nd November 1905 which were to the effect that the appellant and his agent were both seen in Madras on 10th July, 1905 and that the affidavits of the appellant were consequently untrue.

In August 1908 when the appeal was ready for hearing the appellant received notice of an application to be made by the respondent for the dismissal of the appeal as having been presented too late. That application was made on 7th October, 1908, before a Division Bench of the High Court (MUNRO and ABDUR RAHIM, JJ.). It was supported by various affidavits, and the Court was asked to set aside the ex parte order of SANKARAN NAIR, J., and dismiss the appeal as barred by limitation. On 4th November, 1908, the Court held that the affidavits of the appellant and his agent were untrue, and even if they were true they did not amount to 'sufficient cause' within the meaning of section 5 of the Limitation Act, so as to justify them in admitting the appeal after the prescribed period of limitation had expired. "The delay", they said, "should not have been excused".

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The appellant subsequently made an application for a review of the above decision, but it was dismissed on 31st March, 1909. His ground (*inter alia*) was that the appeal having been once admitted, the Division Bench 'had no jurisdiction to consider the propriety of that admission, and to dismiss the appeal as time-barred.'

The High Court refused an application by his daughter and representative, who, on the death of her father, had been put on the record in his place, for a certificate for leave to appeal to His Majesty in Council, but she subsequently, on 7th March, 1913, obtained an order in council granting her special leave to appeal.

On this appeal—

Sir H. Erle Richards, K.C. and Kenworthy Brown for the appellant contended that the long delay (31st July, 1905, to 28th September, 1908) made by the respondent after he received notice of the admission of the appeal was sufficient to bar his application to set aside the order admitting it, and it should have been dismissed as out of time. The power to set aside such an order is derived from the provisions of the Civil Procedure Code: there is no inherent power in the Court; and a mere practice cannot create such a power. Under rules of the Madras High Court which came into force in January, 1905, the Judges (even a single Judge) can hear and determine an application out of time; it was under those rules that the order for the admission of the appeal was made. The practice of the Madras High Court since *Venkatrayudu v. Nagadu*(1) has been against my present contention. The Judges who heard it, it is submitted, had no power to set aside the order of SANKARAN NAIR, J., which was a determination of the question in issue: at any rate they should not have permitted the question of limitation to be re-opened at so late a stage as the hearing of the appeal. The proper, if not the only, remedy against the order was an application for a review under section 623 of the Civil Procedure Code, 1882, but that had to be made within a certain time. The application for review should have come before the same Court which allowed the admission of the appeal. In *Bharat Chunder Roy v. Issur Chunder Sircar*(2) it was held by the Calcutta High Court that after an appeal had been admitted

(1) (1886) I.L.R., 9 Mad., 450.

(2) (1867) 8 W.R., 141.

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and notice given to the respondent the appellate Court before which it came had no power to reject the appeal at the hearing. That was a decision of Sir BARNES PEACOCK, and is relied on as governing the present case. Reference was made also to *Jhotee Sahoo v. Omesh Chunder Sircar*(1), *Dubey Sahai v. Ganesh Lal*(2) and *Vismadev Das v. Sitanath Roy*(3).

On counsel proceeding to go into the merits of the case [*De Gruyther*, K.C., referring to *Corporation of St. John v. Central Vermont Railway Co.*(4)] objected that no ground could be taken now other than that already argued which had alone been urged in applying for special leave to appeal, but he did not press the objection].

SANKARAN NAIR, J., might have qualified his order by the words 'subject to objection at the hearing,' but there is still an order which he had jurisdiction to make, and which under the circumstances should stand.

De Gruyther, K.C. and O. O'Gorman for the respondents were not called upon.

The judgment of their Lordships was delivered by

Sir LAWRENCE JENKINS.—On the 4th November, 1908, the High Court of Madras dismissed an appeal from an original decree on the ground that it was barred by limitation. From this order of dismissal the present appeal has been preferred, and in its support it has been contended, first, that the order was without jurisdiction and, secondly, that it was erroneous on the merits.

The original decree was passed on the 8th February, 1905, in the Court of the Additional Subordinate Judge at Tanjore in the plaintiff's favour.

Against it the first defendant, Krishnasami Panikondar, preferred an appeal to the Madras High Court. The last day for its presentation was the 10th July, when the Court re-opened after vacation; but it was not presented until the 12th July 1905.

It was then returned to the appellant as out of time. It thus became necessary for the appellant to satisfy the Court that he had sufficient cause for not presenting his appeal within the prescribed period.

(1) (1879) I.L.R., 5 Calc., 1.

(3) (1912) I.L.R., 40 Calc., 259.

(2) (1878) I.L.R., 1 All., 35.

(4) (1869) L.R., 14 A.C., 590.

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He accordingly again presented his appeal on the 26th July, supported this time by affidavits purporting to explain the delay. The application for admission came before SANKARAN NAIR, J., sitting as a single Judge, and on the 31st July he made an order in these terms: "Delay excused in the circumstances and appeal admitted."

When notice of this appeal was served on the respondents does not appear, but in the following November affidavits were filed controverting the material allegations in those on which delay had been excused. Further affidavits were subsequently filed on both sides.

The appeal thus admitted came on for hearing before a Division Bench of the Court on the 7th October, 1908, and at the outset it was objected that the appeal was out of time, and so not competent. The Court, after an examination of the several affidavits, accepted this view and dismissed the appeal as provided by section 4 of the Indian Limitation Act. A subsequent application for review failed.

It has been argued that the admission of the appeal by SANKARAN NAIR, J., was final, and that the Division Bench had no jurisdiction at the hearing of the appeal to reconsider the question whether the delay was excusable. But this order of admission was made not only in the absence of Ramasami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to reconsideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the Courts in India.

But there remains the contention that, at any rate, the Court exceeded its jurisdiction in permitting the question of limitation to be reopened at so late a stage as the hearing of the appeal. This objection, however, has all the appearance of an after-thought. It was not urged at the hearing, though the appellant was represented by so experienced an advocate as Sir Bashyam Ayyangar; nor was it even mentioned in the original review

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petition. It was no doubt advanced at a later stage as an additional ground for review, but it met with no success, for the High Court held that the procedure adopted in this case was in accordance with the usual practice of the Court. The authorities, moreover, show that this practice is not peculiar to Madras, and in the circumstances their Lordships hold that the Division Bench had jurisdiction to reconsider the sufficiency of the cause shown, and to do this at the hearing of the appeal.

But while this procedure may have the sanction of usage, it is manifestly open to grave objection. It may, as in this case, lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the Court comes to decide on the question of delay. Their Lordships therefore desire to impress on the Courts in India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal.

On the merits little need be said. It is the duty of a litigant to know the last day on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in section 5 of the Indian Limitation Act, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies. It was with the claim of such a litigant that the Division Bench had to deal, and after a careful and critical examination and appreciation of the evidence, the learned Judges distrusted his explanation and held that sufficient cause had not been shown. The Court therefore declined to exercise in his favour the power to excuse delay. It has not been shown that in this the Court fell into any error, and their Lordships consequently decline to interfere with its decision. They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitor for the respondent: *Chapman-Walkers and Shephard.*

J.V.W.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice
Sadasiya Ayyar and Mr. Justice Kumaraswami Sastriyar.*

VADDADI SANNAMMA (PETITIONER), APPELLANT,

v.

KODUGANTI RADHABHAYI AND TWO OTHERS
(RESPONDENTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 47, explanation—Abandonment of case against defendant properly impleaded, whether dismissal against such defendant—Madras Proprietary Estates Village Service Act (II of 1894), sec. 17—Madras Hereditary Village Offices Act (III of 1895), sec. 5—Service inam lands—Issue of inam title-deed therefor on one date with notification under section 17 of Madras Act II of 1894 enfranchising the lands at date subsequent to issue of deed—Mortgage of the lands in the interval, whether valid—Transfer of Property Act (IV of 1882), sec. 43, whether applicable to illegal transfers.

Held by the Full Bench:—Where a person has been properly impleaded as one of the defendants in a suit but the suit is dismissed as against him on account of the plaintiff's election to abandon his case so far as it affected that defendant, such a person is a 'defendant against whom a suit has been dismissed' within section 47, Civil Procedure Code.

Krishnappa v. Periasami (1917) I.L.R., 40 Mad., 964, distinguished.

An alienation of village service inam lands in a proprietary estate made after the grant of an inam title-deed of enfranchisement but before the date of the notification contemplated by section 17 of the Madras Act II of 1894 is invalid and inoperative on account of the prohibition contained in section 5 of the Madras Act III of 1895. The alienation being a prohibited and illegal one on the date on which it was made, the subsequent removal of the prohibition by the notification of enfranchisement of the service inam land does not render the alienation valid; section 43 of the Transfer of Property Act cannot be applied to make a transfer valid which on the date on which it was made was prohibited by a statute.

Narahari Sahu v. Korithan Naidu (1913) 24 M.L.J., 462 and *Sri Kakarlapudi Lakshminarayana Jagannada v. Sri Raja Kandukuri Balaswarya Prasad Rao* (1915) 23 M.L.J., 650, followed.

Anganwayya v. Narasayya (1908) 18 M.L.J., 241, overruled.

APPEAL against the Order of A. T. FORBES, the District Judge of Vizagapatam, in Appeal No. 414 of 1915, preferred against the

Order of N. RAMASWAMI, the District Munsif of Chodavaram, in SANNAMMA
Miscellaneous Petition No. 800 of 1915, in Execution Petition ^{v.} RADHABHAYI.
No. 241 of 1915, in Original Suit No. 384 of 1913.

The facts are given in the ORDER OF REFERENCE of ABDUR RAHIM, J.

Hon. Mr. B. N. Sarma for the appellant.

C. Rama Rao for Narayana Murti for the first respondent.

The other respondents did not appear.

This appeal came on for hearing in the first instance before ABDUR RAHIM and BAKEWELL, JJ., who made the following ORDERS OF REFERENCE TO A FULL BENCH.

ABDUR RAHIM, J.—The lands to which the dispute relates appertain to a village service inam and are situate in a proprietary estate. The authorities having decided to enfranchise the inam, the inam title-deed was granted on 18th August, 1906 but the notification spoken of in section 17 of Madras Act II of 1894, fixed 1st April, 1911, as the date from which the enfranchisement would take effect. Between these two dates, i.e., on 23rd January, 1909, these lands described by the mortgagors as 'the enfranchised mirasi and inam lands belonging to us' were mortgaged to the appellant who subsequently in 1915 obtained an ordinary mortgage decree. The first respondent also had a mortgage on the same property and sued to enforce it making the appellant a party; but being advised that a mortgage of service inam lands was unenforceable, he gave up his claim on the mortgage and obtained a simple money decree against mortgagors, his suit being dismissed as against the appellant. The first respondent's decree was in 1914, i.e., before the decree of the appellant. The properties being attached in execution of the former money decree, the latter asked by a petition in the execution proceedings that the lands may be sold subject to his mortgage decree. That petition has been rejected and the appeal is against that order.

ABDUR
RAHIM, J.

The respondent has taken the preliminary objection that no appeal lies, contending that although the appellant was impleaded as a party to the suit and his name is borne on the decree, he is not 'a party to the suit in which the decree was passed' within the meaning of section 47 of the Code of Civil Procedure, inasmuch as he ceased to be a proper party when the respondent gave up his claims on the mortgage. This proposition

SANNAMMA v. RADHABHAYI. is laid down by AYLING and KUMARASWAMI SASTRIYAR, JJ., in *Krishnappa v. Periyaswamy*(1) but SADASIYA AYYAR and PHILLIPS, JJ., held otherwise in *M. Venkataswami v. K. Chidambaram*—Second Appeal No. 888 of 1916(2) printed as a footnote to this page. It seems to me with all respect that in the former decision sufficient effect has not been given to the plain language of the section which is made still clearer by the explanation attached to it. The explanation says 'For the purposes of this section, a defendant against whom a suit has been dismissed is a party to the suit.' Nor can it be said that it is the duty of a Court charged with execution of a decree to see that a defendant against whom the suit has been dismissed was properly made a party or not. Having in view however the conflict of views expressed in *Krishnappa v. Periyaswamy*(1) and *M. Venkataswami v. K. Chidambaram*(2), the question should be solved by a Full Bench.

Upon the merits section 43 of the Transfer of Property Act has been invoked to validate the mortgage in favour of the appellant. But it has been ruled by this Court that that section has no application to alienations which are prohibited by law on the grounds of public policy. The matter is fully discussed by the learned Chief Justice in *Sri Kakarlapudi Lakshminarayana*

(1) (1917) I.L.R., 40 Mad., 964.

(2) (1918) I.L.R., 41 Mad., 420 (Footnote).

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JUDGMENT.—An important question of law as to the interpretation of section 47 of the Code of Civil Procedure (with the new explanation added by the Code of 1908) is involved in this appeal. The contention of Mr. Venkataramana Rao for the respondent is that *Krishnappa v. Periyaswamy*(1) relied on by the appellant is opposed to the Full Bench decision in *Ramaswami Sastrulu v. Kameswaramma*(2) and to the plain language of the explanation to section 47 of the Code of Civil Procedure and ought not to be followed.

We agree with Mr. Venkataramana Rao's contention and we do not think that the anomaly pointed out at page 967 of *Krishnappa v. Periyaswamy*(1) is a sufficient reason for overriding the plain legislative provision which was apparently introduced into the new Code for the express purpose of enacting as law the views

(1) (1917) I.L.R., 40 Mad., 964.

(2) (1900) I.L.R., 23 Mad., 361.

Jagannada v. Sri Raja Kandukuri Balasurya Prasada Row(1) with which I respectfully agree. The same view of the law is expressed in *Narahari Sahu v. Korithan Naidu*(2), *Batchu Ramayya v. Dara Satchi*(3) and *Karri Ramayya v. Villoori Jagannadham*(4), while a different view prevailed in *Angannayya v. Narasanna*(5). The decision in the last case is in direct conflict with the other decisions, all relating to alienations of service inam lands. And in my opinion the present case cannot be effectively distinguished from these by reason of the fact that on the date of the appellant's mortgage the inam title had been issued though the notification was not issued till long afterwards. When section 17 of Madras Act II of 1894 expressly says that the enfranchisement shall take effect only from the date of the notification, it seems to me that before that date the legal incidents attaching to the property including its inalienability remained unaltered. It could not be said that by issuing the title-deed the Government bound itself by way of contract to issue the notification, though the notification was certain to issue in ordinary course and in the latter sense it would be right to say that this expectation of the inam holder was not a 'mere possibility.' If the mortgagee could not rely on any contract in favour of the mortgagor, I find it still more difficult to say that the inam title-deed by itself created some sort of inchoate interest in the property free from all restraint of alienation,

(1) (1915) 28 M.L.J., 650.

(2) (1913) 24 M.L.J., 462.

(3) (1913) 14 M.L.T., 430.

(4) (1915) 18 M.L.T., 360.

(5) (1908) 18 M.L.J., 247.

expressed in the decisions of the Bombay and Madras High Courts on the old section 244 (corresponding to the present section 47) and embodied in the Full Bench decision in *Ramaswami Sastrulu v. Kameswaramma*(1) and of overruling by statutory enactment the decisions contra of the other High Courts on the question whether a defendant whose name appears in the decree without having been struck off previously from the record is a party with respect to whom the prohibition of a separate suit enacted in section 47 (old section 244) applies notwithstanding that he had been exonerated by the decree passed in the suit without an adjudication on the controversial questions between him and the plaintiff.

The second appeal is therefore dismissed with costs.

(1) (1900) I.L.R., 23 Mad., 361 (F.B.).

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although the Act says that the enfranchisement shall have no effect except from the date of notification. But as there is a conflict of decisions on the applicability of section 43 to village service inams I think this question also should be referred to the Full Bench.

I would therefore refer the following questions to a Full Bench for OPINION:

(1) Is a person who was impleaded as a defendant in a suit and against whom the suit is dismissed by the decree, a party to the suit in which the decree was passed within the meaning of section 47 of the Code of Civil Procedure, if the dismissal of the suit against him was due to the fact that at the trial the plaintiff abandoned that part of his claim by reason of which the defendant would be a proper party to the suit?

(2) Is a mortgage of village service inam lands in a proprietary estate executed after the grant of the title-deed of enfranchisement but before the date of the notification contemplated under section 17 of the Madras Act II of 1894 valid and operative?

BAKEWELL, J. BAKEWELL, J.—By section 17 of the Madras Proprietary Estates Village Service Act, 1894, the Government was empowered to enfranchise lands granted as remuneration of a village office from the condition of service, but 'such enfranchisement' was declared to 'take effect on or after the date fixed in the notification issued under section 19 for the levy of a village service cess.' That is to say the Government might perform the act constituting an enfranchisement but its operation was suspended until provision had been made for the remuneration of the services on which the land had been previously held. The holder of the office therefore retained the land on the former tenure until such provision had been made, but he acquired a further interest in the land which on the occurrence of the prescribed event would ripen into an absolute interest. In my opinion such an interest is assignable, and is not a mere possibility of a like nature with a chance of an heir-apparent succeeding to an estate or the chance of a relation obtaining a legacy on the death of a kinsman within the meaning of section 6 of the Transfer of Property Act, 1882, since it would become an absolute interest in the ordinary course of business.

In the present case the holder of the lands, after the execution of a deed of enfranchisement but before a notification had been

issued by Government for the levy of cess, purported to transfer by way of mortgage 'enfranchised mirasi and inam lands' held on service tenure, and I think that this was a transfer of the inchoate interest which I have described. The transfer could not operate to convey the subsisting interest in the lands in so far as it consisted of a service tenure (Madras Act III of 1895, section 5), but on the issue of the notification that interest became extinguished and the interest which passed under the mortgage became absolute, without any further act of the parties. The petitioner had therefore a valid security and was entitled to apply to the Court that an attachment of the lands should be declared subject thereto.

The decree under which the attachment was issued contains the name of the petitioner as party defendant, and recites the plaintiff's claim as being for a sum due on a mortgage and the decretal portion directs that the suit be dismissed as against the petitioner. The petitioner was a proper party to the suit as framed and the form of the decree was due to the relinquishment by the plaintiff of his claim under his mortgage and his acceptance of a simple money decree. The case in my opinion falls precisely within the explanation to section 47 of the Code of Civil Procedure, and the petitioner was a party to the suit and this appeal accordingly lies.

Having regard to the differences of opinion mentioned by my learned brother, I agree that the questions framed by him should be referred to a Full Bench.

ON THIS REFERENCE—

Hon. Mr. B. N. Sarma for the appellant.—An appeal lies as I was a party to the suit; see explanation to section 47, Civil Procedure Code. There is no statutory prohibition on the Government from alienating their reversionary interest to come into effect from the date of the notification. That is the reason for the wording in section 17 of the Madras Act II of 1894. The prohibition is only on the service holder. The inam title-deed is equivalent to an assignment of the Government revenue in return for a quit-rent and the party can mortgage the same.

[WALLIS, C.J.—The inam title-deed does not purport to grant the reversionary interest of the Government, nor does

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BAKEWELL, J. the deed purport to free from liability to service whatever was the service inam, viz., the melwaram or kudivaram or both.]

It has not been ascertained in this case whether kudivaram was also subject to service. If it was not so subject, it could have been validly alienated. Even supposing both the warams, i.e., the lands themselves were subject to service, there can be a valid mortgage of the lands as from the date of freedom from service; see section 43 of the Transfer of Property Act. *Narahari Sahu v. Korithan Naidu*(1) is against me and it is followed in other cases. *Angannayya v. Narasanna*(2) is in my favour.

P. Narayanamurti for the first respondent was not called upon.

The other respondents did not appear.

This appeal coming on for hearing the Court expressed the following OPINIONS:—

WALLIS, C.J. WALLIS, C.J.—I am clearly of opinion that, when a party has been properly impleaded as one of the defendants in a case and the case as against him would have proceeded to judgment but for the fact that the plaintiff elected to abandon part of his case and the suit was in consequence dismissed as against such defendant, he is 'a defendant against whom a suit has been dismissed' within the meaning of the explanation to section 47, Civil Procedure Code. The case which came before the Court in *Krishnappa v. Periyaswamy*(3), of a misjoinder of causes of action and of the plaintiff being required to proceed with one cause of action only and the suit being dismissed as against the defendants who had been joined in respect of the other cause of action only, may possibly stand on a different footing, as to hold that the cause of action which the Court was prohibited from trying may be gone into in execution by virtue of section 47, goes far to defeat the prohibition of joinder, and such a construction of section 47 should therefore be avoided if it is possible to do so. As that question is not before us, I express no opinion upon it, and will only say that the proper course in these cases appears to be for the Court to exercise the power, which it now has under Order I, rule 10 (2),

of ordering at any stage of the proceedings, the name of a defendant improperly joined to be struck out, instead of dismissing the suit as against him. That will, as held by the Full Bench in *Kamaswami Sastrulu v. Kameswaramma*(1), have the effect of taking him out of the operation of section 47 which ought not to apply to him seeing that he has no real concern with the suit. I would answer the first question in the affirmative.

As regards the second question, under section 4 of the Madras Hereditary Village Offices Act, III of 1895, the word 'emoluments' includes 'lands and assignments of revenue payable in respect of such lands,' and according to the finding the emoluments in this case included both the lands and an assignment of revenue arising out of them. Under section 5 these emoluments are 'not liable to be transferred or encumbered in any manner whatsoever,' reproducing in substance the provisions of Regulation VI of 1831 which made such alienations null and void. Section 17 of the Madras Proprietary Estates Village Service Act, II of 1894, provides that:

"if the remuneration of a village office consists in whole or in part of lands, or assignments of revenue payable in respect of lands, granted or continued in respect of or annexed to such village office by the State, the Government may enfranchise the said lands from the condition of service by the imposition of quit-rent,—and such enfranchisement shall take effect from such date as Government may notify."

Government in this case issued an inam title-deed which recited that the inam consisted of an assignment of land revenue and commuted its right to resume the assignment in consideration of payment to Government of a quit-rent in addition to the existing jodi payable to the proprietor. It said nothing about the enfranchisement of the inam or the lands from the condition of service and they remained liable as before, and continued to form the emoluments of the village office until the issue of the notification which was after the date of the alienation now in question. The lands therefore continued subject to the prohibition against the incumbrance in any manner whatsoever, and the alienation in question was undoubtedly

(1) (1913) 24 M.L.J., 462.

(2) (1908) 18 M.L.J., 247.

(3) (1917) I.L.R., 40 Mad., 964.

(1) (1900) I.L.R., 23 Mad., 361 (F.B.).

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void at the time it was made. As pointed out in the ORDER OF REFERENCE, there is a conflict of decisions in this Court as to whether the subsequent enfranchisement has the effect of validating such alienations. In 1907 it was held by WHITE, C.J., and MILLER, J., in *Angannayya v. Narasayya*(1), that, though the transfer was null and void under Regulation VI of 1831, yet after enfranchisement the transferee was entitled under section 43 of the Transfer of Property Act to require that the transfer should operate on the alienable interest subsequently acquired by the transferor. No authority was cited, and the original illegality of the transfer was not referred to. On the other hand, in *Narahari Sahu v. Korithan Naidu*(2) it was held on similar facts by SUNDARA AYYAR and BENSON, JJ., that section 43 has no application to cases where the transfer is forbidden by law on grounds of public policy, referring to *Ramasami Naik v. Ramasami Chetti*(3). This case was approved and followed in *Batchu Ramayya v. Dara Satchi*(4) and *Karri Ramayya v. Villoori Jagannadhan*(5). The decision in *Ramasami Naik v. Ramasami Chetti*(3), on which reliance was placed, has since been followed in *Sri Kakarlapudi Lakshminarayana Jagannada v. Sri Rajah Kandukuri Balasurya Prasada Row*(6). We have not been referred to any English decisions pointing the other way, and on the whole I think the sound position for us to proceed on is that no equities arise out of a transaction which is prohibited by law on grounds of public policy. The present case no doubt differs from the earlier cases because the transfer by way of mortgage purported to be of 'enfranchised mirasi and inam lands' and was made after execution of the inam deed by which a quit-rent was imposed on the lands, a step which was intended to be followed, and was followed at an early date, by a publication of the notification enfranchising the lands. The transfer was none the less illegal when it was made, and on the whole I do not think there are sufficient reasons for departing from what I understand to be the general rule especially in the absence of English authority in point. In *Bettesworth v. Dean of St.*

(1) (1908) 18 M.L.J., 247.
(3) (1907) I.L.R., 30 Mad., 255.
(5) (1915) 18 M.L.T., 360.

(2) (1913) 24 M.L.J., 462.
(4) (1913) 14 M.L.T., 430.
(6) (1915) 28 M.L.J., 650.

Paul's(1), which is referred to by Lord MACNAGHTEN in *Tailby v. The Official Receiver*(2), where a covenant in a lease to renew for ninety-nine years which was lawful when made was rendered illegal by subsequent statutes, it was held by the House of Lords, that, as the statutes permitted leases for forty years, specific performance by executing a fresh lease for forty years might be decreed, but in that case the original agreement was lawful, and it does not cover the present case where the transaction was illegal at the time it was entered into. As regards the second question my answer is that the transfer was clearly illegal and inoperative when it was made and did not become operative on the subsequent enfranchisement of the lands.

SADASIVA AYYAR, J.—I agree with my Lord in the answers to be given to the two questions referred to us.

KUMARASWAMI SASTRIYAR, J.—I agree.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ayling, Mr. Justice Coutts Trotter and
Mr. Justice Kumaraswami Sastriyar.

PANDIRI VEERANNA (PLAINTIFF), APPELLANT,

GRANDI VEERABHADRASWAMI alias VEERABHADRUDE
(SECOND DEFENDANT), RESPONDENT.*

Limitation Act (IX of 1908), ss. 21 (2), 19 and 20—Partnership—Acknowledgment of liability or payment by one partner, when binding on others.

Direct evidence that one of several partners or co-contractors had authority to acknowledge liability or make payments so as to save limitation as against his partners or co-contractors is not necessary, but such authority can be inferred from surrounding circumstances such as the position of other co-contractors or partners.

Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar (1909) I.L.R., 32 Mad., 421 and *Shaik Mohideen Sahib v. The Official Assignee of Madras* (1912) I.L.R., 35 Mad., 142 at p. 145, considered.

(1) (1728) 1 Bro. P.C., 240.

(2) (1888) 13 A.C., 523 at p. 552.

* Appeal No. 343 of 1916.

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APPEAL against the decree of P. C. TIRUVENKATA ACHARIYAR, the Additional Temporary Subordinate Judge, Rajahmundry, in Original Suit No. 3 of 1916.

This was a suit brought in December 1914 for Rs. 11,000 due on transactions carried on between the plaintiff and the defendants Nos. 1 and 2 (father and son) under an agreement that the plaintiff was to advance the necessary capital at 12 per cent interest to the defendants to enable them to purchase timber on their own account and to forward the same to the plaintiff for sale at 2 per cent commission. The defendants constituted a joint Hindu family and were carrying on the trade as a joint family concern and the account of the plaintiff for several years showed the names of both the defendants as the parties liable. There were several periodical settlements of accounts and acknowledgments of liability by both the defendants till March 1911. In September 1913 the first defendant alone settled accounts with the plaintiff and executed in his favour a promissory note for the balance found due and also gave a letter to the plaintiff acknowledging the joint liability of himself and his son (the second defendant) for Rs. 9,855. On these facts the plaintiff prayed for a decree against both the defendants for Rs. 11,000. The first defendant was *ex parte*. The second defendant contended *inter alia* that he had no connexion with the timber trade, that he was carrying on separately a cloth trade, that at any rate his father had no authority to acknowledge liability on his behalf and that the settlement, acknowledgment of liability, and the promissory note signed by his father were not binding on him. The Subordinate Judge held that the timber trade was an ancestral family trade of both the defendants, that both of them were liable to pay the plaintiff Rs. 11,000 from out of their family ancestral property and that the first defendant alone and not the second defendant was personally liable for the claim as the second defendant was not a party to the settlement, promissory note and the letter of acknowledgment given to the plaintiff by the first defendant.

The plaintiff preferred this appeal for a personal decree against the second defendant also on the ground that the settlement, promissory note and acknowledgment made by the father in 1913 bound the second defendant also.

V. Ramadoss for the appellant.

T. Ramachandra Rao for the respondent.

This appeal came on for hearing in the first instance before WALLIS, C.J., and KUMARASWAMI SASTRIYAR, J., who made the following ORDERS OF REFERENCE TO A FULL BENCH:—

WALLIS, C.J.—It is quite clear in this case that the first defendant and his adult son, the second defendant, carried on business as timber merchants with the joint family property. It is also clear that the advances made by the plaintiff were made to them both, and that the second defendant was personally liable on them as well as the first defendant. This is abundantly proved by the fact that the second defendant has signed the settlements in the plaintiff's books (Exhibit A), dated the 27th April, 1907, and A-1, dated the 12th September, 1909, and the promissory notes D, dated the 1st May 1907, and E, dated the 13th September, 1909. He did not sign the settlement A-2, the promissory note F, dated the 26th September, 1910, or the letter J, dated the 1st October, 1910, as he was absent, but on the 7th February, 1911, he signed the letter (Exhibit G), set out in the judgment of the Subordinate Judge, in which he stated that he and his father had been borrowing from the plaintiff, that his father had settled accounts on the 26th September, 1910, and signed in the plaintiff's book, that he had not signed as he was not present, and that subsequently they had received further advances to the extent of Rs. 4,000. In this letter he undertook to discharge both these amounts on his personal liability and added: "There subsists also my personal liability for the whole of the amount payable according to your accounts. As I did not sign in your accounts, this letter was written and given." He did not however sign the subsequent settlement A-3, dated the 7th September 1913, or the promissory-note (Exhibit H), dated the 7th September 1913, or the letter (Exhibit K), dated the 9th September 1913, by which the first defendant acknowledged the joint indebtedness to amount to Rs. 9,855 and arranged for a further advance of Rs. 1,200 for which they were to give a fresh mortgage. The plaintiff has given evidence in support of his case, and neither the first nor the second defendant has ventured to go into the box; and the witnesses called for the second defendant to prove that he had no

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connexion with his father's business are contradicted by the documents under his own signature already mentioned. There is evidence, and it is the second defendant's case, that for the last few years he has been looking after a cloth business, and according to the plaintiff's evidence the first defendant was the manager and always wrote the letters and invoices relating to the timber business.

In these circumstances, the only question is whether the suit is barred against the second defendant personally, and this depends on whether the first defendant can be assumed to have had implied authority to sign the settlement in Exhibit A-3 and the letter Exhibit K on behalf of the second defendant as well as himself. The last acknowledgments were made by the first defendant when he was managing the joint timber business which was being carried on with joint family funds by the first and second defendants as co-contractors or partners and while the second defendant was looking after another business. According to the decisions of this Court in *Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar*(1) and in *Shaik Mohideen Sahib v. Official Assignee of Madras*(2), these facts are not sufficient to raise a presumption that the first defendant had authority to make an acknowledgment on behalf of the second defendant. In the latter case it was expressly decided that the fact of a partner being left in management of the business did not give rise to a presumption that he was authorized to sign acknowledgments. I have pointed out in *K. R. V. Firm v. Seetharamaswami*(3) that a different view has been taken by other Courts in India in the cases cited [to which may be added *Lalta Prasad v. Babu Prasad*(4)] and also apparently in England where the statutory provisions are substantially the same as in India. The point is fully discussed in *K. R. V. Firm v. Seetharamaswami*(3) and, as it is one of great importance to the commercial community, we have decided to refer to a Full Bench the question :

“ Whether, in the absence of direct evidence that a co-contractor or partner has authorized his co-contractor or partner to make acknowledgments or payments saving limitation on his

(1) (1909) I.L.R., 32 Mad., 421.
(3) (1914) I.L.R., 37 Mad., 146.

(2) (1912) I.L.R., 35 Mad., 142.
(4) (1910) I.L.R., 32 All., 51.

behalf, such authority can be inferred from other circumstances such as the position of the other co-contractors or partners in the business ?”

KUMARASWAMI SASTRIYAR, J.—I agree to the reference proposed by my Lord, as I am of opinion that the decisions in *Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar*(1) and in *Shaik Mohideen Sahib v. Official Assignee of Madras*(2) require reconsideration in the light of the decision in *K. R. V. Firm v. Seetharamaswami*(3) which, if I may say so with respect, gives cogent reasons for placing on section 21 of the Limitation Act a more liberal construction in conformity with the decisions of the other High Courts. There is no essential difference between the position of partners in England and India and if under section 251 of the Contract Act the act of one partner which is necessary for or is usually done in the course of the business binds the other partners there is no reason why acknowledgments of liability or payments made by one partner should not bind the others. I have rarely come across any instance where partners, while providing for authority to borrow on behalf of the firm, make any express provision for acknowledgments or payments with reference to limitation. Very often partnership agreement restricts the powers of certain of the partners to borrow, but when there is no restriction, business is conducted on the footing that one who has the power to borrow has also power to settle accounts, make payments and in general to do all things necessary to ensure the credit of the firm. It is well known that Marvadis and Nattukottai Chettis who open accounts with persons insist on periodical settlements and would make no further advances unless accounts are settled when required. The object of the settlement is to prevent disputes as to its correctness and pleas of limitation from being raised. It is difficult to see why partners who allow business to be conducted on lines which are well known to everybody should not be presumed to have given authority in the absence of evidence that the authority to borrow was limited and excluded the doing of things which are ordinarily done where accounts are opened with money-lenders.

(1) (1909) I.L.R., 32 Mad., 421. (2) (1912) I.L.R., 35 Mad., 142.
(3) (1914) I.L.R., 37 Mad., 146.

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I do not think that the wording of section 21 concludes the matter or makes any difference in the general law applicable to partners. The use of the words 'by reason only of' in the Acts of 1877 and 1908 instead of the words 'by reason of' suggests that the legislature did not intend to affect the powers of one partner to bind another by acts falling under section 251 of the Contract Act. If it is shown that one partner has been borrowing moneys, making payments and settling accounts without objection by the other partners, it may well be presumed that he was authorized to do so. There is no reason why we should go further and require an express authority treating the implied authority as useless for the purpose of section 21.

Section 21 is similar in language to section 14 of the Mercantile Law Amendment Act of 1856 which has received judicial interpretation in England so far as partners are concerned. The following passage from Lightwood's Time Limit on Actions, page 383, correctly summarizes the law in England on the subject:—

"Though the doctrine of implied agency as between co-debtors is abolished one may still be the actual agent of the other so as to bind him by payment. In the absence of evidence to the contrary one partner is presumed to be the agent of the other to make payments in respect of partnership debts [*Goodwin v. Parton*(1)], and though the agency is in general terminated by a dissolution of partnership [*Watson v. Woodman*(2)], it may, under special circumstances, be treated as continuing where for instances the retirement of a partner is kept secret and payments of interest are made in the name of the firm, *In re Tucker*(3)."

I agree with the judgment in *K. R. V. Firm v. Seetharamaswami*(4), which deals fully with the English and Indian statutes and decisions and which is entirely in accordance with my experience of the consciousness of the mercantile community and the course of business usually followed. The same view has subsequently been taken in *Lalta Prasad v. Babu Prasad*(5), and in *Abdulalli v. Ranchodlal*(6) and in *Karmlai Abdulla v. Karimji Jiwani*(7).

(1) (1879) 41 L.T., 91.

(3) (1894) 3 Ch., 429.

(5) (1910) I.L.R., 32 All., 51.

(2) (1875) 20 Eq., 721.

(4) (1914) I.L.R., 37 Mad., 146.

(6) (1917) 19 Bom. L.R., 86 at p. 95.

(7) (1915) I.L.R., 39 Bom., 261 (P.C.).

On this Reference—

V. Ramadoss for appellants.—The authority to acknowledge liability to pay or settle so as to bind partners or co-contractors need not be expressed but may be implied. Implication may be from other evidence in the case, such as that such acts are usually done by the partners: see *Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar*(1) and *Shaik Mohideen Sahib v. Official Assignee of Madras*(2). In section 21 (2) of the Limitation Act the words are 'by reason only of payment'; i.e., mere payment alone is not such evidence. The case of *K. R. V. Firm v. Seetharamaswami*(3) is inclined to the opinion that such authority can be inferred from other evidence. There is really no inconsistency in the three Madras cases. Section 251 of the Contract Act declares when one partner's act binds his co-partners. Such authority can be implied if the partner had authority to borrow: *Muthuswami Nadan v. Sankaralingam Chetty*(4) and *Chidambaram Chetti v. Ramaswami Chetti*(5). The fact that the person paying in this case is father of the second defendant and manager of the family is other evidence from which the authority can be inferred. See also *In re Tucker*(6) and *In re Macdonald, Dick v. Fraser*(7).

T. Ramachandra Rao for respondents.—From the mere fact of the person paying being a partner, authority to pay on behalf of others cannot be inferred. It is true that express authority to pay need not be proved. The mere fact that he is the manager or that he was generally conducting the business is not enough. There are no facts in the case from which authority can be inferred.

OPINION.—In this case the two defendants carried on the business of timber merchants as a family business, they being father and son in an undivided Hindu family. They are sued on a debt which would be statute-barred in the absence of an acknowledgment, sufficient within section 19 of the Limitation Act to take it out of the statute. There is such an acknowledgment, but it is only signed by the first defendant, the father, and the question is whether it can operate as against the son, the co-defendant also.

(1) (1909) I.L.R., 32 Mad., 421.

(3) (1914) I.L.R., 37 Mad., 146.

(5) (1914) 27 M.L.J., 631 at p. 634.

(2) (1912) I.L.R., 35 Mad., 142.

(4) (1915) 18 M.L.T., 273.

(6) (1894) 3 Ch., 429 C.A.

(7) (1897) 2 Ch., 181 at p. 188.

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The learned Judges who referred the case have propounded a question about the answer to which we feel no hesitation, but it is obviously referred to us because they felt a doubt as to whether the decisions in *Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar*(1) and *Shaik Mohideen Sahib v. The Official Assignee of Madras*(2) did not preclude them from arriving at the conclusion which they clearly thought to be the right one.

The exact question propounded is

‘whether, in the absence of direct evidence that a co-contractor or partner has authorized his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other circumstances such as the position of the other co-contractors or partners in the business.’

Our answer is in the affirmative. We think that direct evidence of a specific authority to give acknowledgments is quite unnecessary, and that authority may be inferred from the surrounding circumstances, though it is of course quite beyond our province to indicate what circumstances should in our opinion be deemed sufficient to warrant the inference. It is important to notice the exact wording of section 21 (2) of the Limitation Act. The section does not say that a person shall not be liable on an acknowledgment signed by the partner by reason only of his being a partner but by reason only of a written acknowledgment signed by his partner; and it amounts to saying that if you have no more than a written acknowledgment signed by one defendant the fact that the other defendant is his partner cannot affect the latter's liability. You could obviously have a case where one partner signed an acknowledgment in respect of a gambling debt of his own; but for the sub-section, proof of the acknowledgment would be sufficient to fix the other partner with liability, a conclusion manifestly repugnant both to sense and justice. We see nothing in the sub-section to make it necessary to suppose that it is intended to apply to transactions conducted in the ordinary course of partnership business. We need only refer to the general principle of law embodied in section 251 of the Contract Act that partners are the agents of one another and that their acts done in the ordinary course of the partnership business bind the partnership.

(1) (1909) I.L.R., 32 Mad., 421.

(2) (1912) I.L.R., 35 Mad., 142.

As regards the two decisions referred to, it is not quite easy to say whether they should properly be regarded as laying down as a condition of liability that there should be direct evidence of express authority to give acknowledgments. But at least one sentence in *Shaik Mohideen Sahib v. The Official Assignee of Madras*(1) lends colour to that view. WHITE, C.J., referring to the former decision in *Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar*(2), says:

“Following the principle we here *Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar*(2) lay down, we have to see in this case if there is evidence that the person who made the acknowledgment had authority to do so on behalf of his firm.”

Those words are capable of the construction that what is meant is direct evidence of specific authority, and they were obviously so regarded by the learned Judges who referred this question to us. If that be so we have no hesitation in saying that they were wrongly decided and should no longer be regarded as law. Such a view is completely at variance with that taken by the other Courts of India and by the English Courts in their construction of the corresponding sections of the English Acts and would obviously put a premium on commercial dishonesty.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

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v.

AYYANERI GOVINDA REDDY AND ANOTHER
(DEFENDANTS), RESPONDENTS.*

Mortgage—Transferee from benamidar—Right of suit.

A transferee-mortgagee can maintain a suit on the mortgage though the mortgagee named in the bond is only a benamidar and though the beneficial owner is not added as a party.

Kirtibas Das v. Gopal Jiu (1914) 19 C.L.J., 193, and *Parmeshwar Dat v. Anardan Dat* (1915) I.L.R., 37 All., 113, followed.

SECOND APPEAL against the decree of K. KRISHNAMACHARIYAR, the Subordinate Judge of North Arcot, in Appeal No. 113 of

(1) (1912) I.L.R., 35 Mad., 142 at p. 145. (2) (1909) I.L.R., 32 Mad., 421.
* Second Appeal No. 1887 of 1915.

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1914, preferred against the decree of M. A. KRISHNA RAO, the District Munsif of Sholingur, in Original Suit No. 203 of 1913.

The plaintiff brought this suit upon a registered mortgage deed executed by the first defendant in favour of one Rengasami Reddi and transferred by him to the plaintiff. The second defendant is a subsequent purchaser of the property. The second defendant contended that the original mortgagee Rengasami Reddi, was only a benamidar for the second defendant's judgment-debtors, the mother and sister of the first defendant, and that the assignment in favour of the plaintiff was a nominal and sham transaction. The Court of first instance upholding the above contentions dismissed the plaintiff's suit. The lower Appellate Court confirmed the above decision, observing that a benamidar in respect of a mortgage deed cannot sue and recover on the mortgage. The plaintiff preferred this second appeal.

C. V. Anantakrishna Ayyar for the appellant.

P. Venkataramana Rao for the respondents.

SPENCER, J.

SPENCER, J.—In the Calcutta and Allahabad High Courts it appears to have been settled by judicial decisions that a benami mortgagee may maintain a suit upon a mortgage: vide *Kirtibas Das v. Gopal Jiu*(1), *Sachitananda Mohapatra v. Baloram Gorain*(2), and *Parmeshwar Dat v. Anardan Dat*(3). In this Court there is no reported case on the point so far as I am aware; but in *Chidambara Mandarayan v. Singaram*(4), the same view was taken as in Calcutta and Allahabad and three more unreported cases were therein referred to as authorities that precluded arguments being raised to the contrary. In *Kuthaperumal Rajali v. The Secretary of State for India*(5), the decision in *Chidambara Mandarayan v. Singaram*(4) was quoted with approval and its principle was explained as being that a benamidar's suit is equivalent to a suit by an agent of an undisclosed principal. If a mortgagor can successfully resist a suit brought by the beneficial owner of the bond on the ground that he is not the person named in the bond as mortgagee, it is difficult to see on what grounds he could also be successful

(1) (1914) 19 C.L.J., 193.

(2) (1897) I.L.R., 24 Calc., 644.

(3) (1915) I.L.R., 37 All., 113.

(4) Second Appeal No. 186 of 1903,

(5) (1907) I.L.R., 30 Mad., 245.

against the ostensible owner of the legal estate when the real owner holds back. In case of dispute the remedy would be to join the person alleged to be the real owner as a party, so that he might be bound by the decision. If the benamidar can sue upon the bond there is no reason why he should not assign his right of suit to another for proper consideration. In this case, however, there is a further difficulty. Both the lower Courts have found that the transfer to the plaintiff by Rangaswamy Mudali, the benamidar, was not a *bona fide* transaction.

The Subordinate Judge gives as one of his reasons for this finding that the transfer was made on the very date upon which the second defendant sued to recover the consideration of the pro-note from the real mortgagee. If he meant that the transaction was one in fraud of creditors, it must be set aside in a suit framed for that purpose. So far as the parties to this suit are concerned it is sufficient that Rangaswamy Mudali says he transferred his title to the plaintiff and received consideration for the transfer. His act must be taken as operating to pass whatever title he had to sue the mortgagor and I have held above on the point of law that he had a title to sue as mortgagee though he was a benamidar.

I agree therefore that the lower Court's decree must be reversed and a decree passed for the plaintiff.

SESHAGIRI AYYAR, J.—Both the Courts below have found that the plaintiff's assignor was only a benamidar in respect of the mortgage sued on. We see no reason to differ from this conclusion. The further question whether a benamidar can sue in his own name on the mortgage is not free from difficulty.

There is only a thin line of demarcation between a benamidar and an agent or trustee. The element of confidence in the ostensible owner exists in all the three cases. In the case of an agent, the law gives a qualified right of suit to him. See section 230 of the Contract Act. In the case of a trustee, the law recognizes him alone as entitled to deal with the outside world, because the legal estate vests in him; and until discharge he represents that estate. The case of a benamidar is slightly different. He is not the legal owner because although from the outset he is expected to screen the real owner from the public, he is to be only the alias of the latter, until he chooses to reveal

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himself as the person entitled. Such an attitude is insufficient to create a relationship of principal and agent either.

In this view of his status, the question is whether he should be allowed to sue in his own name. The Judicial Committee of the Privy Council apparently held that he can sue to recover debts; *Gopeekrist Gosain v. Gungapersaud Gosain*(1). In regard to negotiable instruments, it was held in *Subba Narayana Vadhiyar v. Ramaswami Aiyar*(2) that he alone was competent to maintain a suit. An extension of this principle was made in *Sivasankaran Pillai v. Panchami Kesiyar*(3), where he was held entitled to sue for a debt due on a simple bond: A still further inroad upon the rights of the real owner was made in *Sree Raja Datla Venkata Suryanarayana Jagopathiraju v. Goluguri Bupiraju*(4). In that case it was held that a benamidar can sue to set aside a sale. It may here be mentioned that an attempt to bar his right in all cases of suits relating to immovable property in general did not meet with approval in Madras. See observations in *Kuthaperumal Rajali v. The Secretary of State for India*(5). None the less it was held that he is not entitled to sue for rent: *Kuppu Konan v. Thirugnana Sammandan Pillai*(6). Suits in ejectment have been regarded as outside his rights; *Kuthaperumal Rajali v. The Secretary of State for India*(5).

As regards the other High Courts, in Allahabad the benamidar is allowed to sue on the mortgage: *Parmeshwar Dat v. Anardan Lal*(7). A suit in ejectment is also allowed by that High Court: *Nand Kishore Lal v. Ahamad Ata*(8). In Calcutta, notwithstanding *Munshi Basiruddin Ahmed v. Mahomed Jalish Patwari*(9), the later decisions concede his right to sue on a mortgage: *Hara Gobinda Saha v. Purna Chendra Saha*(10) and *Kirtibas Das v. Gopal Jiu*(11) following *Sachitnanda Mohapatra v. Baloram Gorain*(12). But he is not allowed to sue in ejectment: *Mohendra Nath Mookerjee v. Khali Prashad*

(1) (1854) 6 M.I.A., 53 at pp. 72 and 73.
(2) (1907) I.L.R., 30 Mad., 88. (3) (1898) 8 M.L.J., 302.
(4) (191) I.L.R., 34 Mad., 143. (5) (1907) I.L.R., 30 Mad., 245.
(6) (1908) I.L.R., 31 Mad., 431. (7) (1915) I.L.R., 37 All., 113.
(8) (1896) I.L.R., 18 All., 69. (9) (1908) 12 C.W.N., 409.
(10) (1910) 11 C.L.J., 47. (11) (1914) 19 C.L.J., 193.
(12) (1897) I.L.R., 24 Cal., 644.

Johuri(1). In Bombay also, the same view seems to prevail: see *Ravji v. Mahadev*(2).

Probably, it would be more logical to permit the benamidar to sue in all cases, leaving it to the real owner, to his remedies against him in a separate suit. The decisions which apply the rule of res judicata against the real owners and even permit him to execute a decree obtained by the benamidar are not inconsistent with this view. It may be that suits in ejectment stand on a different footing from other suits. In such suits the legal right of the plaintiff and his right to eject are directly in question. It may be said that the defendant can plead *jus tertii*. These considerations may not be altogether absent in other suits. However that may be, it is not necessary at present to canvass the correctness of his position in regard to suits for ejectment.

I think that prima facie a suit on a mortgage is one to recover a debt, although such a debt is charged on immovable property: consequently, the dictum of the Privy Council in *Gopeekrist Gosain v. Gungapersaud Gosain*(3) is applicable to such a suit. It was pointed out in *Chidambara Mandarayan v. Singaram*(4) that the practice in this Presidency is to permit the benamidar to sue on a mortgage; and that practice is in consonance with what obtains in the other High Courts. A further argument was addressed to us on the finding of the Subordinate Judge that the transfer to the plaintiff by the first benamidar Rengaswami was in fraud of the creditor, the second defendant. Even accepting this finding it is not open to the second defendant to resist the suit without first suing to set aside the transfer: Vide *Palaniandi Chetty v. Appavu Cheltiar*(5). Under these circumstances we must hold that the plaintiff must be allowed to sue in his own name. The decrees of the Courts below must be reversed and the usual mortgage decree should be passed for the amount sued for. Time for payment will be six months from this date. Each party will bear his own costs throughout.

S.V.

(1) (1903) I.L.R., 30 Cal., 265. (2) (1898) I.L.R., 22 Bom., 672.
(3) (1854) 6 M.I.A., 53. (4) Second Appeal No. 186 of 1908.
(5) (1917) 30 M.L.J., 565.

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REDDY.
—
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APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Bakewell.

GUNTAPALLI NARASIMHAYA AND THREE OTHERS
(COUNTER-PETITIONERS), APPELLANTS,

v.

MARLAPATI VEERARAGHAVULU AND OTHERS
(PETITIONER AND FIFTH COUNTER-PETITIONER),
RESPONDENTS.*

Provincial Insolvency Act (III of 1907), ss. 20 and 47—Sale by receiver of property alleged to belong to an insolvent—Property in possession of third person—Obstruction by such third person—Summary enquiry by District Judge—Order directing delivery of possession, legality of—‘Proceedings’ in section 47 of the Act, meaning of.

Certain property alleged to belong to an insolvent was sold by the receiver under section 20 of the Provincial Insolvency Act. The purchaser whilst attempting to take possession, was obstructed by the appellants who claimed to be in possession of the property as owners thereof. The District Judge, purporting to act under section 47 of the Act, after a summary enquiry, ordered possession to be given to the purchaser:

Held, that the District Judge had no jurisdiction to pass such an order as section 47 only lays down the procedure to be followed by the Insolvency Judge with regard to proceedings under the Act.

Held, also, that the word ‘proceedings’ in section 47 of the Act means the proceedings of the Court and not the act of the receiver under section 20 of the Act.

Minatoonnassa Bibee v. Khatoonnassa Bibee (1894) I.L.R., 21 Cal., 479 and *Golam Hossein Cassim Arif v. Fatima Begam* (1910) 6 I.C., 300, explained.

Cheda Lal v. Lachman Farshad (1917) 27 I.C., 820, approved.

APPEAL against the order of K. SRINIVASA RAO, the District Judge of Guntūr, in Interlocutory Application No. 609 of 1916, in Insolvency Petition No. 3 of 1912.

The necessary facts appear from the judgment.

M. Subbaraya Ayyar for the appellants.

R. Satyamurti Ayyar for the respondents.

The judgment of the Court was delivered by

ABDUR
RAHIM, J.

ABDUR RAHIM, J.—This appeal arises in certain insolvency proceedings in the mufassal Court to which the Provincial Insolvency Act III of 1907 applies. A man called Venkata-krishnayya was declared insolvent and the receiver who was

appointed in insolvency sold some property which was alleged to belong to the insolvent and to have been mortgaged by him to the first respondent and in that sale, the first respondent bought the property. When the purchaser the first respondent, wanted to take possession, he was obstructed by the appellants before us who claimed title to the property in their own right and also alleged that they had been for a long time in possession of the land. The District Judge purporting to act under section 47 of the Provincial Insolvency Act has held a summary enquiry and directed that the purchaser, the first respondent, be put in possession of the land. We do not think that section 47 of the Insolvency Act authorized the District Judge to act in this manner and by a summary proceeding to order the appellants to deliver possession of the land to the first respondent. Section 47 says:

“Subject to the provisions of this Act, the Court in regard to proceedings under this Act shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction.”

What this section lays down is the procedure to be followed by the Insolvency Judge with regard to proceedings had under this Act. But the ‘proceedings’ referred to means the proceedings of the Court and not the act of a receiver done under section 20 of the Insolvency Act. The powers given to the receiver under section 20 are exercised by him standing in the shoes of the insolvent in the interests of the creditors. He does not in any way act as a Court and whatever he does in this connexion he does merely on behalf of the insolvent. The learned counsel for the respondent has asked us to say that under section 47 the District Judge sitting in the Insolvency Court is empowered to try this matter as one in execution of a decree. To that the simple answer is that there was no decree for execution. There was no decree at all in the case and it would be going much too far to say that a judge in insolvency in the mufassal has powers by a summary proceeding to decide questions of title with respect to property which is claimed by third persons. The two Calcutta decisions *Minatoonnassa Bibee v. Khatoonnassa Bibee* (1) and *Golam Hossein Cassim Arif v. Fatima*

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* Appeal Against Order No. 68 of 1917.

(1) (1894) I.L.R., 21 Cal., 479.

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Begam(1), which were cited by the District Judge in support of his view were not under the Insolvency Act at all. They were rulings in connexion with questions arising in the execution of decrees under the Civil Procedure Code. On the other hand there is a ruling of the Allahabad High Court in *Cheda Lal v. Lachman Parshad*(2), which enunciates the same view as we have suggested.

The appeal is allowed and the judgment of the District Judge must be set aside and the first respondent's petition dismissed with costs throughout.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

CHELIMI CHETTY AND FIVE OTHERS (RESPONDENTS

Nos. 1 AND 3 TO 6), APPELLANTS,

v.

SUBBAMMA (PETITIONER, SEVENTH DEFENDANT), RESPONDENT.*

Hindu Law—Joint family—Suit for partition on behalf of minor—Death of minor before the filing of written statement—Severance of the joint status, if effected—Legal representative of minor, right of, to continue the suit.

The rule that the institution of a suit for partition of joint family property effects a severance of the joint status is not applicable to a suit instituted on behalf of a minor; for in such suit it is for the Court to determine whether a decree for partition will be beneficial to the minor.

Where a minor plaintiff dies during the pendency of the suit his legal representatives are not entitled to continue the suit.

Girja Bai v. Sadashiv Dhundira (1916) I.L.R., 43 Cal., 1931; *Sundara Rajan v. Arunachalam Chetti*(1916) I.L.R., 39 Mad., 159, referred to.

SECOND APPEAL against the decree of J. N. Roy, the District Judge of North Arcot, in Miscellaneous Appeal No. 18 of 1915, preferred against the order of K. KRISHNAMA ACHARIYAR, the Subordinate Judge of North Arcot, Civil Miscellaneous Petition No. 67 of 1915 in Original Suit No. 59 of 1914.

The material facts and contentions appear from the judgment.

A. Krishnaswami Ayyar for the appellants.

(1) (1910) 6 I.C., 300.

(2) (1917) 37 I.C., 830.

* Second Appeal No. 1543 of 1917.

N. S. Rangaswami Ayyangar for T. Narasimha Ayyangar for the respondents.

The judgment of the Court was delivered by

Abdur Rahim, J.—This matter arises in connexion with a suit instituted on behalf of a minor member of a joint Hindu family for partition. The minor plaintiff died after the institution of the suit but before the written statement was filed. The respondent before us, who is the mother of the plaintiff, applied to the first Court to be brought on record and for permission to continue the suit as legal representative of the deceased plaintiff. That Court held that no cause of action survived and refused the application of the respondent. On appeal, however, the District Judge set aside the order of the first Court holding that the respondent was entitled to continue the suit as legal representative of the plaintiff. The contention before us on behalf of the defendants in the suit is that when the minor died whatever rights he had in the family property survived to the other members of the family as there was no partition. A rather interesting question was discussed before us as to whether an appeal lay to the District Judge from the order of the Court of first instance, but the learned vakil for the respondent did not mean to persist in the objection as to whether the proper remedy of the defendants in this Court was by way of second appeal or by way of moving us in revision. We need not therefore decide any such question.

On the merits the question that requires our decision is whether by the filing of the plaint severance was effected of the joint status of the family. This is an important point, but there is no authority expressly dealing with it. It is now settled law especially after the recent Privy Council decision in *Girja Bai v. Sadashiv Dhundiraj*(1) and the Full Bench decision of this Court in *Sundara Rajan v. Arunachalam Chetti*(2) that it is open to a member of a joint Hindu family to effect a division of his status by a clear and unequivocal expression of his intention without the necessity of any concurrence on the part of the other co-parceners. The last case laid down that the filing of the plaint is such an unambiguous and unequivocal manifestation of intention within the meaning of the ruling of the Privy Council. It is curious, as has been pointed out to us by the

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(1) (1916) I.L.R., 43 Cal., 1031. (2) (1918) I.L.R., 39 Mad., 159 (P.C.).

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learned vakil for the respondent, that in the Full Bench case the plaintiff who instituted the suit was a minor. Apparently however no question such as has been raised before us was raised before the Full Bench for decision. There can be no doubt that what the Privy Council decided and what the Courts have followed is that it depends upon the discretion of a member of a joint Hindu family whether he is to continue the joint status or whether there should be a separation. That *prima facie* implies that the member who exercises such discretion must be of an age capable of exercising discretion in law. That will not be the case with a minor at least if he is of an age when discretion cannot be imputed to him. In the case of a suit instituted on behalf of a minor member of a Hindu family for partition, it has been laid down that it depends upon the discretion of the Court whether to make a decree for partition or not, that is to say, the Court has to consider in such cases whether a decree for partition would be for the benefit of the minor. If it is satisfied that it is not for the benefit of the minor to give a decree for partition the Court will dismiss the suit. This is laid down by the Privy Council in *Bachoo v. Mankosi Bai*(1) approving the decision of the Bombay High Court on this point. This has also been the law in this Presidency as stated in *Kamakshi Ammal v. Chidambara Reddi*(2) and that position has not been contested before us. If it is left to the discretion of the Court to say in a suit instituted on behalf of a minor whether there should be a division of the family or not, it seems to us *prima facie* to follow that the matter does not depend on the choice or option of any person who chooses to act on behalf of a minor member of a Hindu family. Any person is at liberty to institute a suit on behalf of a minor as the next friend and it is forcibly urged upon us by Mr. A. Krishnaswami Ayyar that it would lead to great hardship and inconvenience, if it were left to the discretion of any person who chooses to file a suit on behalf of a minor to decide whether the family of which the minor is a member shall continue joint or become separate. The institution of a suit so far as it expresses the intention of a member of the family to divide, depends on principle on the same basis as any other expression of intention

(1) (1907) I.L.R., 31 Bom., 373 (P.C.). (2) (1866) 3 M.H.C.R., 94 at p. 96.

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of a competent member of the family. If we are to hold that the filing of a plaint on behalf of a minor *ipso facto* constitutes a severance of the family status, then logically one would be driven to hold also that a notice given by such a person on behalf of the minor to the other members of the family of the intention to divide would also effect a severance of the joint status. This seems to us to be a position which we would not like to uphold without authority and no authority has been cited to us in support of it. It was strongly argued by the learned pleader for the respondent that as the plaint states facts and circumstances which, if proved, would be good justification for the Court decreeing partition, therefore at this stage we must proceed on the basis that there was a good cause of action and there was thus a severance of status effected by the institution of the suit. This clearly does not amount to anything more than this, that it is open to a person who chooses to act on behalf of a minor member of a Hindu family to exercise the discretion on his behalf to effect a severance. What causes the severance of a joint Hindu family is not the existence of certain facts which would justify any member to ask for partition, but it is the exercise of the option which the law lodges in a member of the joint family to say whether he shall continue to remain joint or whether he shall ask for a division. In the case of an adult he has not got to give any reasons why he asks for partition but has simply to say that he wants partition, and the Court is bound to give him a decree. In the case of a minor the law gives the Court the power to say whether there should be a division or not, and we think that it will lead to considerable complications and difficulties if we are to say that other persons also have got the discretion to create a division in the family, purporting to act on behalf of a minor. It is urged that there might be cases in which it would be desirable that partition should be effected in the best interests of the minor and as soon as possible. In such cases those who are interested on behalf of the minor are entitled to institute a suit, but having regard to the decision in *Bachoo v. Mankosi Bai* (1) and *Kamakshi Ammal v. Chidambara Reddi*(2), it must be left to the Court to decide whether there should be a partition or not.

(1) (1907) I.L.R., 31 Bom., 373 (P.C.). (2) (1866) 3 M.H.C.R., 94 at p. 96.

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We treat the Civil Revision Petition as a Second Appeal and set aside the order of the District Judge with costs here and in the Courts below. The respondents' petition will stand dismissed. This decree will not be drawn up unless the learned pleader for the appellants pays court fee within a week.

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APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

P. L. A. PALANIAPPA CHETTIAR (PLAINTIFF), APPELLANT,

v.

V. L. A. R. VEERAPPA CHETTIAR AND NINE OTHERS
(DEFENDANTS), RESPONDENTS.*

1917,
August 10,
13, 16, 17 and
30.

Limitation Act (IX of 1908), ss. 13, 19 and 20—Loan to a partnership—One of the partners absent from British India—Suit for loan more than three years after loan but within three years after return of partner, whether barred and against whom—Release by some partners of a partnership debt, whether binding on legal representative of a deceased partner—Entries in debtor's accounts, whether payment of interest or acknowledgment.

The plaintiff's father was a partner along with the third, the sixth and the eighth defendants, of a firm at E, which advanced certain loans in 1903 and 1904 to a firm at S of which the first defendant and the former defendants were partners; the first defendant was out of British India from 1903 to 1908. The plaintiff sued in 1909 to recover his share of the loans from the partners of the firm at S. The defendants pleaded that the suit was barred by limitation; the plaintiff relied in bar of limitation on section 13 of the Limitation Act and also on certain unsigned entries in defendants' account books in which the interest accruing due were added to principal from time to time; the first defendant further pleaded a release by defendants Nos. 3, 6 and 8 of the claim against him as binding on the plaintiff:

Held, that the suit was not barred by limitation against the first defendant as the plaintiff was entitled to a deduction of the time during which the first defendant was out of British India but was barred against the other defendants under section 13 of the Limitation Act;

that the entries in the debtor's accounts could not be treated as payments of interest under section 20 of the Limitation Act, or as acknowledgments under section 19 of the Act as they were not signed by the debtors.

Held also, that a partner can release a partnership claim, and, after the death of a partner, the surviving partners have a right to release such a claim;

that, if a release by any of the partners is fraudulent the other partners can avoid it and seek to recover their share of the released debt, but the legal

* Appeal No. 134 of 1911.

representative of a deceased partner is not entitled to avoid it as the right to do so is personal to the partners;

Held (on the facts) that the release of the first defendant by the third, sixth and eighth defendants was bona fide and binding on the plaintiff.

APPEAL against the decree of A. SAMBAMURTI AYYAR, the Temporary Subordinate Judge of Rāmnād, in Original Suit No. 72 of 1910.

The plaintiff's father, Velliappa Chetty, and the third, the sixth and the eighth defendants were doing business as partners at Epoh, while the latter and the first defendant were doing business as partners at Singapore. The other defendants were the undivided sons of the above said defendants respectively. On the 28th December, 1903, and the 20th January, 1904, the firm at Epoh advanced the suit loans to the Singapore firm. Velliappa died in 1904. The Singapore firm showed signs of failure and a composition deed was entered into between the said firm and its creditors including the firm at Epoh represented by the third, sixth and eighth defendants who were its surviving partners after the death of the plaintiff's father. Under the terms of the composition deed, *inter alia*, the first defendant was released from all liability to the creditors of the Singapore firm on his paying a certain amount for his share of the liability. This was assented to by the third, sixth and eighth defendants as partners of the Epoh firm. The first defendant paid the amount as agreed. The plaintiff, as the son of Velliappa who was a partner of the firm at Epoh during his life-time, sued to recover his five-elevenths share in the loans advanced by the Epoh firm to the Singapore firm and impleaded all the partners of the latter firm as defendants, impeaching the composition deed as fraudulent and collusive between the first and the other defendants. The first defendant was residing outside British India from 1903 to 1908 and the suit was instituted on the 3rd November, 1909, after the first defendant returned to British India. The first defendant and his undivided son, the second defendant (the other defendants being *ex parte*), contended that the suit was barred by limitation and that they were not liable by reason of the release of the first defendant's liability under the composition deed. The plaintiff relied in bar of the plea of limitation on section 13 of the Indian Limitation Act and also on certain alleged payments of interest and acknowledgments furnished by certain entries in the account-books of

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the Singapore firm, in which the interest accruing due on the loans were added to the principal from time to time, though the entries were not signed by the debtors or anyone on their behalf. The Subordinate Judge dismissed the suit; the plaintiff preferred this appeal to the High Court.

K. Srinivasa Ayyangar A. Krishnaswamy Ayyar and Patanjali Sastri for the appellant.

Hon. Mr. *S. Srinivasa Ayyangar*, Advocate-General, for the respondents.

The judgment of the Court was delivered by

SESHAGIRI
AYYAR, J.—The suit was found by the Subordinate Judge to be barred by limitation. The suit loans were taken on 28th December, 1903, and 20th January, 1904, but the suit was not instituted till 3rd November, 1909.

Appellant's first contention may be briefly disposed of. His vakil argues that in accordance with a usage of the trading community to which the parties belong, there was an automatic renewal at the end of every three months, the accrued interest being added to the principal and the total being treated as a fresh loan. There are entries in defendants' accounts which might be consistent with such a usage, but no evidence whatever has been adduced to show its actual existence. No such contention appears to have been raised in the Lower Court as far as can be seen and in paragraph 14 of his judgment the Subordinate Judge says these quarterly entries were made according to custom merely with a view to record exactly the amount of liability. In the absence of evidence of the usage this plea must be rejected.

It is next urged that these entries in defendants' accounts should be treated as payments of interest within the meaning of section 20, Indian Limitation Act. This position is equally untenable. Entries in the debtors' account-books cannot be treated as payments: vide *Ichha Dhanji v. Natha* (1). Appellant relies on *Kariyappa v. Rachapa* (2) but the ruling in that case is clearly against him. There is nothing to show that similar entries were made in plaintiff's own books; and the entries in the books of the debtor firm could in no circumstances be a complete answer to a suit brought by the creditor for recovery of the amount due to him. The entries are not signed and so cannot be treated as acknowledgments under section 19, Indian Limitation Act.

(1) (1889) I.L.R., 13 Bom., 338. (2) (1900) I.L.R., 24 Bom., 493.

The last argument of Mr. Patanjali Sastri on the question of limitation is entitled to far more weight. He argues that as the first defendant was not in British India for six years from 1903 to 1908 the plaintiff's cause of action was suspended during that period under section 13 of the Limitation Act, not only against the first defendant but also against defendants Nos. 6 and 8. Before disposing of this question of law, we must deal with a preliminary objection raised by the respondents to its consideration. It was argued on their behalf that this exemption from limitation was not specifically pleaded in the plaint, and that consequently the appellant is not entitled to be heard on it. We asked the learned Vakils that as the question was considered at length by the Subordinate Judge, whether there are any grounds for holding that they were prejudiced by the procedure adopted by the lower Court. In answer, we were told that if this point had been mentioned in the plaint and raised in the issue, the defendants could have pleaded that under the law of Epoh the suit was barred by limitation altogether. We are unable to understand why this plea should not have been put forward even though the exemption under section 13 of the Indian Limitation Act was not specifically raised in the plaint. Having regard to the fact that the plea of limitation can be disposed of upon the admissions made by the defendant himself and having also regard to the fact that the question was considered by the lower Court, we think we should not be justified in refusing to hear the appellant on this point. Before proceeding further we may say that the deposition of the first defendant is clear and unambiguous that between 1903 (we shall take the end of 1903) and December 1908 he was not in British India. On this evidence there can be no doubt that if the first defendant were the sole defendant, the suit would be in time.

The question argued by the learned vakil for the appellant has two aspects:—One is whether the plaintiff is entitled to claim a reduction of time as against all the defendants by the fact that one of them was absent from British India, and the other whether the plaintiff is not entitled to deduct the time at least as against the particular defendant who was not resident in India. These questions are not covered by any Indian authority. Mr. Patanjali Sastri drew our attention to some English cases bearing upon the statute of Queen Anne. The language of that

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statute is not very different from the one we have to construe. In *Fannin v. Anderson* (1) Lord DENMAN, Chief Justice, held that if one of the defendants was absent in a foreign country, the plaintiff was entitled to have the period of absence deducted in his favour as against the particular defendant and his co-promisors. This was followed by JERVIS, C.J., in *Towns v. Mead* (2). The other learned Judges who sat with him expressed no opinion on the question. These two cases were quoted with approval in *Roldam v. Morley* (3). Prima facie therefore the extreme contention of the learned vakil for the appellant would seem to derive support from these decisions; that on examining them, we are of opinion that the plaintiff is not entitled to deduct the time of absence of the first defendant as against the other defendants. Mr. Shephard in his commentary on the Indian Limitation Act points out that under the English law if a co-obligor who is within the jurisdiction is sued, it is open to him to demur to the trial of the action on the ground that the other co-obligors should also be proceeded with at the same trial. Reference may be made in this connexion to the well-known case of *King v. Hoare* (4). Having regard to section 43 of the Indian Contract Act which declares that co-promisors are jointly and severally liable such a plea will not be available in India. Secondly, it is stated in *Fannin v. Anderson* (1):

"The plaintiff cannot bring the absent defendants into Court by any act of his; and, therefore, if he be compelled to sue those who are within six years, without joining those who are absent, he may possibly recover against insolvent persons, and lose his remedy against the solvent ones who are absent."

That again is not the rule of law which obtains in this country. See *Mahammad Askari v. Radha Ram Singh* (5) and *Mool Chand v. Alwar Chetty* (6). It is doubtful whether the principle mentioned by Lord DENMAN, Chief Justice, is good law now even in England. See Bullen and Leake's Precedents of Pleadings note (a) at page 614 and Leake on Contracts, page 684 (6th edition). In this treatise, the law is stated in these terms:

(1) (1845) 7 Q.B., 811.

(2) (1855) 16 C.B., 123.

(3) (1857) 1 De G. & J. 1 at p. 11.

(4) (1844) 13 M. & W., 494; s.c., 153 E.R. 206.

(5) (1900) I.L.R., 22 All., 307.

(6) (1916) I.L.R., 39 Mad., 548.

judgment recovered against one of joint obligors of a bond merges the joint liability on the bond, and is a bar to an action against the others; but if the obligors are bound jointly and severally the judgment against one, without satisfaction, is no bar to an action against another upon his several liability, whilst any part of the debt remains due."

A third ground upon which the English decisions proceed is pointed out in *Darby and Bosanquet on Limitation* and that is that the principle of the cases decided under the Statute of James which applies to one of several plaintiffs residing abroad should govern the construction of the Statute of Queen Anne as well. None of the above special grounds are applicable to India. Moreover the language of section 13 of the Limitation Act does not lend itself to the extreme contention of the appellant. Although the singular 'defendant' would include the plural 'defendants,' the contention would necessitate our reading into the section some words like these, namely, "if there are more defendants than one and any one of them happens to be out of British India." We see no reason for adopting such a construction. We must therefore hold that the absence of the first defendant would not entitle the plaintiff to count the period of his absence in his favour as against defendants Nos. 6 and 8.

On the other hand we think that the alternative contention of the learned vakil for the appellant is well-founded. As we have stated already under section 43 of the Indian Contract Act the liability of co-promisors is joint and several. Section 249 of the Contract Act enunciates the same principle as regards partners. Consequently the plaintiff could sue for the whole of the amount the first defendant alone; and he would be entitled under section 13 of the Limitation Act to deduct the time during which the latter was absent from British India. The fact that in the suit thus brought, the plaintiff has impleaded defendants Nos. 6 and 8 is no ground for rejecting the claim as against the first defendant also. No violence will be done to the language of section 13 of the Limitation Act by holding that as against the absentee—defendant alone the plaintiff is entitled to the deduction of time during which he was away from British India. The fact that he could have sued his co-obligors who were within British India is not a ground for holding that the claim against the first defendant is barred by limitation: see *Abdulkhadir v. Ahammad Shaiwa Ravuthar* (1). We must therefore hold that the

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(1) (1915) I.L.R., 38 Mad., 419.

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appeal, so far as defendants Nos. 6 and 8 are concerned, fails and must be dismissed; the appeal also fails as against defendants Nos. 3, 4, 5, 7, 9 and 10 who are members of a joint family with defendants Nos. 6 and 8. We must now proceed to hear the appeal against the defendants Nos. 1 and 2 on the merits.

This appeal as against respondents Nos. 1 and 2 again coming on for hearing the following judgment of the Court was delivered by

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SESHAGIRI AYYAR, J.—On the second question argued by Mr. A. Krishnaswami Ayyar, the facts are these:—The father of the plaintiff was a partner with defendants Nos. 3, 6 and 8, in the Epoh firm, which we shall denominate as the creditor-firm. Defendants Nos. 3, 6 and 8 were also partners with the first defendant in the Singapore firm, which we shall call the debtor-firm. The plaintiff's father died in 1903. During the course of the winding up of the creditor-firm defendants Nos. 3, 6 and 8 lent to the debtor-firm a certain sum of money. The present suit is to recover the plaintiff's share of that loan. The question whether the plaintiff can maintain the suit against a firm which consists of some of his own partners need not be decided as we agree with the lower Court upon another point.

By Exhibit I, the debtor-firm entered into a deed of composition with the outside creditors of that firm. The main provisions of that document are that the first defendant should pay a certain sum of money to pay off these outside creditors and that he should be released from liability to his partners for any moneys advanced by them. The arrangement come to appears to us to have been bona fide and reflects credit on the partners in that they agreed to forego their own rights with a view to pay off those who had lent monies to the firm. We are unable to agree with Mr. A. Krishnaswami Ayyar that by such an understanding defendants Nos. 3, 6 and 8 secured any personal advantage to themselves. We agree that moral turpitude need not be brought home to them, see *Norton v. Lord Ashburton*(1), but we think that the arrangement was a business like one and was entered into for the purpose of securing the best interests of the debtor-firm. The question, under these circumstances, is whether the release of the first defendant is impeachable by the plaintiff. That one partner can release a partnership liability is well established—see Lindley, page 180. That after dissolution by the

(1) (1914) A.C., 932.

death of one of the partners the surviving partners still have the right of releasing a claim is clear from section 263 of the Contract Act: vide also *Motilal Bechardass v. Ghellabhai Hariram*(1).

Mr. A. Krishnaswami Ayyar put forward the ingenious argument that after the death of one of the partners, his legal representative continues to be a partner for the purpose of winding up. We are unable to accede to this proposition. Under section 241, the legal representative of a deceased partner will become a lender in respect of any business that might have been carried on by the surviving partners. If no business is carried on then the legal representative will be a tenant in common with the surviving partners in respect of the assets of the business—vide Story on Partnership, section 346. That the principle of section 45 of the Contract Act is applicable to partners was decided in *Motilal Bechardass v. Ghellabhai Hariram*(1) and we agree with this proposition. The argument that by section 263 of the Contract Act, the legal representative of a deceased partner is by implication a partner is opposed to the language of the section. Clause (2) of section 29 of the English Partnership Act was relied on. That only shows that if during the winding up the partner makes a secret profit, he is accountable to the legal representatives of the deceased partner for it. That section is no authority for the position contended for by the learned vakil. *Piercy v. Fynney*(2), *Veerasawmy Naicker v. Ibramsa Rowther*(3) and *Baikunt Nath Chakrabarti v. Haree Lal Pal Chowdhury*(4) lay down that if a release by one of the parties is fraudulent, the other partners can avoid it and seek to recover their share of the released debt. The legal representative is not entitled to such a right which is personal to the partners. We are therefore of opinion that the release of the first defendant is binding on the plaintiff. If he had been damnified by the conduct of defendants Nos. 3, 6 and 8, his remedy is to sue them for damages. As we have held that the claim against defendants Nos. 3, 6 and 8 is barred by limitation, this matter need not be pursued any further.

The decision of the Court below is right and we dismiss the appeal with the costs of defendants Nos. 1 and 2.

K.R.

(1) (1898) I.L.R., 17 Bom., 6 at p. 13.

(2) (1871) L.R., 12 Eq., 69.

(3) (1909) 19 M.L.J., 221.

(4) (1911) 18 C.L.J., 234.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Bakewell
and Mr. Justice Kumaraswami Sastriyar.

GRANDE GANGAYYA (PLAINTIFF), APPELLANT,

v.

GRANDE VENKATARAMIAH AND THREE OTHERS (DEFENDANTS),
RESPONDENTS. *

1917,
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Partnership by manager of joint Hindu family with strangers—Right of other members of family to institute suits in respect of partnership.

A contract of partnership entered into by the manager of a joint Hindu family with strangers does not *ipso facto* make the other members of the family partners; and not being partners, the other members whether divided or undivided cannot institute any suit in respect of partnership (e.g.) a suit for dissolution of partnership.

Sokkanadha Vannimundar v. Sokkanadha Vannimundar (1905) I.L.R., 28 Mad., 344, and *Ramanathan Chetty v. Yegappa Chetty* (1916) 20 M.L.J., 241, applied.

Joopooddy Sarayya v. Lakshmanuswamy (1913) I.L.R., 36 Mad., 185 (P.C.), distinguished.

APPEAL under clause (15) of the Letters Patent against the judgment of SPENCER, J., who differed from PHILLIPS, J., in *Gangayya v. Venkataramiah*(1).

Plaintiff and defendants Nos. 1 and 4 were members of an undivided Hindu family and first defendant as manager and on behalf of his family entered into a partnership with third defendant, a stranger, for the purpose of carrying on a trade. Subsequently plaintiff and defendants Nos. 1 and 4 became divided, and effected an actual partition of a considerable portion of the family property, but the property invested in the joint trade with third defendant was not divided. Thereafter plaintiff brought this suit to recover his share in that trade, and prayed for a dissolution of the partnership and for taking an account. The suit was dismissed by the lower Courts on the ground that as he was not a partner, he could not sue for dissolution of partnership. Against the dismissal the plaintiff preferred a Second Appeal to the High Court, which was heard by SPENCER and PHILLIPS, JJ. SPENCER, J., agreed with the lower Courts and

* Letters Patent Appeal No. 261 of 1916.

(1) Second Appeal No. 1807 of 1915, preferred against the decree of H. R. BARDSWELL, the District Judge of Kurnool, in Appeal Suit No. 163 of 1914 preferred against the decree of C. V. KRISHNASWAMI AYYAR, the District Munsif of Kurnool, in Original Suit No. 835 of 1913.

dismissed the second appeal, while PHILLIPS, J., allowed the second appeal holding that the plaintiff had a cause of action and could get a decree at least for taking accounts of the partnership and for delivery of his share. In the result the second appeal was dismissed with costs. The plaintiff preferred this Letters Patent Appeal.

B. Sitarama Rao for *A. Krishnaswami Ayyar* for the appellant.—Where a manager of a joint Hindu family is a partner of a firm, the other members of the family are also in law members of the partnership; and as soon as there is a partition in the family, different *personæ* arise as regards partnership and each member has a right to sue for dissolution of the partnership: *Joopooddy Sarayya v. Lakshmanaswamy*(1).

T. R. Venkatarama Sastriyar for the respondent.—Some of the other properties of the family have not been fully divided and if this suit is allowed it will be encouraging a suit for partial partition. Even when the manager carries on a trade on behalf of the family, without any strangers as partners, junior members of the family have no right to interfere in the affairs of the trade: See *Kishan Prasad v. Har Narain Singh*(2). See also *Sokkanadha Vannimundar v. Sokkanadha Vannimundar*(3). The meaning of the passage in page 192 of *Joopooddy Sarayya v. Lakshmanaswamy*(1) is given in *Ramanathan Chetty v. Yegappa Chetty*(4).

KUMARASWAMI SASTRIYAR, J.—The question for decision is whether it is open to a member of a Hindu family who has become divided in status to sue for dissolution of a partnership entered into between the managing member of the family and strangers when the family was joint.

Sections 254 and 265 of the Indian Contract Act only contemplate suits by one of the partners (as defined in section 239) for dissolution of partnership and the taking of the partnership accounts and there is nothing in the Act which confers such right of suit on a person merely by reason of his being entitled to a share in the interest of one of the partners in the firm. Such a person cannot be in a better position than a sub-partner

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(1) (1913) I.L.R., 36 Mad., 185 at p. 192 (P.C.).

(2) (1911) I.L.R., 33 All., 272 (P.C.).

(3) (1905) I.L.R., 28 Mad., 344.

(4) (1916) 30 M.L.J., 241.

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and it is settled law that he has no right to ask for dissolution of partnership or the taking of the partnership accounts, there being no contract or privity except between him and the partner with whom he is a sub-partner.

In the present case the plaintiff was not admitted as a partner in the firm during his minority so as to entitle him to the benefit of section 247 of the Contract Act or after he became a major so as to make him a partner within the meaning of section 239. The only ground on which he became a partner in the firm is that he became in law a partner of the firm when the managing member of the family entered into the contract of partnership with the third defendant or when owing to a partition between himself and the other members of the family he became entitled to a specific divided share in the joint family properties.

It is well settled that a contract of partnership between a member of a joint family and a stranger does not make every member of the joint family which the managing member represents a partner so as to clothe him with all the rights and obligations of a partner as defined in section 239 of the Contract Act. I need only refer to *Sokkanadha Vannimundar v. Sokkanadha Vannimundar*(1), *Ramanathan Chetty v. Yegappa Chetty*(2) and *Vadilal v. Shah Khushal*(3). It is no doubt true that as between the members of the undivided family and the co-parcener who enters into a contract of partnership for the benefit of the family they will be entitled to call upon him to account for the profits earned by him from the partnership and to share in such profits but this will not place them in any position of direct contractual relationship with the other partners of the firm. Nor would the fact that the entire assets of the joint family might be available to the creditors of the firm make any difference. The position of the plaintiff in the present case cannot be higher than that of a sub-partner. The managing member of an undivided family though he has the power of representing the interests of the other members is not their agent in the strict sense of the term so as to clothe the other members of the family with all the rights of principals in respect of contracts entered into by their agent. His position is, as pointed out by their

(1) (1905) I.L.R., 28 Mad., 344.

(2) (1916) 30 M.L.J., 241.

(3) (1903) I.L.R., 27 Bom., 157.

Lordships of the Privy Council in *Annamalai Chetty v. Murgesa Chetty*(1) more analogous to that of a trustee.

If a member of a joint family does not become *ipso facto* a partner by reason of the contract of partnership entered into between a member of his family, it is difficult to see on what ground a partition would place him in a better position. Reliance has been placed by Mr. Seetarama Rao on the observations of their Lordships of the Privy Council in *Joopody Sarayya v. Lakshmanaswamy*(2) to the effect that different *personae* arose in law on a partition between members of joint family one of whom was carrying on business in partnership with a stranger so as to entitle the stranger to refuse alliance in partnership with the divided members. What their Lordships were considering was the question of fact as to when a partnership became dissolved so as to attract the provisions of article 106 of the second schedule of the Limitation Act and I entirely agree with the observations of COURTS TROTTER, J., and SRINIVASA AYYANGAR, J., in *Ramanathan Chetty v. Yegappa Chetty*(3) to the effect that their Lordships cannot be taken to have overruled the decisions of Indian Courts as to the position of co-parcener in relation to a partnership entered into by one of the members of the family.

When there has been a partition between the members of a joint family all that the divided co-parcener can do is to call upon the managing member or co-parcener partner of the firm to get in the assets which would be due to him as partner by proper proceedings against his partners and divide it between them in the proportion of their shares in the joint family property. If he refuses or neglects to do so their remedy is to treat the interest of the co-parcener in the firm as joint family assets and to sue for partition. In such a suit the assets can be realized by the appointment of a receiver who as representing the partner co-parcener can by appropriate proceedings get in what may be due to him. It has been argued that this procedure will lead to a multiplicity of actions, but looking at the question from the mere stand point of convenience I think it would be mischievous to hold that a co-parcener can interfere with the affairs of the partnership simply because he has on partition got a specific

(1) (1903) I.L.R., 26 Mad., 544 at p. 545 (P.C.).

(2) (1913) I.L.R., 36 Mad., 185 (P.C.). (3) (1916) 30 M.L.J., 241.

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share in the interest of one of the partners and to treat him as a partner because of a partition with which the other partners have no concern. In cases of a mere change of status which according to the recent decision of the Privy Council can be effected by a mere unilateral declaration of intention the position is still more complicated as it may well be that on actual partition of the various items of joint family property the interest of the family in the business may go to some other co-parcener. I do not think that any consideration of inconvenience to the members of a joint family should affect the settled rules of law as to the rights and obligations of partners *inter se*.

I am of opinion that the decision of Mr. Justice SPENCER is right and would dismiss the Letters Patent Appeal with costs.

WALLIS, C.J. WALLIS, C.J.—I agree.
BAKEWELL, J. BAKEWELL, J.—I agree.

N. R.

APPELLATE CIVIL.

Before Sir John Wallis, Chief Justice, Mr. Justice Bakewell and
Mr. Justice Kumaraswami Sastriyar.

1917,
September
11 and 21.

MANJESHWARA KRISHNAYA (THIRD DEFENDANT),
APPELLANT,

v.

VASUDEVA MALLYA AND FOUR OTHERS (PLAINTIFFS NOS. 1
TO 5 AND FIRST DEFENDANT), RESPONDENTS.*

Lis Pendens—Transfer of Property Act (IV of 1882), sec. 52—No contest between defendants—Alienation by one defendant to a stranger pending suit, whether affected by *lis pendens*.

The rule of *lis pendens* enunciated in section 52 of the Transfer of Property Act does not differ from the English rule and it protects parties to litigation against alienations by their opponents pending suit; and the prohibition contained in the section is like *res judicata* inapplicable between parties to the suit who are ranged on the same side and between whom there is no issue for adjudication. 'Any other party' in section 52 means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation.

Bellamy v. Sabine (1857) 1 De. G. & J., 566 and *Faiyaz Husain Khan v. Prag Narain* (1907) I.L.R., 29 All., 339 and 245 (P.C.), applied.

* Letters Patent Appeal No. 283 of 1916.

In a previous suit by A to set aside a sale made by him to B as void and invalid and consequently to set aside a mortgage made by B to C also as invalid, the plea of B and C that both the sale and mortgage were good was upheld. Pending the suit D bought B's rights in a Court auction. In a subsequent suit by C to enforce the mortgage,

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Held that D's purchase was not affected by *lis pendens* as there was no contest between B and C in the previous suit as to the validity of the mortgage and that D was entitled to plead that the mortgage was invalid as having no consideration.

APPEAL under clause 15 of the Letters Patent against the judgment of PHILLIPS, J., who differed from OLDFIELD, J., in *Krishnaya v. Vasudeva Mallya* (1).

One Manjunatha Bhandari filed a suit (O.S. No. 114 of 1898) for a declaration that a sale-deed of the suit properties which he had executed in favour of one who was the first defendant in that suit and in this, was not binding on him, and for a further declaration that the mortgage for Rs. 2,000 executed by the first defendant in favour of the third defendant in that suit, the father of the present plaintiffs, was not valid and binding on him. The real question then was as to the validity of the sale under Exhibit D, as, if that was upheld, the plaintiff had no concern with the subsequent mortgage executed by the vendee, the first defendant, to the third defendant (the father of the present plaintiffs). The first and third defendants in that suit made common cause by pleading the validity of the sale and the mortgage and succeeded in upholding the validity of the sale under Exhibit D, subject to the plaintiff's lien for unpaid purchase money. The first defendant in his written statement in the previous suit admitted his mortgage to the third defendant, and the High Court in second appeal decided in effect that the plaintiff was entitled to a charge on the property for his unpaid purchase money in priority to the third defendant's mortgage. While that suit (O.S. No. 114 of 1898) was pending, the present second defendant, by Exhibit H, dated 18th December 1899, acquired the first defendant's interest in the same properties at a sale in execution. Thereafter the plaintiffs in the present suit, viz., the sons of the third defendant in the previous suit

(1) Second Appeal No. 1736 of 1914 preferred against the judgment of E. L. THORNTON, the District Judge of South Kanara, in Appeal Suit No. 45 of 1913, preferred against the decree of D. RAGHAVENDRA RAO, the Subordinate Judge of South Kanara, in Original Suit No. 60 of 1911 (Original Suit No. 63 of 1908) on the file of the District Court of South Kanara.

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brought this suit to enforce the mortgage against the first defendant and the second defendant, who was the purchaser of his rights in Court auction, and the present third defendant who was the alienee from him. The defendants pleaded *inter alia* that the mortgage had no consideration and was not valid.

The plaintiffs answered that the defendants were not entitled to raise this defence as the Court sale to them was, pending the suit in which the sale under Exhibit D, and the mortgage were in question. The lower Courts, upholding this answer allowed the suit. A second appeal filed by the third defendant was heard by OLDFIELD and PHILLIPS, JJ. OLDFIELD, J., allowed the appeal holding that the defendants were not affected by *lis pendens* as there was no contest in the previous suit as to the validity of the mortgage and remanded the suit for disposal on the merits of the plea as to the want of consideration for the mortgage. PHILLIPS, J., agreed with the lower Courts and dismissed the second appeal. In the result the second appeal was dismissed with costs under section 98, Civil Procedure Code. The third defendant preferred this Letters Patent Appeal.

B. Sitarama Rao for the appellant.—I am not affected by *lis pendens*, as there was no *lis* between the defendants about the mortgage in the previous suit. The previous suit was by the plaintiff therein to have the sale by him to the first defendant herein and the mortgage executed by the first defendant to the second defendant therein declared void. The decree was that the sale was good and that the plaintiff therein was entitled to a charge for unpaid purchase money in priority to the mortgage. Once it was declared that the sale was good, plaintiff therein had no right or interest to question the mortgage and the Court could not and did not give any declaration as to the validity of the mortgage. An adjudication as to the mortgage was unnecessary to give the necessary relief to the plaintiff and both the defendants pleaded that the mortgage was good.

A. Narasimhachariar for *V. V. Srinivasa Ayyangar* for respondent.—The defendant is affected by *lis pendens*. There was in the previous judgment an actual adjudication that the mortgage in my favour was good. The plaintiff attacked the mortgage.

[Court—But not the defendants *inter se*, all of whom supported the mortgage. It was not then necessary to decide the validity of the mortgage.]

I rely on *Bellamy v. Sabine*(1).

[WALLIS, C.J.—That lays down that an alienation cannot be made *pendente lite* so as to prejudice the opposite party. That is the meaning to be given to the words 'other party' in section 52 of Transfer of Property Act.]

I rely on *Tyler v. Thomas*(2). The principle of *lis pendens* is not that there is a judgment against one party or another but that the judgment affects the land; Story's Equity Jurisprudence, sections 405 and 406.

B. Sitarama Rao in reply quoted *Annamalai Chettiar v. Malayandi Appaya Naik*(3) to show that there must be a contest between the defendants. He referred to *Faiyaz Husain Khan v. Prag Narain*(4) and *Krishna Kamini Devi v. Deno Money Chowdhurani*(5). Section 52 of the Transfer of Property Act does not in terms apply but its principle applies.

WALLIS, C.J.—*Manjunatha Bhandari* filed a suit, Original Suit No. 114 of 1898, for a declaration that the sale deed of the suit properties which he had executed in favour of the first defendant in that suit and this was not binding on him, and for a further declaration that the mortgage for Rs. 2,000 executed by the first defendant in favour of the third defendant in that suit, the father of the present plaintiffs, was not valid and binding on him. The real question was the validity of the sale under Exhibit D, as if that was upheld, the plaintiff had no concern with the subsequent mortgage by the vendee, the first defendant, to the third defendant, the father of the present plaintiffs. The first and third defendants in that suit made common cause and succeeded in upholding the validity of the sale under Exhibit D, subject to the plaintiffs' lien for unpaid purchase money. The first defendant in his written statement admitted his mortgage to the third defendant, and as there was no contest about the mortgage what the High Court apparently

(1) (1857) 1 De. G. & J., 566.

(2) (1858) 25 Beav. 47.

(3) (1906) I.L.R., 29 Mad., 426 at p. 434.

(4) (1907) I.L.R., 29 All., 339 at p. 345 (P.C.).

(5) (1904) I.L.R., 31 Cal., 658 at p. 663.

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decided was that the plaintiff was entitled to a charge on the property for his unpaid purchase money in priority to the third defendant's mortgage. While this suit, Original Suit No. 114 of 1898, was pending, the present second defendant, by Exhibit II, dated 18th December 1899, acquired the first defendant's interest in the suit properties at a sale in execution. It is well settled that the doctrine of *lis pendens* applies to purchases at auction sales in execution of decrees against parties to the suit as well as to private alienations by the parties, and the question before us is whether the second defendant's purchase from the first defendant pending the suit was subject to the result of the suit and whether the result of the suit was to preclude the present second defendant as alienee from the first defendant from disputing the validity of the mortgage executed by the first defendant to the third defendant, the father of the present plaintiffs, in the present suit which they have brought to enforce it. That again raises the question whether the alienation by the first to the second defendant pending suit is affected by the doctrine of *lis pendens* as embodied in section 52 of the Transfer of Property Act. As there was absolutely no contest on the point between the first and third defendants in that suit, it seems clear that the present case is not within the English doctrine as to *lis pendens* which is intended to protect the parties to litigation against alienations by their opponents pending suit. This is clearly explained by Lord CRANWORTH in *Bellamy v. Sabine*(1) where he observes that *lis pendens* affects a purchaser,

"not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property, in dispute so as to prejudice the opposite party."

Later on he observes

"*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent," and in *Faiyaz Husain Khan v. Prag Narain*(2) Lord MACNAUGH-
TEN, delivering the judgment of the Judicial Committee in a case governed by section 52 of the Transfer of Property Act, referred to this as the 'correct mode of stating the doctrine'. If then the English doctrine and the principle on which it rests is only

applicable as between opponents with regard to alienations made by any one of them during suit, does the language of section 52 of the Transfer of Property Act compel us to apply the doctrine as between parties to the suit who were ranged on the same side and between whom there was no issue for adjudication? The section provides that

"during the active prosecution of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein."

It is not, I think, putting an unduly restrictive construction on the section to say that 'any other party' whose rights are not to be affected means any other party who can be said to be arrayed on the opposite side to the party alienating owing to the existence of some issue between them upon which the Court is called to adjudicate in the suit which may thus be regarded as a contentious suit between them in which each of them requires the protection of the doctrine against alienations by the other. In other words 'any other party' in this section means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation.

To hold otherwise would have strange and incongruous results which cannot have been contemplated by the legislature. The law of *lis pendens* is an extension of the law of *res judicata*, and makes the adjudication in the suit binding on alienees from the parties pending suit, just as the law of *res judicata* makes the adjudication binding on the parties to the suit and on alienees from them after decree. Now it is well settled that the bar of *res judicata* does not arise between defendants in a suit unless there is an active contest between them. Consequently the issue as to the validity of the mortgage would not be *res judicata* as between the present plaintiffs, the representatives of the third defendant in the former suit, and the first defendant in that suit and this, or between them and the second defendant if the alienation by the first defendant to the second defendant had been made after the decree instead of during the pendency of the suit. It would be indeed incongruous if the effect of section 52 were to bar a transferee from one of the parties pending suit from raising an issue which his transferor and

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(1) (1867) 1 De. G. & J. 568. (2) (1907) I.L.R., 29 All., 339 at p. 345 (P.C.).

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MALLYA.
WALLIS, O.J. transferees from his transferor after decree are at liberty to raise. In these circumstances I think we are justified in placing a restrictive construction on the language of section 52 so as to avoid this incongruity and to bring the section into line with the English law, more especially as the observations of Lord MACNAUGHTEN already referred to seem to support this interpretation. This is the construction put on the section by OLDFIELD, J., with whom I agree.

This is sufficient to dispose of the appeal but, as some reliance has been placed on the fact that the decree of the High Court in Second Appeal No. 323 of 1902 on appeal from the decree of the District Judge in Appeal No. 299 of 1900 affirming the decree of the District Munsif in Original Suit No. 114 of 1898 contains a declaration of the validity of the mortgage, Exhibit I, by the first defendant to the third defendant subject to the plaintiff's claim for Rs. 1,000 for unpaid purchase money which, it is said, amounts to an adjudication on the question, I may state that this declaration is not, in my opinion, an adjudication between the first and the third defendants in that suit. In their judgment, Exhibit E, the High Court expressly directed the decree of the lower Court to be modified by the insertion of this declaration 'as between the plaintiff and the third defendant' and accepted the findings of the lower Court, one of which was that the mortgage by the first defendant to the third defendant was fraudulent and without consideration (paragraph 5). It is not easy to reconcile their acceptance of this finding with the declaration they granted of the validity of the mortgage as between the plaintiff and the third defendant. But, as already pointed out, in the result of the suit the plaintiff was not concerned with the validity of the mortgage seeing that it was postponed to his claim for unpaid purchase money and that he had failed to set aside his sale to the first defendant, and probably all that was meant was that the mortgage, which the first defendant the mortgagor did not dispute, was to be subject to the plaintiff's lien for Rs. 1,000 for unpaid purchase money. In the result I agree with OLDFIELD, J., and would allow the Letters Patent Appeal with costs and make the order proposed by him.

BAKEWELL, J.
KUMARA-
SWAMI
SASTRIYAR, J.

BAKEWELL, J.—I agree.

KUMARASWAMI SASTRIYAR, J.—I agree.

N.B.

APPELLATE CRIMINAL.

Before Mr. Justice Phillips and Mr. Justice Krishnan.

THE KING-EMPEROR, APPELLANT,

v.

LAL BAGE (ACCUSED), RESPONDENT.*

1917
October 8.

Police Act (XXIV of 1859), sec. 46—'Threat,' meaning of—Demand by a police constable of mamul or customary payment, whether an offence under the section.

A demand by a police constable, of a 'mamul' (customary payment made to obtain his favour), is a 'threat' within section 46 of the Police Act (XXIV of 1859) and obtaining money by such threat is an offence under the section. †

APPEAL under section 417 of the Code of Criminal Procedure (Act V of 1898) against the acquittal of the accused by *Janab Moulvi Muhammad Hubibullah Khan Bahadur*, the Sub-divisional Magistrate of Guntur, in Criminal Appeal No. 20 of 1917, preferred against the conviction and sentence by *R. Kotayya*, the Stationary Sub-Magistrate of Guntur, in Calendar Case No. 51 of 1917.

The accused, a police constable in the town of Guntur, demanded of a shepherd who had as usual brought his goats to Guntur for sale, the payment of his 'mamul' (a customary payment) and threatened to take him to the police station in case of non-compliance. The shepherd accordingly paid three annas to the accused. On these facts deposed to by the shepherd and two others, the Sub-Magistrate convicted the accused of having committed an offence under section 46 of the Police Act (XXIV of 1859) but the conviction was set aside on appeal by the

* Criminal Appeal No. 327 of 1917.

† Section 46 of the Police Act (XXIV of 1859) is as follows:—

"Any police officer who shall, directly or indirectly, extort, exact, seek, or obtain any bribe or unauthorized reward or consideration, by any illegal threat or pretence, or for doing or omitting or delaying to do, any act which it may be his duty to do or to cause to be done, or for withholding or delaying any information which he is bound to afford or to communicate, or who shall attempt to commit any of the offences abovesaid, or shall be guilty of cowardice, shall be liable, upon conviction before a Magistrate, to a fine not exceeding twelve months' pay, or to imprisonment, with or without hard labour, not exceeding twelve months or both."

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v.
CHENNAYYA.

appellant applied under Order XXI, rule 90, of the Civil Procedure Code to set aside the sale; the petition was dismissed; the appellant preferred an appeal from the order refusing to set aside the sale; the Appellate Court reversed the order and set aside the sale. The respondent, who was the auction-purchaser, was not made a party to the proceedings taken to set aside the sale or to the appeal in which the sale was set aside. The appellant, who was the second defendant, filed an application in the District Munsif's Court for restitution against the auction-purchaser (respondent) by delivery of possession of the lands which had been purchased by him and put in his possession and also claimed to recover mesne profits from him. Both the lower Courts dismissed the petition as incompetent; the second defendant preferred this civil miscellaneous second appeal.

V. Ramesam for the appellant.

N. Chandrasekara Ayyar for the respondent.

The judgment of the Court was delivered by

SADASIVA
Ayyar, J.

SADASIVA AYYAR, J.—Section 144 of the Code of Civil Procedure cannot, in terms apply as no *decree* was varied or reversed but only an *order* under Order XXI, rule 90, refusing to set aside a sale in execution, was reversed by the Appellate Court.

Assuming that section 151 of the Code of Civil Procedure allows an order for restitution in appropriate cases even though it does not fall under section 144 of the Code of Civil Procedure, such an order cannot be made on the analogy of section 144 unless the auction-purchaser was a party before the Appellate Court which set aside the sale in the proceedings instituted for setting it aside.

The mere fact that the decree-holder was a party to those proceedings will not suffice as the Court auction-purchaser is not the representative of the decree-holder. *Manicka Udayan v. Rajagopala Pillai*(1) which held otherwise has been disapproved of in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*(2) to both of which decisions the present learned CHIEF JUSTICE was a party.

The Munsif says, that the 'auction-purchaser need not at all be a party to any proceedings for confirmation of or setting aside the sale.' The petition for restitution does not expressly

(1) (1907) I.L.R., 30 Mad., 507.

(2) (1911) I.L.R., 34 Mad., 417.

state that the Court auction-purchaser was a party to the proceedings taken to have the auction sale set aside. No records have been produced before us to establish that fact. We therefore cannot hold that section 151 empowers the Court to pass an order for restitution against a person not shown to be a party to and so bound by the order of the Appellate Court setting aside the sale.

The appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling
and Mr. Justice Kumaraswami Sastriyar.

PALAKKUNNATH ILLATH GOVINDAN NUMBUDIRI
(PLAINTIFF),

v.

OTTATHAYIL MOIDIN (DEFENDANT).*

1917,
October 11.

Stamp Act (II of 1899), sec. 25—Marupat—Counterpart of lease—Document giving a charge on improvements for arrears of rent—Stamp duty, whether payable both as counterpart and as mortgage.

Where a tenant executed a *marupat* in favour of a landlord, agreeing therein that the arrears of rent, if any, should be a charge on the improvements that might be made by him:

Held, that a *marupat* is the counterpart of a lease or a deed executed by a tenant promising to pay a certain rent, and that the document in question must be stamped both as a counterpart and as a mortgage.

CASE stated under section 60 of Stamp Act (II of 1899) by H. D. C. REILLY, the acting District Judge of North Malabar, in Original Suit No. 675 of 1915, on the file of S. V. PADMANABHA AYYANGAR, the District Munsif of Taliparamba.

This is a reference made to the High Court by the District Munsif of Taliparamba through the District Judge of North Malabar under section 60 of the Indian Stamp Act (II of 1899) in respect of a document sued on by the landlord to recover rent in Original Suit No. 675 of 1915 on the file of the District Munsif's Court.

The document sued on was a *marupat* or counterpart of a lease, executed by the tenant; it contained a provision charging

* Referred Case No. 7 of 1916.

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the arrears of rent on the improvements that might be made by the tenant. The portion of the document providing for a charge was as follows:—

“But if the *pattam purappad* fixed on inspection as agreed is kept in arrears without being paid up every year, I consent to the amounts that may be in arrears, being realized together with interest thereon at the usual rate till the date of realization and to the properties being recovered possession of from me within the prescribed period after paying to me the *kuzhikkur* value.

“The *purappad* along with the *pattam purappad* that may be fixed on inspection would not exceed Rs. 20.

“I further agree to the amount that may be in arrears on account of *purappad*, etc., mentioned above, being always charged as *kudikkadam* (encumbrance) on the entire *kuzhikkur chamyams* belonging to me in the said *puramba*. There are no encumbrances (*kudikkadams*) whatever on these till now, etc.”

The District Munsif levied a stamp duty as on a mortgage-deed and also a penalty and forwarded the document and the certificate under sections 35 and 38 of Act II of 1899 to the Sub-Collector. The Sub-Collector returned the document holding that the document was an agricultural lease exempt from stamp duty and that it could not be impounded and that duty and penalty should not have been levied. The District Munsif re-submitted the papers to the Sub-Collector who returned the same and pointed out that the Board of Revenue had in B.P. No. 2389, dated 19th August 1885, ordered that such documents were only agreements to lease and not mortgages and relied also on *Eressa Menon v. Shamu Patter*(1).

The District Munsif thereupon stated a case for reference to the High Court through the District Judge under section 60 of the Stamp Act.

WALLIS, C.J.,
AYLING AND
KUMARA-
SWAMI
SASTRIYAR,
JJ.

JUDGMENT.—A *marupat* is a counterpart of lease or a deed executed by a tenant promising certain rent—Moore's Malabar Law.

We think it must be stamped both as a counterpart and as a mortgage.

K.R.

(1) (1898) I.L.R., 21 Mad., 138.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling
and Mr. Justice Kumaraswami Sastriyar.

TENJERLA SURYANARAYANA (DEFENDANT), APPELLANT,

v.

PRABHALA SUBBAYYA (PLAINTIFF), RESPONDENT.*

1917,
October
8 and 16.

Contract Act (IX of 1872), sec. 23—Agreement to pay money to the vakil's clerk for giving special attention to a case, whether opposed to public policy.

An agreement by which a litigant binds himself to pay his vakil's clerk a certain amount for giving special attention to his legal business which his vakil was bound to see to in consideration of his fee, is opposed to public policy and is void and unenforceable.

Ex parte Cotton (1846) 9 Beav., 107, referred to.

APPEAL under clause 15 of the Letters Patent against the Judgment of OLDFIELD, J., who differed from BAKEWELL, J., in *Subbayya v. Suryanarayana*(1), Letters Patent Appeal against the Judgment of NAPIER, J., in *Suryanarayana v. Subbayya*(2).

The defendant who had a decree in his favour engaged a vakil for a fee to conduct execution proceedings therein and agreed to pay the vakil's clerk, the plaintiff, Rs. 20 in consideration of the clerk taking special interest in the matter. The agreement further provided that defendant was to make all arrangements for service of notices, attachments, etc., in the debtor's village, and was to pay the amount promised at the end of the execution proceedings without reference to his gaining or losing by them. After the close of the execution proceedings the plaintiff filed a small cause suit against the defendant for the recovery of Rs. 20. The defendant pleaded *inter alia* that the agreement had no consideration and was opposed to public policy. The Munsif decreed the claim. The defendant preferred a Civil Revision Petition (No. 346 of 1915) to the High Court. NAPIER, J., allowed the Revision Petition and dismissed the suit holding that the agreement was against public policy. An Appeal (No. 167 of

* Letters Patent Appeal No. 36 of 1917.

(1) Letters Patent Appeal No. 167 of 1916.

(2) Civil Revision Petition No. 346 of 1915, praying the High Court to revise the decree of G. G. SOMAYAJULU, the Principal District Munsif of Masulipatam, in Small Cause Suit No. 2680 of 1914.

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1916) under clause 15 of the Letters Patent was thereupon filed by the plaintiff and it was heard by OLDFIELD and BAKEWELL, JJ. OLDFIELD, J., held that the plaintiff was entitled to a decree, while BAKEWELL, J., dismissed the suit agreeing with NAPIER, J. In the result the judgment of OLDFIELD, J., prevailed under clause 36 of the Letters Patent and the Letters Patent Appeal was allowed. The defendant then preferred this Letters Patent Appeal No. 36 of 1917 under clause 15 of the Letters Patent.

P. Nagabhushanam for the appellant.—I contend for the view of BAKEWELL, J., who agreed with NAPIER, J. The policy of the legislature is to prohibit such contracts with vakils' clerks: see sections 10 and 28 of the Legal Practitioners Act, Order III, rule 1, Civil Procedure Code, and *Ramachandra Chintaman v. Kedu Raju*(1), and *Harrington v. Victoria Graving Dock Co.*(2). Such contracts are against public policy and in England they are not at all known. The rule in India should be similar. This contract, if recognized, will amount to this, viz., that the clerk who is paid for his services by his master has a right to stipulate for a special fee in some cases and thus neglect the cases of other clients who do not remunerate him in the same manner.

V. Ramadoss for the respondent.—The contract in this case is to do something which is not what a vakil or his clerk has to do ordinarily; such a contract is valid; *Kali Kumar Roy v. Nobin Chunder Chuckerbutty*(3). Unless such a contract is contrary to some known head of public policy, new grounds of public policy ought not to be introduced; vide *Janson v. Driefontien Consolidated Mines, Limited*(4), *Bhagwan Dei v. Murari Lal*(5) and *Fraser and Company v. The Bombay Ice Manufacturing Company*(6).

WALLIS, C.J.

WALLIS, C.J.—The agreement in question is one by which a litigant binds himself to pay his vakils' clerk Rs. 20 for giving special attention to legal business which the vakil was bound to see to in consideration of his fee. The revised translation makes it clear that this is the scope of the agreement. The law has never allowed legal practitioners of any kind to enforce

contracts with clients irrespectively of the consideration whether they conformed to public policy or not. Barristers cannot sue at all for their fees, and the fees which barrister's clerks receive by custom according to a fixed scale are mere gratuities and cannot be sued for though they are recognized on taxation: *Ex parte Cotton*(1). Solicitors' charges are now the subject of legislative enactment in England resembling the provisions in the Legal Practitioners Act as to charging more than the regulation fees. But even before these enactments, such agreements were jealously scrutinized and required to conform to the dictates of public policy. In *Pomfret v. Murray*(2), speaking of a novel stipulation by an attorney who was also a trustee, Lord HARDWICKE said:

"This is a case of great consequence: and it is incumbent on the Court to proceed warily before they allow such a demand,"

an observation which appears to me to be peculiarly applicable to the present case. In *Saunderson v. Glass*(3) the same great Judge observed:

"It is truly said at the bar, that a security obtained by an attorney, whilst he is doing business for his client, or whilst a cause is depending, appears to this Court in a quite different light than between two common persons; for if an attorney, *pendente lite*, prevails upon a client to agree to an exorbitant reward, the Court will either set it aside entirely, or reduce it to the standard of those fees to which he is properly entitled; . . . and if the Court did not observe such a rule, it would expose clients very much to the artifices of attorneys."

See also *Drax v. Scroope*(4) and *Philby v. Hazle*(5), where EARL, C.J., and WILLIAMS and BYLES, JJ., all speak of agreements by solicitors of the kind there in question as being in the words of WILLIAMS, J., manifestly 'contrary to the general policy of the law.' It is clear then that we shall be introducing no new law if we apply the test of public policy to agreements of the character now sued on. We have not been referred to any case in England in which a solicitor's clerk has stipulated with his employer's client for remuneration for giving special attention to his business. Such conduct might very possibly afford good

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WALLIS, C.J.

(1) (1878) I.L.R., 2 Bom., 362.

(2) (1878) K.R. 3 Q.B., 549.

(3) (1881) I.L.R., 6 Cal., 595.

(4) (1902) A.C., 484.

(5) (1917) I.L.R., 39 All., 51 (F.B.).

(6) (1905) I.L.R., 29 Bom., 107 at p. 120.

(1) (1846) 9 Beav., 107.

(2) (1741) 9 Mod., 231.

(3) (1742) 2 Atk., 296.

(4) (1881) 2 B. & Ad., 581.

(5) (1830) 8 C.B. (N.S.), 647.

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SUBBAYYA.
WALLIS, C.J. ground for his immediate dismissal, and the fact that in this case the vakil does not object to his clerk's adopting this course in this and other cases, far from making the case any better, opens out a fresh vista of undesirable possibilities, and only makes it the more incumbent on us to interfere for the protection of clients by refusing to enforce such agreements as contrary to public policy. I would allow the appeal and dismiss the suit with costs throughout.

AYLING, J. AYLING, J.—I concur.

KUMARASWAMI SASTRIYAR, J.—I agree.
SASTRIYAR, J.

N.R.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling
and Mr. Justice Kumaraswami Sastriyar.*

1917,
October 26.

ANNAVAJHULA VENKATACHELLAMAYYA
(PETITIONER—DECREE-HOLDER), APPELLANT,

v.

RAMA GIRJEE NILAKANTA GIRJEE (AUCTION-PURCHASER, FIRST
COUNTER-PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXI, rr. 71 and 84 to 87—Purchase in a Court sale of judgment-debtor's right to get a reconveyance of certain lands—Default in payment of balance of purchase-money within fifteen days of Court sale—Liability of purchaser for deficiency on re-sale.

A purchaser in a Court auction of a judgment-debtor's right to get a reconveyance of certain lands on payment of a specified sum is, on default in payment of the balance of purchase-money within fifteen days of the Court sale, liable to pay under summary process under Order XXI, rule 71, Civil Procedure Code, any deficiency in price on a re-sale, though the date stipulated for payment to get the reconveyance happens to be shortly after the Court sale and before the expiry of the fifteen days allowed for the payment of the balance.

The loss of the right to get a reconveyance which is a substantial right, occasioned by the neglect of the purchaser to exercise his right to pay at the stipulated time, does not make the property re-sold, any the less the same property as the one sold before, provided all the then existing rights of the judgment-debtor therein are correctly stated in the proclamation for the re-sale.

* Letters Patent Appeal No. 42 of 1917.

Cases in which an existing encumbrance on the property is omitted to be mentioned at the time of the first sale but finds a place in the proclamation for the re-sale stand on a different footing.

Bajinath Sahai v. Moheep Narain Singh (1889) I.L.R., 16 Cal., 535, and *Kali Kishore Deb Sarkar v. Guru Prosad Sukal* (1898) I.L.R., 25 Cal., 99, distinguished.

APPEAL under clause 15 of the Letters Patent against the judgment of OLDFIELD, J., who differed from BAKEWELL, J., in *Venkatachellamayya v. Nilakanta*(1).

The appellant, who was the petitioner in the lower Court, brought to sale in execution of a decree of his, the judgment-debtor's right to get a reconveyance of certain properties from a stranger in possession. The respondent purchased this right in the Court sale for Rs. 6,90,000 on 25th August 1914, and deposited a fourth of that sum under Order XXI, rule 84, Civil Procedure Code, but failed to deposit the remainder within fifteen days thereafter as provided by rule 85. The stipulation of the judgment-debtor with the stranger in respect of the reconveyance was, that on payment of Rs. 6,00,000 for which the property was originally sold by the judgment-debtor to the stranger, on or before 31st August 1914, the property should be reconveyed. Though the respondent, viz., the purchaser of this right at the Court sale had nearly a week after the Court sale to pay this Rs. 6,00,000 to the stranger, he neglected to do so either himself or with the aid of the judgment-debtor. In addition, he failed to pay the balance of the purchase-money within fifteen days as stated before. Consequently the property was re-sold on a fresh proclamation which simply mentioned the original conveyance and the agreement to reconvey and stated that the two amounted to a mortgage. On resale the property was purchased by a third party for Rs. 1,01,000 and the sale was confirmed. The decree-holder, viz., the appellant, then filed this petition under Order XXI, rule 71, Civil Procedure Code, for recovery of the deficit of Rs. 5,89,000 from the respondent, the purchaser in Court auction. The respondent contended *inter alia* that he was not liable for the deficit, for the reason, among others, that the

(1) Appeal against Order No. 91 of 1916 against the order of C. KRISHNASWAMI BAO, the District Judge of Nellore, in Civil Miscellaneous Petition No. 108 of 1915 in Execution Petition No. 55 of 1914 in Civil Suit No. 1879 of 1912 on the file of the High Court in the exercise of its Ordinary Original Civil Jurisdiction.

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property re-sold was not the same as the one sold before and that the deficit was not recoverable in execution proceedings. The District Judge dismissed the petition holding that the petitioner was not entitled either under Order XXI, rule 71, or under Order XXI, rule 86, to claim the deficit or the amount originally deposited. The petitioner preferred an appeal to the High Court (Civil Miscellaneous Appeal No. 91 of 1916) which was heard by OLDFIELD and BAKEWELL, JJ. OLDFIELD, J., agreed with the District Judge while BAKEWELL, J., held that the appellant was entitled to succeed. The result was that the appeal was dismissed with costs.

The petitioner, viz., the decree-holder, preferred this appeal under clause 15 of the Letters Patent.

K. Srinivasa Ayyangar (with *S. Varadachariar*) for the appellant.—The property sold on the second occasion is the same as the one sold before. If the same property is again sold, depreciation of the property in the interval does not change the nature of the property though it may give rise to a claim for damages. The title of the auction-purchaser relates back to the date of sale; hence any accretion or mesne profits in the interval go to the purchaser. If the judgment-debtor has any interest, however small, that goes to the purchaser. There is no warranty of title in a court sale. If the deterioration is owing to the default of the purchaser, he alone is liable. If after having bid and paid one-fourth of the price, he defaults to pay the remainder for any reason of his own, he alone is to blame. Any liability that may arise after the sale to him and before confirmation will also fall on him: *Bhawani Kumar v. Mathura Prasad Singh*(1) and *Scoruj Buksh Singh v. Sree Kishen Dose*(2); see also Order XXI, rule 86, as to re-sale owing to non-payment of the 25 per cent. The present is not a case of 'no title' in the judgment-debtor.

Hon. Mr. *S. Srinivasa Ayyangar*, the *Advocate-General*, for the respondent.—Order XXI, rule 71, gives only a cumulative remedy. There is also a right of suit; hence it is discretionary with the Court to allow this summary remedy. Under the rule the property sold must be the same. If owing to the decree-holder's mistake there occurs a loss on the second sale, the first purchaser

(1) (1913) I.L.R., 40 Cal., 89 (P.C.). (2) (1833) 6 W.R., Mis., 12 8.

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is not at all liable. The description of the property on the second sale is different from that on the first. The right that was first sold is a right to a reconveyance (an actionable claim). What was sold on the second occasion was an equity of redemption, because owing to lapse of the time specified to get a reconveyance, the right to reconveyance was lost. On the construction of Order XXI, rule 71, see *Bajinath Sahai v. Moheep Narain Singh*(1), *Kali Kishore Deb Sarkar v. Guru Prosad Sukul*(2), *Gangadas Dayabhai v. Bai Suraj*(3) and *Bavaneshwar Prasad Singh v. Bajinath Ram Goenka*(4). The words 'by reason of the purchaser's default' in Order XXI, rule 71, go only with 're-sale' and not with 'deficiency of price'. The conditions of the second sale are in this case more onerous to the purchaser than those of the first. As the sale was not eventually confirmed to the original purchaser in this case, no title vested in him as from the date of the purchase. And hence he had no right or liability to pay for the reconveyance: *Ram Chander v. Kallu*(5). It was the judgment-debtor that was bound to pay for it. If a life-interest is brought to sale and the life-tenant dies before confirmation the purchaser is liable: *Anson v. Towgood*(6). But the rule is otherwise, if any *vis major* occurs or if there are any taxes to be paid or covenants to be observed whose non-compliance may entail a forfeiture; see volume I, Daniell's Chancery Practice, page 951, *Ex parte Minor*(7), *Palmer v. Goren*(8), Sugden's Vendors and Purchasers, page 101 and *Jitandra Nath Basu v. Peyer Deye Debi*(9). The principle of section 56 of Contract Act applies. Under Order XXI, rule 71, there must be a certificate as to the amount of the deficiency. There was none here. The cases referred to by the other side were distinguished.

K. Srinivasa Ayyangar in reply.—The purchaser purchased with knowledge that the time for reconveyance will lapse before the fifteen days. As there is no warranty of title in court sales the judgment-debtor or anybody else is not bound to see to the title

(1) (1889) I.L.R., 16 Cal., 535 at p. 538. (2) (1898) I.L.R., 25 Cal., 99.
(3) (1912) I.L.R., 36 Bom., 329 at p. 333.
(4) (1915) I.L.R., 42 Cal., 897 (P.C.) at p. 912.
(5) (1898) I.L.R., 30 All., 497.
(6) (1890) 1 Jac. & W., 637. (7) (1805) 11 Ves. Jun., 559.
(8) (1856) 4 W.R. (E.) 688. (9) (1916) I.L.R., 43 Cal., 990 (P.C.).

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being made good or kept good. In India, unlike in England, the bid becomes complete as soon as the bid is accepted. In England, in a sale before the master, it is complete only on the master's certificate, who in the *interim* looks to the title being good; *Ex parte Minor*(1) was a case of sale before the master. There was no covenant which the judgment-debtor in the present case undertook with reference to the property.

WALLIS, C.J.

WALLIS, C.J.—Under Order XXI, rules 84—86 of the Code of Civil Procedure on the default of a purchaser at a Court auction either in making the deposit or paying the balance of purchase-money within the specified period the property is to be re-sold; and under Order XXI, rule 71, any deficiency in price which may occur at the re-sale together with the expenses attending the re-sale, as certified to the Court, are recoverable at the instance of the decree-holder or the judgment-debtor under the provisions relating to the execution of a decree for the payment of money. By his failure to complete his purchase the purchaser commits a breach of contract and is answerable in damages to the Court or the persons on whose behalf it sells, viz., the decree-holder and the judgment-debtor. These damages estimated by the ordinary rule consist of the deficiency, if any, in the price obtained at the re-sale as compared with the price at the first sale together with the expenses of the re-sale; and the rule provides a summary method of recovering these damages in execution by the Court at the instance of either of the parties interested, the decree-holder or the judgment-debtor. This is a salutary provision intended to minimise the hardship resulting from the purchaser's default, and I see no reason why the Court should refuse to give effect to it unless the defaulting purchaser would be substantially prejudiced. This was the case in *Bajinath Sahai v. Moheep Narain Singh* (2), where he had been induced to bid for the property as unincumbered by the fact that the incumbrances were not mentioned in the proclamation of sale and the re-sale was on a proclamation in which the incumbrances were mentioned. In such a case the difference between the two prices could not be regarded as a fair measure of damages, as the purchaser who afterwards defaulted must obviously have made a higher bid than he would have done if he had known of the

(1) (1805) 11 Ves. Jan., 559.

(2) (1889) I.L.R., 16 Cal., 535.

incumbrances. If the learned Judges in *Bajinath Sahai v. Moheep Narain Singh*(1) and *Kali Kishore Deb Sarkar v. Guru Prosad Sukul*(2) intended to lay down a more stringent rule, I am with great respect unable to agree with them.

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WALLIS, C.J.

There was no circumstance of this kind in the present case. The efforts, in which the legislature joined, to save the ancient Zamindari of Kalahasti from being sold in execution having finally failed, a taluk of the North Arcot district, was attached and brought to sale at the instance of a judgment-creditor. The taluk had been conveyed to a Mahant for six lakhs of rupees with an agreement for reconveyance if the money was repaid before a stipulated date, the 31st August 1914. The sale in execution to the respondent took place on the 25th August 1914 only a few days before the stipulated time for repayment to the Mahant, and the respondent was no doubt aware of this when he bid, as he would not have bid more than five lakhs for the judgment-debtor's interest without satisfying himself of the terms of the agreement for reconveyance mentioned in the sale proclamation, and in any case he must be taken to have had notice of it. The case for the appellant is that the respondent was a man of straw employed by the Mahant to get the property knocked down to him as the highest bidder and make the necessary deposit with the money supplied by the Mahant in order to keep out genuine purchasers and to ensure that the specified date should be allowed to go by without repayment and the right to a reconveyance be lost; but all this has not been gone into and it is unnecessary to rely on it. On the 25th of August, the date of the sale, the respondent made the necessary deposit of Rs. 1,72,500 which entitled him to a delay of fifteen days to complete the purchase, *vide* Order XXI, rule 85. On the completion of the fifteen days he defaulted, and it became necessary to re-sell. By that time the 31st August 1914 had gone by, and the purchaser would no longer have a clear right to a reconveyance from the Mahant on payment of six lakhs, and could only rely on the positions that the transaction was really a mortgage or that the tender had been made before the specified date and refused. Now it is quite clear that what was put up to sale and purchased by the respondent on the 25th August included the right to get

(1) (1889) I.L.R., 16 Cal., 535.

(2) (1898) I.L.R., 25 Cal., 99.

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back this taluk from the Mahant on payment of six lakhs before 31st August, and if he chose to purchase the judgment-debtor's interest and let the day go by, I am clearly of opinion that he is the person to bear the resulting loss. The other view as regards this part of the case appears to be that the judgment-debtor's right to a reconveyance on payment of a fixed sum before a stipulated day, which might be a most valuable right and in this case is said to have been worth much more than the five lakhs which the respondent agreed to pay for it, cannot be made the subject of an effective sale in execution, if the sale takes place less than fifteen days before the stipulated date, as under Order XXI, rule 85, the purchaser has fifteen days to pay the balance and the sale is not final until confirmed after not less than thirty days. These provisions, in my opinion, were made *alio intuitu* and were not intended to have that effect. The respondent could, if necessary, have procured the concurrence of the judgment-debtor in making the tender to the Mahant without prejudice to the question of the confirmation of the sale, and in that case would have been entitled to a charge on the property so released. In any view he got what he bargained for, and I can see no reason why he should not incur the ordinary consequences of failing to complete his bargain.

It is quite clear, and has not been disputed before us, that at the re-sale consequent on the respondent's default, the judgment-debtor's right, title and interest in the same properties was brought to sale. It was, however, no longer possible to put up a right to reconveyance on payment before the 31st August 1914 as that date had gone by; but the nature of the judgment-debtor's interest was represented as favourably as possible in the proclamation as it alleged that the transaction with the Mahant was a mortgage and also that the agreement for the reconveyance still subsisted because, it alleged, the Mahant had fraudulently gone away from his residence to avoid receiving the tender of six lakhs which the judgment-debtor made before the stipulated date. In this case the sale and the re-sale were both duly held and were of the judgment-debtor's interest as it existed at the date of the sale and re-sale respectively, and the depreciation which occurred in the meantime was one for which the respondent was exclusively responsible. In these circumstances I see no reason why the deficiency should not be recovered from him

under the Code. It was scarcely disputed before us that he would have no answer to a suit for damages, and I see no reason for refusing to give effect to the plain language of the Code. I concur in the order proposed by KUMARASWAMI SASTRIYAR, J.

AYLING, J.—I concur.

KUMARASWAMI SASTRIYAR, J.—This appeal arises out of an application by the decree-holder to recover from the auction purchaser the loss arising from a re-sale held in consequence of his default. Certain villages forming part of the Kalahasti Zamindari were brought to sale in execution of a decree against the Zamindar. The villages had been conveyed by the Zamindar to one Raja Bahadur Narasingar Gyangirji of Hyderabad for six lakhs of rupees by a deed dated 4th August 1908. The Zamindar got an agreement to reconvey bearing the same date if the sum of six lakhs was re-paid by the 31st August 1914. The sale proclamation specified the two documents as also other documents not material for the purpose of this Appeal. The Zamindar's interest in the property conveyed was described as "the right of obtaining a reconveyance under the reconveyance agreement dated 4th August 1908 executed and given to the defendant by Raja Narasingar Gyangirji Garu residing at Hyderabad and all the other rights and interest possessed by the defendant in these villages." The sale took place on the 25th August 1914 and the respondent, who was the highest bidder, was declared the purchaser for six lakhs and ninety-thousand rupees. He paid Rs. 1,72,500, the deposit required by Order XXI, rule 84, of the Code of Civil Procedure. Rule 85 gave him fifteen days for the payment of the balance, but he failed to pay the sum and complete the purchase.

There was so far as I can see no excuse for his not paying the balance. It is not shown that there was any irregularity in the proceedings that led up to the sale or that any circumstances existed on the date of sale which would justify the purchaser in refusing to complete the purchase. He knew perfectly well what he was purchasing and the risks he ran. There is no warranty of title in sales by Court in execution of decrees and as Order XXI, rule 91, only applies to cases where there is no saleable interest. So long as the judgment-debtor has any interest however small in the property the purchaser cannot except in cases where he would have the right to set aside the sale on the ground

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of material irregularity under Order XXI, rule 90, avoid his purchase.

Order XXI, rule 86, provides for a re-sale in case the purchaser makes default in paying the balance of the purchase money within the time limited by rule 85. The defaulting purchaser is under rule 71 liable to pay the deficiency in price, if any, and the same on being certified by the officer holding the sale is recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

Owing to the respondent's default the property was put up for resale. Both Mr. Justice OLDFIELD and Mr. Justice BAKEWELL agree in holding that the same villages were put up for sale the second time and this is not disputed before us. When the property was purchased by the respondent at the first sale there were only six days within which six lakhs had to be paid in pursuance of the agreement to reconvey dated 4th August 1908. This period elapsed within the fifteen days allowed to the respondent to pay the balance of purchase money and it is clear that no re-sale was possible within the period when the six lakhs was payable. At the date of the fresh proclamation rendered necessary by rule 87 before re-sale the position of the Zamindar, the judgment-debtor, in relation to the villages advertised for sale became altered. Whereas prior to the 31st August 1914 he was entitled to a reconveyance on tender or payment of six lakhs, he could after that date in the absence of proof of tender in time only get a reconveyance if he was able to show that the transaction evidenced by the sale deed and agreement to reconvey of the same date was in law a mortgage and not a mere sale with an agreement to repurchase. It was alleged by the Zamindar that he did make a tender within the 31st August which was improperly refused, but as this allegation has not been enquired into by the District Judge, I shall proceed on the footing that no such tender was made.

The proclamation for re-sale had to mention the state of facts as they stood on the date when it was settled by the Court. There is nothing in the Code requiring that the proclamations of sale and re-sale should in all respects be identical and having regard to the duty of the Court to give intending purchasers correct information, it is difficult to see how mention of a material alteration in the circumstances between the first and

second proclamations could be avoided. The second proclamation therefore contained a statement to the effect that tender of six lakhs was made and was improperly refused, that the transaction evidenced by the deed of sale and agreement to repurchase dated 4th August 1908 was a mortgage, that Gyangirji has only the right to recover six lakhs of rupees and that the property was sold subject to the right.

It is difficult to see how these statements could be prejudicial to the first purchaser. Their tendency was, if anything, to induce persons to purchase for a higher price, as a bald statement after the 31st August 1914 that the property was agreed to be reconveyed if six lakhs were paid before the 31st August 1914 would be useless. The only person to complain would be the second purchaser if the allegation as to the tender and the effect of the sale and agreement to reconvey were not correct, but he has raised no objection and the sale to him has been confirmed.

The chief contention raised by the learned Advocate-General for the respondent is that in order to attract the provisions of Order XXI, rule 71, what is sold at the re-sale should be in all respects the identical property that was sold the first time, identical not only with reference to the description and area of the property sold but also with respect to the interest of the judgment-debtor therein, and that consequently the sale at which his client purchased being the right of the judgment-debtor to get a reconveyance on tender of six lakhs without reference to the nature of the transaction evidenced by the sale deed and agreement to reconvey (which was a clear and good title), the re-sale of the properties in which the judgment-debtor's interest was only the right to obtain a reconveyance on proof that the transaction was only a mortgage—a fact which the subsequent purchaser had to prove at his risk, was not a re-sale contemplated by rule 71. Reference has been made to *Baijnath Sahai v. Moheep Narain Singh*(1), *Kali Kishore Deb Sarkar v. Guru Prasad Sukul*(2) and *Gangadas Dayabhai v. Bai Suraj*(3).

In *Baijnath Sahai v. Moheep Narain Singh*(1) the first proclamation of sale contained no statement as to the encumbrances on the property put up for sale while the proclamation

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(1) (1889) I.L.R., 16 Calo., 535.

(2) (1898) I.L.R., 25 Calo., 99.

(3) (1912) I.L.R., 36 Bom., 329.

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for re-sale set out the encumbrances. It was therefore clear that the purchaser at re-sale would have paid considerably less than the first purchaser who purchased the property on the assumption that it was unencumbered, and the deficiency of price was attributable not to the first purchaser's default but to the misdescription in the first proclamation. In *Kali Kishore Deb Sarkar v. Guru Prasad Sukul*(1), the defaulting purchaser had applied to set aside the sale under section 313 of the Civil Procedure Code and the finding was that there was a material misdescription in the sale proclamation. In the first case the learned Judges observe that a change in the nature of the property by diluvion and the like causes beyond the control of anybody might not relieve the defaulting purchaser from liability. Their observations as to the effect that section 293 of the Act of 1882 applied only to cases when the same property was sold under the same description at both sales must be read in the light of the later observations as to the change in the property by causes beyond the control of the parties.

I do not think that it was intended to lay down as an inflexible rule that if a few trees on the land fell down or a portion was washed away between the dates of sale and re-sale there could be no re-sale so as to make the defaulting purchaser liable for the deficiency. The observations in *Kali Kishore Deb Sarkar v. Guru Prasad Sukul*(1) as to the effect of correctly stating in the proclamation of re-sale what was incorrectly set out in the first proclamation are *obiter* and with all respect I fail to see why the correction of errors at least of such as would in the ordinary course enhance the value of the property at the second sale should be a valid ground of objection.

The general rule no doubt is that it is the property which was sold on the first occasion that must be put up for sale but this is subject to the property remaining identical. If owing to natural causes or causes attributable to the defaulter, there should be any change either in the property or the wording of the sale proclamation, there is nothing in the Code to release the defaulting purchaser from his liability under rule 71.

Gangadas Dayabhai v. Bai Suraj(2) was a case where it was admitted that the first proclamation did not state either fairly or

accurately the property to be sold. The property was described as that of A in the first sale and as that of B in the second.

Sooruj Buksh Singh v. Sree Kishen Doss(1) cited by the vakil for the appellant is more in point. In that case a purchaser at a Court sale declined to complete the purchase on the ground that the property had been sold the next day in execution of another decree by a party who had a previous mortgage on the estate. The property was subsequently re-sold and he was asked to pay the difference. The Sudder Ameen held that the first purchaser was not liable under section 254 of Act VIII of 1859 which is substantially the same as Order XXI, rule 71, of the Act of 1908, but his decision was reversed by the High Court on the ground that he had purchased something though perhaps less than what he had expected and that if he chose to bid he was bound to complete his purchase. From the facts as set out in the judgment it appears that the decree obtained by the mortgagee was in force at the date of sale which, unless discharged before the sale fixed for the day after the first sale, would entail the consequences that the property would pass under a title paramount to that of the first purchaser and that the re-sale was after the sale in execution of the mortgage decree when no title remained in the judgment-debtor.

Time runs and with it follows change. The provisions of Order XXI of the Code of Civil Procedure as to re-sale in case the balance of purchase money is not paid necessitate a delay of at least one and a half months from the date of the first sale. The reasonable construction to place on rule 71 is that the re-sale should be within a reasonable time after the first sale and property re-sold should be substantially the same and that any difference will not matter if the difference in the condition of the property or the title thereto is one which would occur in the ordinary course of things having regard either to the nature of the property or the transactions in respect thereof having legal force at the date of sale or was brought about by the first purchaser's default.

It has been argued that the provisions of rule 71 are summary in their nature and so should receive a very strict interpretation. Rule 71 only enacts the rule that the measure of damages in

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(1) (1866) 6 W.R. Mis., 126.

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cases when a purchaser commits default is the difference between the price at which he agreed to purchase and the price realized at a re-sale. I do not think the rule prevents the defaulting purchaser from raising such objections as are competent to him under Order XXI of the Civil Procedure Code to raise. It is a principle of natural justice that a person should be given an opportunity of showing cause before an order adverse to him is passed and though rule 71 does not expressly provide for the issue of a notice to the defaulting purchaser it is the duty of the Court to give him notice and to hear and decide on his objections before it orders execution to issue against him. In all the cases decided under the old and new Code the defaulting purchaser did appear and raise objections which were adjudicated upon by the Court and he was held by the Calcutta and Madras High Courts to have a right of appeal. I need only refer to *Sooraj Buksh Singh v. Sree Kishen Doss*(1), *Bajinath Sahai v. Mohsep Narain Singh*(2), *Kali Kishore Deb Sarkar v. Guru Prosad Sukul*(3), and *Amir Baksha Sahib v. Venkatachala Mudali*(4).

I do not, therefore, see any good reason for placing an unduly restricted interpretation on Order XXI, rule 71. Having regard to the fact that there is no warranty of title in the case of sales by Court the maxim *caveat emptor* applying, and that the purchaser cannot avoid the sale so long as the judgment-debtor has some interest however small in the property, the objections which the defaulting purchaser can urge are practically confined to those which can be urged in an application to set aside a sale under Order XXI and proceedings under rule 71 are neither more nor less summary than proceedings under Order XXI to set aside a sale.

It was also argued that it was the duty of the judgment-debtor or the decree-holder to keep the title alive between the period of sale and confirmation and that as no tender was made of six lakhs the defaulting purchaser is not liable. As the sale was only of the right, title, and interest of the judgment-debtor subject to the conditions in the agreement to reconvey on repayment of six lakhs, it is clear that the person to pay the six lakhs was the purchaser, the price he pays being estimated with reference to

(1) (1866) 6 W.R. Mis., 126.

(3) (1898) I.L.R., 25 Cal., 99.

(2) (1889) I.L.R., 16 Cal., 535.

(4) (1896) I.L.R., 18 Mad., 439.

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the existing liability on the property. There was under the terms of the proclamation no duty on the decree-holder or judgment-debtor to pay six lakhs.

With reference to the argument that the defaulting purchaser had no legal right to tender six lakhs as he acquired no title on the 31st of August, the last date for the tender, I think the auction purchaser has an interest in the property which would make any tender by him valid. The position of a person between the date of sale and the date of confirmation is not that of a person who has only an agreement to sell in his favour. Section 65 of the present Code unlike section 316 of the old Code vests title in him from the date when the property is sold and not from the time the sale becomes absolute. It is no doubt true that the sale is liable to be set aside either by payment under Order XXI, rule 89, or for irregularity or want of title under Order XXI, rules 90 and 91, but it does not follow that a person who under Order XXI, rule 84, has been "declared to be the purchaser" by the officer conducting the sale has no interest in the property sufficient to prevent a forfeiture or preserve the title from destruction. The observations of their Lordships of the Privy Council in *Bhavani Kumar v. Mathura Prasad Singh*(1) as to the rights and duties of an auction purchaser as from the date of sale are in point.

I am of opinion that no valid grounds exist in the present case for not making the defaulting purchaser liable for the loss arising from the re-sale. I would allow the Letters Patent Appeal and set aside the order of the District Judge with costs in this and the lower Court. The District Judge will dispose of the application of the appellant with regard to the deposit paid by the respondent according to law.

N.B.

(1) (1913) I.L.R., 40 Cal., 89 at p. 103. (P.C.)

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Bakewell
and Mr. Justice Kumaraswami Sastriyar.

1917,
September,
10 and 11,
and
October, 5.

MANNATH VEETIL ITTI PANKU MENON (SECOND
DEFENDANT), APPELLANT,

v.

THAZETH MELADAM DHARMAN ACHAN
AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

*Contract—Third party's right to sue on—Limitation Act (IX of 1908), sec. 18, and
arts. 62, 115 and 116—Suit for rent by the third party to contract—Date
from which limitation begins.*

Contrary to his undertaking to redeem a prior *kanom* and to collect and pay the *jenmi*, arrears of rent due by the *kanomdar*, a *melkanomdar* assigned his rights and liabilities under the *melkanom* to the *kanomdar* by a registered deed in 1909 without the knowledge of the *jenmi* and thus enabled the *kanomdar* to continue in possession for a further period. The *jenmi* who came to know of the assignment in 1912 at once recognized it, demanded arrears of rent from the *kanomdar* and brought the suit in 1913 against the *kanomdar* and the *melkanomdar* for all the rent due during the periods of the *kanom* and the *melkanom*.

Held by WALLIS, C.J., and KUMARASWAMI SASTRIYAR, J. (BAKEWELL, J., dissenting) that the *jenmi* was entitled to recover from the *kanomdar* the arrears of rent as moneys had and received to the plaintiff's use and that the suit was not barred by limitation by reason of article 62, and section 18 of the Limitation Act.

Per WALLIS, C.J. and BAKEWELL, J.—The *jenmi* was not entitled to sue on the assignment to which he was not a party.

Per KUMARASWAMI SASTRIYAR, J.—The *jenmi* was entitled to sue on it.

Jamnu Das v. Ram Autar Pande (1912) I.L.R., 34 All., 63 (P.C.) and *Tweddle v. Atkinson* (1855) 30 Ch. D. 57 and other cases considered.

APPEAL under clause 15 of the Letters Patent against the judgment of PHILLIPS, J., who differed from ABDUR RAHIM, J., in *Ittipanku Menon v. Dharman Achan* (1).

The plaintiff granted a *Kanom* (Exhibit III) to the second defendant on 6th July 1893 whereby the latter became entitled to be in possession for twelve years, i.e., till 6th July 1905. On

* Letters Patent Appeal No. 19 of 1917.

(1) Second Appeal No. 588 of 1915, preferred against the decree of A. NARAYANAN NAMBIYAR, the Subordinate Judge of Palghat at Calicut, in Appeal No. 851 of 1914 preferred against the decree of K. A. KANNAN, the District Munsif of Palghat, in Original Suit No. 3479 of 1913.

28th January 1904 the plaintiff granted a *melcharth* to the first defendant by Exhibit I, the material portions of which ran as follows:—

“On the expiry of the term of the demise, you shall either directly or by suit pay to Gopala Menon and another (the *kanomdars* under Exhibit III) the balance *kanom* after setting off the arrears of *purupad* and interest against the *kanom* and obtain possession of the properties. And you shall hold the properties on paying properly the *purupad* due from 1081 (1905—1906). You shall then pay to Edom (plaintiff) the value of the *purupad* which you get set off against the *kanom* and obtain receipt therefor. . . . It is stipulated that you should pay the whole of the *purupad* from 1081 (1905-06) even in case there is delay in getting possession of the properties.”

The first defendant did not redeem the *kanom* of the second defendant when it became redeemable on the 6th July 1905 but assigned his rights under the *melcharth* deed (Exhibit I) to the *kanomdar* by a registered deed of assignment (Exhibit II), dated the 6th July 1909. The material portion of the assignment deed ran as follows:—

“I have this day received in cash from you Rs. 600 made up of the renewal fee of Rs. 400 due to me in accordance with the said *melcharth* and interest thereon and Rs. 56 being the value of paddy consisting of the *michavaram* paid by me to the *jenmi* from 1081 (1905-06) to 1084 (1903-09) with interest thereon and I have hereby assigned to you all the rights belonging to me under the said *melcharth* . . . You should directly pay to the *jenmi* the arrears of *michavaram*, etc., payable to the *jenmi* from 1071 (1895-96) to 1080 (1904-05) inclusive. If you do not do so, you shall be liable for the damages arising therefrom.”

As soon as the plaintiff came to know of the assignment, he recognized the same and demanded on 8th January 1912 all the arrears of rent from 1893 from the second defendant as undertaken by the second defendant in the deed of assignment.

In the suit the plaintiff prayed for payment of rent from 1896 to 1905 and from 1910 to 1913 and for sale of the defendant's *kanom* right. The cause of action was alleged to have arisen on 28th January 1904, the date of *melcharth*. The first defendant pleaded that he had assigned his right to second defendant with the liability of paying the arrears to plaintiff, that the plaintiff had consented to collect the *michavaram* from

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second defendant and that he was not liable for the claim. The second defendant pleaded *inter alia* that the plaintiff was not entitled to sue him for rent of the period from 1896 to 1905, that the rent therefor was barred by limitation and that there could be no charge in law for arrears of rent. Plaintiff's vakil conceded in both the lower Courts that the rent was not a charge on the kanom.

The District Munsif held that the plaintiff was not entitled to sue for the former period and that the same was barred by limitation. He therefore gave a mortgage decree as against both the defendants for Rs. 173 with interest as for the rent due for the later period (1910 to 1913). The plaintiff appealed and the second defendant preferred a memorandum of objections. On appeal the Subordinate Judge held that the plaintiff was entitled to sue the second defendant as the second defendant undertook to pay the arrears of rent under the assignment deed (Exhibit II) and got possession of the property for a further period by virtue of the same. The Subordinate Judge farther held that the rent for the earlier period was not barred by limitation as the suit was brought within six years from the date of the undertaking contained in the registered deed of assignment. He therefore gave a decree for the full amount claimed by the plaintiff, viz., Rs. 877, as against the second defendant and exonerated the first defendant as the second defendant undertook his liability. A second appeal filed by the second defendant was heard by ABDUR RAHIM and PHILLIPS, JJ. ABDUR RAHIM, J., held that the plaintiff was entitled to a decree against the first defendant alone for arrears of rent for the earlier period, viz., 1894 to 1904, and against the second defendant for rent since the date of the assignment, while PHILLIPS, J., confirmed the decree of the Subordinate Judge. In the result the second appeal was dismissed with costs. Thereupon the second defendant preferred this appeal under clause 15 of the Letters Patent against the plaintiff and the first defendant on the grounds that the plaintiff being a stranger to the contract was not entitled to sue him for rent for the earlier period and that the same was barred by limitation.

K. P. M. Menon for the appellant.—I contend for the view upheld by ABDUR RAHIM, J. The plaintiff being a third party cannot enforce against me a liability which I undertook with

another, see *Jamna Das v. Ramantar Pande*(1), which was affirmed on appeal by the Privy Council in *Jamna Das v. Ram Autar Pande*(2). The suit is for rent and I am sued as *kanomdar*. More than six years' rent cannot be recovered. If I am sued as a transferee of the *melcharth*, then I am liable only for the last three years' rent subsequent to the assignment, for there is no privity of contract between me and the plaintiff, but there is only a privity of estate. Article 62 and not article 116 applies. *Naduvil Edomkelu Achan v. Varadaraja Iyer*(3), *Rangasami Naden v. Subbaroya Iyen*(4), *Mangal Sen v. Muhammad Husain*(5) and *Nochulliyil Eazhuvan Theethisson Theethalan v. The Eralpad Raja* styled as *Elaya Rajah*(6). The assignment transfers only the rights and not the obligations.

C. Madhavan Nair for respondents.—I contend for the view of PHILLIPS, J. The transfer of *melcharth* in effect extinguished the kanom. Instead of a formal redemption there was a settlement of accounts making the arrears payable as a charge on the estate. There is a merger of the two mortgages here and the *jenmi* has recognized the transfer. The *kanomdar* is now in possession only under the transfer of the *melcharth* which imposes payment of arrears of rent as a condition of the transfer. On redemption of the first kanom even barred arrears of rent stand as a charge on the kanom amount. That position the *kanomdar* undertook on transfer. I rely on *Kanna Pisharodi v. Kombi Achen*(7), and *Harihara Mangalath v. Ibrayan Kutti*(8). A question of law turning upon a proper construction of a document if wrongly given up by a vakil in the lower Courts can be argued in the Appellate Court, *Beni Pershad Koeri v. Dudhnath Roy*(9).

P. Appu Nair for the first defendant.—All the parties are before the Court and the liabilities of the defendants *inter se* can be adjusted now.

K. P. M. Menon in reply. *Kanna Pisharodi v. Kombi Achan*(7) does not say that a charge is given, but only decides that arrears can at the time of redemption be set off against the

(1) (1909) I.L.R., 31 All., 352. (2) (1912) I.L.R., 34 All., 63 (P.C.).

(3) (1914) 26 M.L.J., 283. (4) (1907) I.L.R., 30 Mad., 410.

(5) (1915) I.L.R., 37 All., 115. (6) (1917) 32 M.L.J., 442.

(7) (1885) I.L.R., 8 Mad., 381 at p. 383.

(8) (1917) M.W.N., 275 at p. 276.

(9) (1900) I.L.R., 27 Calc., 156 at pp. 162 and 163 (P.C.).

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mortgage amount. See *Eressa Menon v. Shamu Patter*(1), *Vasudeva Shenoi v. Damodaram*(2), *Vedapuratti v. Avara*(3), *Achuta v. Kalu*(4), *Unnian v. Rama*(5) and *Parasurama Pattar v. Venkatachalam Pattar*(6). If there is a charge, it will be barred after twelve years, but under the customary law arrears of rent even for more than twelve years can be set off. The charge given in the melcharth does not apply to prior arrears. Even if the transferor has a charge the *jenmi* has not a charge.

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WALLIS, C.J.—This appeal raises a question of some difficulty. In 1904 the plaintiff, *jenmi*, who was entitled to redeem in 1905 a *kanom* granted by him to the second defendant in 1893, executed a melcharth in favour of the first defendant by which the latter became entitled to redeem the second defendant on the expiry of his *kanom* and to hold the lands himself on a fresh *kanom*. The *kanom* debt payable to the second defendant on redemption was subject to reduction by the amount of the arrears of rent due from the second defendant to the plaintiff under the *kanom* even though a suit for the arrears had become barred, and the first defendant was required on redemption to deduct this amount from the *kanom* debt and pay it over to the plaintiff, or in other words to collect the arrears due to the plaintiff. He did nothing till 1909 when he assigned his rights under the melcharth to the *kanomdar*, the second defendant, stipulating at the same time that the second defendant should pay the plaintiff the arrears of rent due under the *kanom* which he had bound himself to collect and pay on redeeming the second defendant.

One of the questions argued before us was whether the plaintiff is entitled to sue on this contract made between the first defendant and second defendant. As regards this I agree with ABDUR RAHIM, J., that he cannot, and that the question is concluded by the recent decision of the Privy Council in *Jamna Das v. Ram Autar Pande*(7) where Lord MACNAGHTEN delivering their Lordships' judgment held that a purchaser's contract with his vendor to pay off a mortgage on the property sold could not be enforced by the mortgagee.

(1) (1898) I.L.R., 21 Mad., 138.

(3) (1902) I.L.R., 25 Mad., 568.

(5) (1885) I.L.R., 8 Mad., 415.

(2) (1900) I.L.R., 23 Mad., 86.

(4) (1884) I.L.R., 7 Mad., 545.

(6) (1913) 25 M.L.J., 581.

(7) (1912) I.L.R., 34 All., 63 (P.C.).

"The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him and the purchaser is not personally bound to pay off the mortgage debt."

This, in my opinion, recognizes the general applicability in India of the common law rule that the parties to a contract are the proper parties to sue on it, which was also the rule in equity except in so far as equity made an exception as explained in *Gandy v. Gandy*(1) in cases where the contract was made for the benefit of the third party and in such circumstances as to give rise to a trust in his favour which is not the case here. In the earlier case of *Kwaja Muhammad Khan v. Husaini Begam*(2), their Lordships held that this common law rule was not applicable to the facts and circumstances of that case in which the agreement executed by the defendant had specifically charged immovable property for the allowance which he had bound himself to pay to the plaintiff then a minor in contemplation of her marriage. Their Lordships observed that, although no party to the document, she was clearly entitled in equity to proceed to enforce her claim, and that in India, where marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connexion with such contracts. It is clear however from the later case that their Lordships did not intend to lay down that the common law rule had no application to India. In *Tweddle v. Atkinson*(3), to which their Lordships referred, reliance had been placed on certain old cases in which persons not parties to the contract had been allowed to maintain an action in assumpsit apparently, as observed by CROMPTON, J., on the ground that the action of assumpsit was in its origin an action of trespass on the case. In *Gandy v. Gandy*(4), BOWEN, L.J., considered that it would be mere pedantry now to go through the history of that idea; and this is probably why their Lordships in the case we are considering disposed of *Tweddle v. Atkinson*(3), with the remark that it was an action of assumpsit; but, as I have already said, they did not

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(1) (1885) 30 Ch. D., 57.

(2) (1910) I.L.R., 32 All., 410 (P.C.). (3) (1861) 1 B. & S., 393.

(4) (1866) 30 Ch. D., 57 at p. 60.

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mean by this that the common law rule on the basis of which that action was dismissed was generally inapplicable in India.

This however does not appear to me to dispose of the present case. The assignment by the first defendant of his right under the melcharth to the second defendant has been recognized by the plaintiff who by the notice (Exhibit B), dated 8th January 1912, demanded payment of the arrears from the second defendant by reason of the assignment and has also framed the present suit upon it; and, even if it could be said that the melcharth contained an implied covenant against assignment to the second defendant, I do not think the validity of the assignment can now be questioned. I think however that by reason of this assignment the second defendant became bound to redeem the old *kanom* and to hold the demised lands for a further term for the old *kanom* debt less the amount of arrears which were due at the date of redemption, and that the plaintiff *jenmi* when he came to know of the assignment, which was apparently shortly before he served the notice (Exhibit B) on the second defendant, became entitled to insist on his so redeeming the old *kanom* and to treat the arrears as money in the second defendant's hands had and received to the plaintiff's use and to recover it within three years under Article 62 and I think he must be taken to have exercised this right when he demanded payment of the arrears from the second defendant by Exhibit B on the basis of the assignment. I do not think we are bound to treat the redemption as having taken place on the date of the assignment by the first defendant to the second defendant seeing that the arrears were not paid over to the plaintiff as they should have been. Even if we were, I should be prepared to hold that under Article 62 read with section 18 of the Limitation Act time would not run against the plaintiff so long as he was kept in the dark as to the manner in which his rights had been affected by the assignment of the first defendant's melcharth rights to the second defendant.

In this view of the case I do not think it necessary to decide the question which has been raised, whether under the Malabar Law the *jenmi* has a charge on the amount of the *kanom* debt for arrears of revenue or merely a right to take credit for the amount of such arrears when the account is taken as between the mortgagor and the mortgagee. A charge may be realized at any time under section 100 of the Transfer of Property Act,

and one test would appear to be whether under the Malabar custom barred arrears can be recovered at any time by enforcing the charge. If not, I should as at present advised be disposed to hold that there cannot strictly speaking be said to be a charge. In the result, the Letters Patent Appeal will be dismissed with costs.

BAKEWELL, J. — The plaint recites a *kanom* deed, dated the 6th July 1893, granted by the plaintiff to the second defendant, and a melcharth, dated the 28th January 1904, to the first defendant, and alleges that under the provisions of the melcharth the first defendant was bound to redeem the second defendant on the expiration of the term of the *kanom* in 1905 and to pay to the plaintiff the arrears of rent due by the second defendant for the years 1896 to 1905. The plaint also recites an assignment of the melcharth, dated the 6th July 1909, by the first defendant to second defendant and an agreement therein contained that the latter would pay the arrears of rent to the plaintiff.

The cause of action is stated to have arisen on the date of the melcharth and the plaint prays for payment of the arrears of rent from 1896 to 1905 and from 1910 to 1913 and for sale of the defendants' *kanom* right.

The suit is therefore to enforce payment of monies due to the plaintiff under the provisions of the melcharth. The plaintiff's remedy for rent for the earlier period is barred, but in a suit for redemption he would be entitled to have it credited to him in taking an account as between the mortgagee in possession and the mortgagor. In such a suit the mortgagor is entitled to be credited with any monies received or due by the mortgagee, including rent, as on the dates on which they were received or fell due; and I do not think that it is correct to say that these monies are a charge on the mortgage monies, or that the learned Judges in *Kanna Pisharodi v. Kombi Achen* (1) intended to hold that any kind of charge is created by non-payment of rent. I do not think that the sum due for rent can be said to be money had and received by the mortgagee for the use of the mortgagor; he was bound to pay this sum but he never in fact received it on account of the mortgagor. At the

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date of the melcharth the plaintiff was therefore entitled to have an account taken of the amount due to the second defendant under his kanom, in which the arrears of rent would be credited to the plaintiff, and to redeem this defendant by payment of the balance, but there was no specific sum due and payable by the defendant to the plaintiff.

It appears from the recitals of the melcharth that the plaintiff had disputes with the second defendant and was anxious to redeem him and compel him to give up possession of the land, and also to obtain payment of arrears of rent, and the bargain between the plaintiff and the first defendant as evidenced by this document was that on the expiry of the term granted by the kanom the first defendant should redeem the second defendant by payment of the balance due to the latter and take possession of the land, and that the first defendant should then pay to the plaintiff the arrears of rent which would have been credited to him in the account.

The document contains a demise of the land to the first defendant "for a period of twelve years commencing from the date of recovering possession of the said properties", but provides that the first defendant shall pay rent from 1905, when the kanom term expired, "even in case there is delay in getting possession of the properties". The last provision appears to have been inserted for the purpose of ensuring prompt performance of the first defendant's obligation to redeem the mortgagee.

In my opinion the demise under this document was not intended to take effect until this obligation had been fulfilled and that since this has not been done the term of twelve years contemplated by the melcharth has not yet come into existence, and the assignment of the benefit of the document was in breach of its terms and passed nothing to the second defendant.

The relations between the plaintiff and the second defendant therefore fall to be determined, in accordance with the provisions of the kanom, and the plaintiff is not entitled to any remedy under the melcharth as against the second defendant.

Assuming that on the true construction of the melcharth a leasehold interest was created in favour of the first defendant immediately upon the determination of the term granted by the kanom to the second defendant, and that the assignment of the melcharth to the second defendant imposed upon him an

obligation to take an account of the amount due under his kanom and to redeem himself, the result would be that he would hold the term granted by the melcharth as security for the balance found to be due to him. The obligation to pay a certain item taken the account in ascertaining the balance would arise not from the redemption but from the personal liability undertaken by the first defendant under his melcharth.

The first defendant's obligation to pay a sum of money determined by the arrears of rent due under the previous demise in fact formed part of the consideration for the grant of the new lease; this sum was not rent due under the latter, and the agreement to pay it cannot be said to run with the land so as to be binding upon an assignee.

The sum agreed to be paid might possibly be a charge upon the interest (if any) of the first defendant in the land, as unpaid purchase money, but this point has not been taken either in the plaint or the arguments.

I respectfully agree with the learned Chief Justice that a contract cannot be enforced by a person not party to it, and I think that the provisions of the melcharth that the first defendant shall redeem the kanomdar and pay a certain sum to the plaintiff are personal covenants and cannot be enforced against the second defendant. The same reasoning applies to the provisions of the assignment to the second defendant.

The plaintiff appears to have acquiesced in the assignment of the melcharth to the second defendant but it has not been shown that the latter has by conduct or otherwise agreed to be bound by its terms; on the contrary the assignment appears to have been obtained by him with the view of preventing the provisions of the melcharth from coming into force and thus postponing the redemption of his mortgage.

The lower Appellate Court refused relief against the first defendant; and there is no appeal from that order by the plaintiff.

For these reasons I think that this appeal should be allowed, the decrees of the lower Courts set aside and the plaintiff's suit in respect of rent for the period from 1895 to 1905 dismissed.

KUMARASWAMI SASTRIYAR, J.—The suit out of which this appeal arises was filed by the plaintiff (the jenmi) to recover arrears of rent. The second defendant obtained a kanom from

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the *jenmi* under Exhibit III on the 6th July 1893 whereby he was entitled to be in possession of the properties demised for twelve years (i.e., till 6th July 1905). On the 28th January 1904 the *jenmi* granted a *melcharth* to the first defendant by Exhibit I, the material portion of which runs as follows:—

"On the expiry of the term of the demise you shall either directly or by suit pay to Gopala Menon and another (the *kanomdars* under Exhibit III) the balance *kanom* after setting off the arrears of *purapad* and interest against the *kanom* and obtain possession of the properties. And you shall hold the properties on paying properly the *purapad* due from 1081 (1905-1906). You should then pay to the Edom the value of the *purapad* which you get set off against the *kanom* and obtain receipt therefor . . . It is stipulated that you should pay the whole of the *purapad* from 1081 (1905-1906) even in case there is delay in getting possession of the properties."

The first defendant did not redeem the *kanom* of the second defendant when it became redeemable on the 6th July 1905 but assigned his rights under the *melcharth* deed (Exhibit I) to the *kanomdar* by the deed of assignment (Exhibit II), dated the 6th July 1909. The material portion of the document runs as follows:—

"I have this day received in cash from you Rs. 600 made up of the renewal fee of Rs. 400 due to me in accordance with the said *melcharth* and interest thereon and Rs. 56 being the value of *paddy* consisting of the *michavaram* paid by me to the *jenmi* from 1081 (1905-1906) to 1084 (1908-1909) with interest thereon and I have hereby assigned to you all the rights belonging to me under the said *melcharth* . . . You should directly pay to the *jenmi* the arrears of *michavaram*, etc., payable to the *jenmi* from 1071 (1895-1896) to 1080 (1904-1905) inclusive. If you do not do so, you shall be liable for the damages arising therefrom."

Although the *jenmi* might have repudiated the *melcharth* owing to the *melcharthdar's* failure to redeem the prior *kanom* as expressly stipulated in the *melcharth*, he did not choose to do so; but on the contrary sent the notice Exhibit B to the assignee of the *melcharth* demanding arrears of rent "as he held in himself the entire rights of the prior tenant and the *melcharthdar*." In his plaint the *jenmi* recognizes both the *melcharth* and the assignment as valid and subsisting transactions at the date of suit and he obtained a decree against the second defendant.

The *melcharth* provides for rent being paid to the *jenmi* even if the *melcharthdar* delayed in redeeming the *kanom* and there is nothing so far as I can see to prevent (in the absence of any objection raised by the *jenmi*) the *kanomdar* and *melcharthdar* from agreeing between themselves that the *kanomdar* is to remain in possession so long as the rights of the *jenmi* to the rent reserved by the *melcharth* and his right to recover arrears of rent on the *kanom* are not affected. I do not think that the *melcharth* was at the date of the assignment invalid and inoperative by reason of the failure of the grantee to redeem the *kanom*.

The rights of the parties must be dealt with on the footing that the second defendant remains liable for all the legal consequences that would flow from his being both the *kanomdar* and the assignee of the *melcharth*.

I am of opinion that the effect of the assignment of the *melcharthdar's* rights to the *kanomdar* was to extinguish the *kanom* at least from the date *jenmi* assented to the assignment. The *kanomdar* then became entitled to use the *melcharth* as a shield against any attempts which the *jenmi* might make to recover possession of the land. If the *melcharthdar* instead of assigning the *melcharth* had acted according to its terms and redeemed the *kanom* the *jenmi* would, under the terms of Exhibit I, have been entitled to recover the sum which would be in the *melcharthdar's* hands as arrears of rent which had been set off against the *kanom* amount. There can be little doubt that the effect of the assignment of the *melkanom* to the *kanomdar* was to allow the *kanomdar* to remain in possession for the period provided in the *melkanom* and the question is whether the *kanomdar* can be heard to say that he is under no obligation to pay the *jenmi* under arrears of rent on the *kanom* which the *kanomdar* bound himself to pay the *jenmi* under Exhibit II. I do not think it is open to the *kanomdar* to claim the advantages which he got by reason of the assignment of the *melcharth* without performing the obligations imposed by the *melcharth*. In *Kulandavelu Padayachi v. Kamatchi Aiyer* (1), it was held that a person who though not a party to a contract, takes benefits under it, is bound to pay money due under the contract. The case was one where by a partition deed between two brothers

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lands were given to a female member for her maintenance on condition that she paid a certain sum of money to each of the brothers. She took possession and was sued by one of the brothers for the amount payable. The lower Court dismissed the suit on the ground that she was no party to the contract but in revision SUNDARA AYYAR, J., held that though not a party to the contract she took a benefit under it and was subject to the burden imposed on her by the document. I might in this connection refer to *Irving v. Turnbull*(1). It was a case where a common vendor of various plots of land agreed to pay the purchaser of one plot, one half of the cost of erecting a party wall which was partly built on a portion of an adjacent plot and then sold the adjacent plot to another person with covenant that the second purchaser should pay to the first purchaser the sums which the vendor had agreed to pay in respect of the building of the party wall. In a suit by the first purchaser against the second, objection was taken that there was no privity of contract but a decree was passed on the ground that

"sufficient had taken place to constitute privity of contract where the second purchaser in fact used the wall that had already been built upon by his neighbour and that consequently at that stage there was sufficient for the Court to hold that an action at common law as upon an implied contract would arise from such a use of the wall."

CHANNEL, J., observed that

"very little will create that privity of contract where it is so convenient for all parties that the matter should be carried out between two parties really interested in it."

It has been contended on the authority of *Tweddle v. Atkinson*(2), that no stranger to the consideration can enforce performance of a contract though made for his benefit. That the rule laid down in *Tweddle v. Atkinson*(2), has exceptions and is not of universal application in India is clear from the following observations by their Lordships of the Privy Council in *Khwaja Muhammad Khan v. Husaini Begam*(3):

"First, it is contended, on the authority of *Tweddle v. Atkinson*(2), that as the plaintiff was no party to the agreement she cannot take advantage of its provisions. With reference to this it is enough

to say that the case relied upon was an action of assumpsit and that the rule of common law on the basis of which it was dismissed is not, in their Lordships' opinion applicable to the facts and circumstances of the present case."

Their Lordships were of opinion that the fact that the payment was charged on the immoveable property and that the plaintiff was beneficially entitled to it gave her the right to sue on the contract to which she was not a party.

In *Shuppu Ammal v. Subramanian*(1), it was held on the authority of *Rahmabai v. Gorind*(2) and *Husaini Begam v. Khwaja Muhammad Khan*(3), which was confirmed by the Privy Council in *Khwaja Muhammad Khan v. Husaini Begam*(4), that a person who is no party to a document but in whose favour a charge is created by it was entitled to file a suit to enforce its terms either as actual beneficiary or charge-holder. If the decision in *Tweddle v. Atkinson*(5) is to be followed, as a rule of general application it is difficult to see how the fact that a charge has been created makes any difference so far as the person not a party to the contract is concerned. In *Arumuga Gounden v. Chinnammal*(6), it was held that a person could sue on an agreement to which she was no party, whereby two persons agreed to give her a certain quantity of paddy for her maintenance, SUNDARA AYYAR, J., referring to *Khwaja Muhammad Khan v. Husaini Begam*(4), observed that

"the rule that a person not a party to the contract cannot sue to enforce any rights created by it is one which would require considerable modification in this country."

He thought that if the rule was subject to exceptions one very proper exception was where co-parceners agreed to provide for maintenance of female members of the family. In *Kulandavelu Padayachi v. Kamakshi Aiyer*(7), the same learned Judge held that a person who is not a party to a contract but who takes a benefit under it was subject to the burden imposed.

Though *Dutton v. Poole*(8) affirmed on error in the *Exchequer Chamber* was dissented from in *Tweddle v. Atkinson*(5) it was followed in *Chinnaya Rau v. Ramaya*(9), and as pointed

- (1) (1910) I.L.R., 33 Mad., 238. (2) (1901) 6 Bom., L.R., 421.
(3) (1910) I.L.R., 29 All., 151. (4) (1910) I.L.R., 32 All., 410 (P.O.).
(5) (1861) 1, B. & S., 393. (6) (1911) 21 M.L.J., 918.
(7) (1912) M.W.N., 409.
(8) (1793) 2 Lev., 210; s.c., 1 Vent., 381; s.c., Ray., 302.
(9) (1832) I.L.R., 4 Mad., 137.

(1) (1900) 2 Q.B., 129.
(2) (1861) 1, B. & S., 393. (3) (1910) I.L.R., 32 All., 410 (P.O.).

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out by Pollock in his commentaries to the Contract Act, *Dutton v. Poole*(1) is having regard to 'consideration' in section 2, clause (d) of the Contract Act good law in India, where consideration need not move from the promisee.

All that was decided in *Jamna Das v. Ram Autar Pande*(2), was that a purchaser of property subject to a mortgage was not personally liable to pay the sum due on the mortgage to the mortgagee so as to entitle him to a personal decree should the sale-proceeds of the mortgaged property be insufficient. It was not alleged that the mortgagee was in any way prejudiced by the transfer or that any exceptional circumstances existed.

If as pointed out by their Lordships of the Privy Council in *Khwaja Muhammad Khan v. Hussaini Begam*(3), and by SUNDARA AYYAR, J., in *Arumuga Gounden v. Chinnammal*(4), the rule in *Tweedle v. Atkinson*(5), is not of universal application and is subject to exceptions in India, I think the *jenmi* situated as the plaintiff in the present case is, is entitled to sue on the contract between the *kanomdar* and *melkanomdar*.

Even assuming that the *jenmi* cannot enforce the contract evidenced by Exhibit I against the *kanomdar* I think that an action for money had and received would lie. This aspect of the case has been fully dealt with by the Chief Justice in his judgment which I have had the advantage of perusing and I entirely agree with his observations on the point.

Whether the claim of the *jenmi* is based on his right to sue on the arrangements evidenced by Exhibits I and II or on the ground that the *kanom* must be deemed to have been redeemed when the assignment of the *melcharth* to the *kanomdar* was assented to by the *jenmi* it is not barred. In the former case he would have six years within which to file the suit as Exhibits I and II are registered documents and in the latter he would have three years from the date of his assent. It is unnecessary to deal with the contention of the respondents that the *jenmi* has a charge on the *kanom* amount in respect of rent due to him from the *kanomdar*.

I am of opinion that the decision of PHILLIPS, J., is right and would dismiss the Letters Patent Appeal with costs.

N.B.

(1) (1793) 2 Lev., 210; s.c., 1 Vent., 381.
(2) (1912) I.L.R., 34 All., 63 (P.C.). (3) (1910) I.L.R., 32 All., 410 (P.C.).
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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 146, AND O. XXII, R. 10—*Suit originally filed in a District Munsif's Court—Plaint returned and filed in a Subordinate Judge's Court—Suit property mortgaged to another during pendency of suit in the former Court—Decree for plaintiff by Subordinate Court—Petition to District Court by mortgagee for permission to appeal, if competent—Appeal by mortgagee against decree of Subordinate Judge's Court, whether, maintainable.*

A plaint filed in a District Munsif's Court was, on objection taken by the defendant to the valuation of the suit, ordered to be returned and was presented in the Subordinate Judge's Court. While the suit was pending in the District Munsif's Court, the suit property was mortgaged by the defendant to the appellant. On the suit being decreed by the Subordinate Judge in favour of the plaintiff, the defendant did not prefer an appeal; the appellant, as the mortgagee of the suit property pending suit alleging collusion between the plaintiff and the defendant, filed an application in the District Court under Order XXII, rule 10, for an order allowing him to prefer an appeal, and also preferred an appeal against the decree. The District Judge dismissed both the petition and the appeal as incompetent. The appellant preferred to the High Court a Civil Miscellaneous Appeal and a second appeal against the decisions respectively. *Held*, that Order XXII, rule 10, only governs applications made to continue a suit and that an application presented after the termination of the suit was not within the rule; *Subba Pillai v. Rungasami* (1917) M.W.N., 306 and *The Collector of Musaffernagar v. Husaine Begam* (1896) I.L.R., 18 All., 86, followed. *Held* also, that, under section 146 of the Civil Procedure Code, it was competent to the mortgagee to prefer an appeal to the District Court against the decree of the Subordinate Judge, and that the District Judge was bound to dispose of the appeal on the merits, notwithstanding the dismissal of the petition under Order XXII, rule 10. Where a plaint is returned for presentation to the proper Court, any devolution of interest during the pendency of proceedings in the first Court must be taken to be a devolution of interest during the pendency of the suit in the second Court. *Seshagiri Rao v. Vapa Velayudam Pillai* (1918) I.L.R., 36 Mad., 492, distinguished.

Sitaramaswami v. Lakshmi Narasimha ... (1910) I.L.R., 41, Mad., 510
 O. XLII, AND SEC. 115—*Suit for rent in a Revenue Court—Service inam—Discontinuance of service—Ryoti land—Decree in Revenue Court—Appeal—Jurisdiction of Revenue Court—Plaint ordered by District Judge to be returned for presentation to Civil Court—Appeal to the High Court against order of District Judge, if competent—Order*

whether a decree—*Estates Land Act (Madras Act I of 1908), sec. 192, cl. (a)—Prohibition of Appeals—Conversion of appeal into civil revision petition.*] A landholder sued for arrears of rent in a Revenue Court from the defendants who originally held the lands on service tenure but had ceased to perform the services prior to the suit. The Revenue Court passed a decree in favour of the plaintiff. On appeal, the District Judge set aside the decree holding that the Revenue Court had no jurisdiction to entertain the suit and ordered that the plaint should be returned to the plaintiff for presentation to a proper Court. On plaintiff preferring an appeal to the High Court, the respondent raised a preliminary objection that the appeal did not lie. *Held*, that no appeal lay against the order of the District Judge, because section 192, clause (a) of the Estates Land Act prohibited the applicability of Order XLIII of the Civil Procedure Code to proceedings under the Act, and the order was not a decree under the Civil Procedure Code. *Held also*, that the appeal should be converted into a civil revision petition under section 115 of the Civil Procedure Code, as the latter section was not excluded by section 192 of the Act; and that the Revenue Court had jurisdiction to entertain the suit, as the lands were ryoti lands and did not fall within the exception to ryoti land in section 3 of the Act, inasmuch as the services were not performed at the date of the suit. *The Secretary of State for India v. Chelekani Rama Rao* (1916) I.L.R., 39 Mad., 817 (P.C.), distinguished.

Rajah Venkata Rammayya v. Veeraswami ... (1918) I.L.R., 41 Mad., 554

COURT OF WARDS ACT (MADRAS ACT II OF 1902), ss. 41 AND 37—*Non-notification of pecuniary claims as required by section 37, effect of—Cessation of interest, whether, final—Postponement of payment of unnotified claims to notified claims, whether, continued after cessation of Court of Wards' management.*] The direction contained in section 41 of the Madras Court of Wards Act (II of 1902) to postpone payment of pecuniary claims against a ward of the Court which are not notified to claims notified to the Collector as required by section 37 of the Act applies only to the Court of Wards and not to others authorised to execute decrees under the Civil Procedure Code; and that too in respect of unsecured claims; and the direction is not operative after the ward's estate ceases to be under the Court of Wards. Hence a mortgage decree against a person which the decree-holder failed to notify to the Collector while the person was under the Court of Wards is executable in Civil Courts, without any liability to postponement to notified claims, after the Court of Wards' management ceases. But non-notification of the existence of the claim as required by section 37 entails a final cessation of interest from six months after the notification prescribed in section 37 of the Act except in the event specified in section 55 (4). *Depuru Kalappa Reddy v. Umada Rajah* (1911) 1 M.W.N., 75, considered.

Ranga Row v. Rajah of Karvetnagar ... (1918) I.L.R., 41 Mad., 508

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 562—*Penal Code (Act XLV of 1860), sec. 420—Section 562, whether applicable to a conviction under section 420.*] The word "cheating" in section 562 of the Code of Criminal Procedure does not cover the form of cheating punishable under section 420

of the Indian Penal Code. *Emperor v. Ramjan Dadubhai* (1915) 16 C.L.J., 781, approved and followed. *Harnarain v. Ramji Das* (1915) 12 A.L.J., 465, dissented from.

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DAMAGES:—*See* TORTS.

DISTRICT MUNICIPALITIES ACT (MADRAS ACT IV OF 1884), ss. 172 AND 173:—*See* TORTS.

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EVIDENCE ACT (I OF 1872), s. 68.—*Attesting witness, meaning of—Writer of a document, whether can be regarded as an attesting witness.*] The writer of a document who signed the same as a scribe, can be regarded as an attesting witness, if he saw the signing of the document by the executant. *Veerapudayan v. Muthukaruppan Thevan* (1913) 21 M.L.J., 534, *Ayyasami Iyengar v. Kylasam Pillai* (1915) 26 I.C., 409 and *Ranu v. Laxman Rao* (1909) I.L.R., 33 Bom., 44 referred to. *Badri Prasad v. Abdul Karim* (1913) I.L.R., 35 All., 254 and *Ram Bahadur Singh v. Ajodhya Singh* (1916) 20 C.W.N., 699, dissented from.

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EXECUTION, purchase of mortgage property in, by prior mortgage who did not implead puisne mortgage—*Receipts of rents and profits, thereafter*:—*See* MORTGAGE ...

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GUARDIAN, adult coparcener's power to appoint by will:—*See* HINDU LAW ...

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HINDU LAW—*Mitakshara joint family—Power of adult coparcener to appoint by will a guardian for minor coparcener's property.*] *Held* by the Full bench that the only adult coparcener of a Mitakshara family consisting of himself and his minor coparceners, is not competent to appoint a testamentary guardian to the coparcenary properties of the minor coparceners. *Cases on the subject reviewed.*

Chidambara Pillai v. Rangaswami Naicker ... (1918) I.L.R., 41 Mad., 561

LIMITATION ACT (IX OF 1908), ARTS. 4, 7, 101, 102 AND 120—*Hereditary archaka of a temple—Suspension by trustees—Suit by archakas for pay, perquisites and damages against trustees—Limitation for suit—Provincial Small Cause Courts Act (IX of 1887), sch. art. 18—Suit, whether cognizable by a Small Cause Court—Appeal against order of remand, whether competent.*] The plaintiffs, who were hereditary archakas in a temple, were suspended from their office in June 1912, by the trustees of the temple; the order was passed on the 19th June 1912 and the suspension lasted till 3rd July 1912. The plaintiffs, alleging that the suspension was illegal and unjust, sued on the 28th June 1915 to recover their pay and perquisites as well as damages for mental distress, loss of dignity, etc., for an amount below Rs. 500 as against the trustees, the *peishkar* of the temple and the person who performed the duties of their office during their suspension. The Lower Appellate Court having held that the suit was not barred by limitation as regards pay and perquisites and remanded the case to the Court of First Instance, one of the trustees preferred an appeal against the order of

remand, contending that the suit was wholly barred. The respondents (plaintiffs) raised a preliminary objection that the appeal was incompetent as the suit was of a small cause nature: *Held*, that an appeal lay to the High Court against the order of remand, as the suit was not cognisable by a Small Cause Court; that article 102 of the Limitation Act applied to the suit as against the trustees as regards the pay and the perquisites if payable by the temple, and the suit was not barred as regards such claims; that article 36 applied to the claim for perquisites if payable by third persons, as well as to the claim for damages, and the claims were barred; and that, as against the *peishkar*, there was either no cause of action or it was barred under article 36 of the Limitation Act.

Davalwaja Mudaliar v. Arunachala Gurukkal ... (1918) I L.R., 41 Mad., 528

MALABAR LAW—*Karnavan appointed by family karar*—Right of other members to remove such *karnavan* by suit, for misconduct.] *Held* by the Full Bench that a person appointed as *karnavan* of a *tarwad* by an agreement (*karar*) of the members of the *tarwad* is liable to be removed for gross misconduct by a suit at the instance of the other members. *Cheria Pungi Achan v. Unnala- chun*, (1917) M.W.N., 185, explained.

Ohindan Nambiar v. Kunhi Raman Nambiar ... (1918) I.L.R., 41 Mad. 577

MORTGAGE—*Suit and decree by prior mortgagee without impleading puisne mortgagee*—Purchase of mortgage property by prior mortgagee in execution—Receipt of rents and profits thereafter—Mode of accounting between the two mortgagees.] A mortgage decree obtained by a prior mortgagee without impleading a puisne mortgagee does not effect the latter and the amount therefore payable by the latter in discharge of the prior mortgage is not the amount of the decree but that which is due on the footing of the prior mortgage as if no suit had been brought; and if the prior mortgagee buys the mortgage property in execution of his decree and gets possession of the same, the rents and profits received by him cannot be set off as equivalent to the interest due for the period of possession, but must be accounted for and deducted from the amount payable by puisne the mortgagee. *Umes Chunder Sircar v. Zahur Fatima* (1891) I.L.R., 18 Cal., 164 (P.C.) and *Ganga Pershad Sahu v. The Land Mortgage Bank of India* (1894) I.L.R., 21 Cal., 365 (P.C.), applied. *Syed Ilrubi Sahib v. Armuyathayee* (1915) I.L.R., 38 Mad., 18 considered.

Muthammal v. Renu Pillai ... (1918) I.L.R., 41 Mad., 513

MOTOR VEHICLES ACT (MADRAS ACT I OF 1907) NEGLIGENCE, see TORTS.

PENAL CODE (ACT XLV OF 1860), ss. 29, 30, 464, 467 AND 474—*Forgery—Document, meaning of*—Valuable security—Incomplete document—Material alteration of incomplete document, effect of.] An agreement in writing, which purported to be entered into between five persons, was signed by only two of them; it was altered by the addition of some material terms by the accused who was one of the two executants without the consent or knowledge of the other executant and was not signed by the other parties to the agreement. The accused was in possession of the instrument which was altered by him: *Held*, by OLDFIELD, J. (on a reference under section 429, Criminal Procedure Code, owing to difference of opinion between SADASIVA AYYAR and PHILLIPS, JJ.), that the accused was guilty of the offence of forgery of a valuable

security under section 467, or of being in possession of a forged document under section 474 of the Indian Penal Code. The instrument, though not signed by all the parties thereto, fulfilled the requirements of the definition of a 'document' in section 29 of the Code. The document was a valuable security because it imposed an obligation on the actual executants and an option on the others and there was no express or implied condition precedent to be found in the document or established by independent evidence that the document was to be inoperative against the executants until all the parties executed it. It is open to the accused to plead and to prove that the alteration were not made fraudulently or dishonestly, because they represented what accused in good faith believed to be the truth and intended to use to support what in good faith he claimed or might claim. *Queen-Empress v. Syed Hussain* (1895) I L.R., 7 All., 403; *Queen-Empress v. Shao Dyal* (1885) I.L.R., 7 All., 452; *Queen v. Kishan Pershad* (1870) 2 N.W.P.H.C.R., 232; and *Manicka Azari v. Emperor* (1915) M.W.N., 278, referred to. *Regina v. Turpin* (1841) 2 C. & K., 820, disapproved. *R. v. Bingley* (1821) R. & R., 449, referred to. *R. v. Lee* (1848) 3 Cox., 80 and *Reg. v. Harper* (1881) 7 Q.B.D., 73, followed.

Ramaswami Ayyar v. The King-Emperor ... (1918) I.L.R., 41 Mad., 589

PENAL CODE (ACT XLV OF 1860), SEC. 420:—*See CRIMINAL PROCEDURE CODE ACT V OF 1909*, s. 562.

PRE-EMPTION—*Right of, in involuntary sales*. *Held* by the Full Bench:—In the absence of any statutory reservation of the right, a right of pre-emption does not exist in cases of involuntary sales; hence a Malabar otti mortgagee has no right of pre-emption against a purchaser in Court auction of the mortgaged property and he is not entitled to any notice of the intended Court sale or of the price fetched at the sale.

Vasudevan Moosad v. Ittirarichan Nair ... (1918) I.L.R., 41 Mad., 582

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. ART. 13:—*See LIMITATION ACT (IX OF 1908), ARTS. 417, 101, 102 AND 120.*

TORTS—*Negligence—Municipalities, liability of—Repair of Road—Independent contractor—Leaping of gravel on road without light—Injury to plaintiff—Damages*—Statutory bodies, liability of—*District Municipalities Act (IV of 1884), ss. 172 and 173—Madras Motor Vehicles Act (I of 1907)—Absence of licence, effect of.*] The plaintiff sued the Municipality of Vizagapatam to recover compensation for injuries sustained by him owing to the negligent stacking of gravel in a municipal road which was being repaired by a contractor employed by the municipality. The defendant pleaded non-liability under the general law and also on the ground that it had employed an independent contractor for the repair of the road: *Held*, that the municipality was liable to pay damages to the plaintiff for the injuries sustained by him. *Per SESHAGIRI AYYAR, J.*—In laying and maintaining a road, municipalities in this country are not exercising purely sovereign functions and consequently they are liable for misfeasance. *The Secretary of State v. Cockcroft* (1914) I.L.R., 39 Mal., 351, distinguished. The absence of a provision for payment of damages in the District Municipalities Act which directs the application of the Municipal fund in a particular manner, does not affect

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the right of a person against whom a wrong has been committed by the statutory body to recover compensation for such injury. The fact that the plaintiff did not obtain a licence under the Madras Motor Vehicles Act at the time of the accident, did not disentitle him to damages. Although an employer is not *ordinarily* liable for illegality or neglect on the part of a contractor employed by him, there are certain recognized exceptions to the rule, namely:—(1) Where the employer is aware that the doing of a contract work involved a public danger, he ought to see that the contractor so discharges his duty as to avoid such a danger; *The Corporation of the Town of Calcutta v. Anderson* (1834) 1 L.R. 10 Cal., 445, referred to. (2) Where statutory bodies are entrusted with the performance of a public duty, their liability cannot be shifted to a contractor; *Hardaker v. Idle District Council* (1896) 1 Q.B., 335, referred to. *Per* NAPIER, J.—(1) A statutory body like a municipal council cannot be said to be either the servant or the agent of the Crown unless it is so constituted by the provisions of the Act. (2) With regard to statutory bodies, the liability does not depend on their levying tolls or taxes on account of the work undertaken by them. (3) Section 173 of the District Municipalities Act does not control the provisions of section 172 of the same Act. (4) Where a statutory authority has power to do something to a road which will make it dangerous while it is being done, it is liable for any negligence in the doing of that which has to be done, whether the action be that of its own servant or of an independent contractor.

Municipal Council of Vizagapatam v. Foster ... (1918) I.L.R., 41 Mad., 538

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Bakewell
and Mr. Justice Kumaraswami Sastriyar.*

SRINIVASA RUNGA ROW PANTULU (DEAD) (REPRESENTED BY
THE OFFICIAL ASSIGNEE, HIGH COURT, MADRAS) AND ANOTHER
(PETITIONER), APPELLANTS,

1917,
September,
10 and 19.

v.

RAJAH OF KARVETNAGAR, BY HIS GUARDIAN,
VARADACHARIAR (COUNTER-PETITIONER),
RESPONDENT.*

Madras Court of Wards Act (II of 1902), ss. 41 and 37—Non-notification of pecuniary claims as required by section 37, effect of—Cessation of interest whether final—Postponement of payment of unnotified claims to notified claims, whether continued after cessation of Court of Wards' management.

The direction contained in section 41 of the Madras Court of Wards Act (II of 1902) to postpone payment of pecuniary claims against a ward of the Court which are not notified, to claims notified to the Collector as required by section 37 of the Act applies only, to the Court of Wards and not to others authorized to execute decrees under the Civil Procedure Code; and that too in respect of unsecured claims; and the direction is not operative after the ward's estate ceases to be under the Court of Wards. Hence a mortgage decree against a person which the decree-holder failed to notify to the Collector while the person was under the Court of Wards is executable in Civil Courts, without any liability to postponement to notified claims, after the Court of Wards' management ceases. But non-notification of the existence of the claim as required by section 37 entails a final cessation of interest from six months after the notification prescribed in section 37 of the Act except in the event specified in section 55(4).

Depuru Kalappa Reddy v. Umada Rajah (1911) 1 M.W.N., 75, considered.

APPEAL under clause 15 of the Letters Patent against the Judgment of OLDFIELD, J. (who differed from KRISHNAN, J.), in *Srinivasa Runga Row v. Minor Rajah of Karvetnagar*(1).

One V. Krishnaswami Row became an insolvent and his estate vested in the Official Assignee of Madras. He was a member of a joint Hindu family of four persons. One of the

* Letters Patent Appeal No. 266 of 1916.

(1) Civil Miscellaneous Appeal No. 107 of 1912 preferred against the order of L. G. MOORE, the District Judge of North Arcot, in Civil Miscellaneous Petition No. 148 of 1911, dated 4th December 1911, in Execution Petition No. 132 of 1905, in Original Suit No. 7 of 1894.

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assets of the family was a mortgage decree for a lakh of rupees against the Zamindar of Karvetnagar in Original Suit No. 7 of 1894. The Official Assignee brought a suit (Original Suit No. 116 of 1897) for partition and was appointed receiver to execute the mortgage decree. But before this was done a twenty-fourth share in the decree had passed to a person not a party to the partition suit or the order in it; this share finally passed to one Srinivasa Raghavachari. The Court of Wards had taken charge of the Karvetnagar Estate in 1899, the then zamindar having been declared a ward. The management continued up to 1905 when the estate was released as the zamindar died. The Official Assignee filed Execution Petition No. 132 of 1905 for executing the mortgage decree. The minor zamindar who had succeeded to the estate was also declared a ward of the Court of Wards who assumed management again in August 1907 before the execution was carried out. The management continued till January 1910 when the estate was released under the discretionary power given under the first part of section 54. The usual notification was published by the Collector under section 37 (1) in February 1908 calling upon all creditors to notify their debts and a special notice was apparently sent to the Official Assignee. For some reason not apparent the Official Assignee failed to notify his mortgage decree debt. In December 1914, the District Court held in Civil Miscellaneous Petition No. 148 of 1911 (in the above Execution Petition No. 132 of 1905) that under section 41 of the Act, the claim of the Official Assignee to execute his decree should be postponed until after discharge or satisfaction of the claims of creditors notified or admitted under section 38 and that interest should cease from August 1908, i.e., at the expiry of six months from the date of notification under section 37 (1). Against this order the present appeal was filed in the High Court by the Official Assignee and two others.

In the meanwhile Srinivasa Raghavachari, abovementioned assignee of a twenty-fourth share in the decree, applied for execution of the decree in Original Suit No. 7 of 1894. His application was allowed as he had properly notified his claim under section 38. In execution the mortgaged property was sold in April 1916 and purchased by one Muthia Chetty, a stranger, and the sale-proceeds were deposited in Court.

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The decree in Original Suit No. 7 of 1894 having been fully executed, the prayer in the Execution Petition No. 132 of 1905 under appeal, to sell the mortgaged properties became useless; and the decree-holder therefore prayed in the High Court that the balance of the sale-proceeds deposited in Court be paid to him in execution of his decree.

The appeal was heard by OLDFIELD and KRISHNAN, JJ. OLDFIELD, J., agreed with the lower Court and held that as the appellant had not notified his claim to the Collector as required by section 37 (1) of the Madras Court of Wards Act (II of 1902) he had lost his right to subsequent interest and was not entitled to be paid until the creditors who had notified their claims were paid; while KRISHNAN, J., reversed the lower Court's order and remanded the petition holding that on non-notification of the claim interest ceased *for ever*, but that the penalty of postponement was operative only so long as the management of the Court of Wards lasted, and that therefore the decree-holder was entitled to be paid out of the sale-proceeds. In the result the application was dismissed with costs.

The decree-holder then preferred this appeal under clause 15 of the Letters Patent.

T. Narasimha Ayyangar for the appellant.—I contend for the view taken by KRISHNAN, J. The penalty of postponement contained in the second part of section 41 of the Court of Wards Act is only operative during the period of the Court of Wards' management and not after it ceases. *Depuru Kalappa Reddy v. Umada Rajah*(1) is wrong.

L. A. Venkata Raghava Ayyar for *L. A. Govinda Raghava Ayyar* for the respondent.—section 41 (second part) is imperative and the penalty is absolute and extends after the termination of the Court of Wards' management. I adopt the view of OLDFIELD, J. Section 55 gives a clue to the interpretation to be put on section 41. Interest ceases for ever as has been held in *Depuru Kalappa Reddy v. Umada Rajah*(1). The same finality must result in the case of non-notification of security. There are no words in the section stating that the penalty is to be only during the Court of Wards' management.

WALLIS, C.J.—In construing the provisions of section 41 WALLIS, C.J. of the Madras Court of Wards Act I of 1902, regard must be

(1), (1911) 1 M.W.N., 75.

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had to the scope and object of the amendments introduced into the Madras Court of Wards Regulation V of 1804 by Madras Act IV of 1899 and reproduced without substantial alteration in the Act of 1902. The object was to save the estates of embarrassed proprietors or at least a portion of them for their owners and it was hoped that with the aid of the additional powers conferred on it the Court of Wards would be able to provide for the full discharge of the proprietors' debts and liabilities. If not, the creditors were left to their ordinary remedies which were only interfered with as expressly provided. Among the powers conferred on the Court of Wards and its agent the Collector specified in the order under section 19 of the Act, was that of requiring all persons having pecuniary claims on the ward, whether decrees or not, to notify those claims within a specified period, failure to do so being visited with the penalties prescribed by sections 41 and 42. With the information thus acquired and with aid of further powers of ousting usufructuary mortgages from possession and converting them for the time into simple mortgages and of revising improvident leases it was hoped that the Court of Wards might find itself in a position to raise sufficient money to discharge all the liabilities. Section 41 imposes two penalties with regard to claims which have not been duly notified. The first of them is that

"it shall, notwithstanding any law, contract, decree, or award to the contrary, cease to carry interest from the expiration of the period prescribed by section 37"

for notifying claims. This threatened loss of interest was a strong inducement to notify claims and having regard to the express provision that interest shall cease even when payable under a decree and to the absence of any provision as to its again becoming payable except in the event specified in section 55 (4), I agree with both the learned Judges that, under the sections, the cessation of interest is final and that the claimant is left to prosecute his legal remedies for the amount already accrued due to him.

As regards the second penalty that the unnotified claim

"shall not be paid until after the discharge or satisfaction of the claims notified or admitted under section 38",

it may be observed in the first place that the provision cannot be construed as depriving secured creditors of their security or as

authorizing the application of money raised on their securities otherwise than in satisfaction of their claims. If not paid the secured creditor is entitled to retain his security till he is paid. In these circumstances to hold that the Court of Wards is prohibited by this section from raising money on the security and discharging the secured creditor and applying the surplus in the discharge of the general indebtedness would merely be to prevent the Court from raising money for the beneficial purposes specified in section 323 (3), Code of Civil Procedure and would unnecessarily embarrass it in the discharge of the difficult function entrusted to it without advantage to any body. This cannot, I think, have been the intention of the Legislature and I think that therefore we are justified in putting a restrictive construction on this highly general section and holding that in the case of secured creditors who have not notified it only prohibits payments to them by the Court of Wards out of the unincumbered funds at its disposal and does not prohibit the realization of the security and the satisfaction out of the proceeds of the secured creditor's claim.

If the prohibition of payment in section 41 is directed to the Court of Wards it follows of course that it must cease as held by KRISHNAN, J., when the Court of Wards withdraws from superintendence. I am disposed to think that it must be confined to the Court of Wards and that it does not extend to the authorities executing decrees even during the continuance of the superintendence of the Court of Wards. Creditors whether they have notified or not are not prevented from obtaining decrees and proceeding to execute them. If the execution is left to the Civil Courts, each Court must execute the decree before it with due regard to the rights of secured creditors and to the rights of unsecured decree-holders to rateable distribution. It can hardly have been intended that on each occasion of executing a decree the executing Court should have to embark on an inquiry as to whether all the notified debts have been paid and I think that sufficient effect may be given to section 41 without construing it as affecting the duties of executing Courts and that if it had been intended to affect them, there would have been express provisions to that effect. Again when the Local Government exercises its power under section 45 of transferring decrees against the ward to Collector for execution,

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I think the same considerations apply and that the provisions of section 41 as to order of payment do not affect the decree collector, as he is called, in the discharge of his duties under sections 321—325 (C) of the old Code of Civil Procedure which are made applicable by section 47 subject to the rules prescribed by the Local Government under section 45 (2) which rules however apply only to procedure and do not affect the substantive rights of the parties. In the case of decrees such as the present obtained by secured creditors ordering the sale of immoveable property in pursuance of a contract specifically affecting the same the decree collector has the powers conferred upon him by section 321 and is required by section 324 (A), to apply the moneys realized by him, subject to the claims of maintenance holders, in execution of the decree for which the Court ordered the sale of the immoveable property and in the case of other decrees to apply such moneys by way of rateable distribution under section 323 (3); the decree collector is also empowered to discharge the claim of any incumbrancer whether it has matured or not

“for the purposes of improving the saleable value of the property available or any part thereof or rendering it more suitable for letting or managing or for preserving the property from sale in satisfaction of an incumbrance.”

I do not think that the second part of section 41 was intended to affect the decree collector as regards these powers and duties.

This is an attempt to execute a mortgage decree passed in 1895. It is stated by the District Judge of North Arcot in his order on the connected Execution Petition No. 79 of 1912, dated 21st November 1912, that the Court of Wards assumed management on 26th July 1899 and gave up management of the estate on 27th September 1905 and that decrees were transferred to the Collector for execution and retransferred to the Civil Courts on 27th February 1906. It is also stated that the Court of Wards again assumed superintendence on 17th August 1907, and relinquished it on 15th January 1910, but it is not stated that decrees were again transferred to the Collector for execution during that period and the execution still remains with the Civil Courts. As it is now more than eighteen years since the Court of Wards first took over management and the other secured and unsecured claims have not yet been satisfied it seems exceedingly

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unlikely that they ever will be satisfied and if they are not, the money which has been realized on account of the defendant's security and which is in Court must according to the District Judge's order remain there for ever, a result which the Legislature can certainly not have contemplated. In passing the order the learned District Judge relied on a ruling contained in a judgment to which I was a party with KRISHNASWAMI AYYAZ, J., in *Depuru Kalappa Reddi v. Umada Rajah* (1) that the provisions of section 41 are absolute except in so far as they are cut down by section 55 (3) and OLDFIELD, J., has also relied on this ruling. That was an appeal against an order in which the District Judge had held that the zamindari was not liable to be proceeded against for many debts incurred by the previous holder and the order was reversed on the ground that his view was wrong. Apparently the District Judge's ruling in that case that section 41 was not applicable when the decree was being executed in the Civil Court was also questioned before us; and, as to this, I now think we expressed ourselves too broadly, because while I am still of opinion that the provisions of section 41 as to the cessation of interest continue to apply, I have come to the conclusion on a fuller consideration of the subject that the further provisions of the section are inapplicable for the reasons already given to the present case. In the result we agree with the order proposed by KRISHNAN, J. Costs of the appeal to abide the result.

BAKEWELL, J.—I agree.

KUMARASWAMI SASTRIYAR, J.—I agree.

BAKEWELL, J.
KUMARA-
SWAMI
SASTRIYAR J.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1917,
October, 31
and
November, 2.

S. SITARAMASWAMI (PETITIONER-ASSIGNEE FROM THE
DEFENDANT), APPELLANT IN BOTH THE APPEALS,

v.

D. LAKSHMI NARASIMHA AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 146, and O. XXII, r. 10—Suit originally filed in a District Munsif's Court—Plaint returned and filed in a Subordinate Judge's Court—Suit property mortgaged to another during pendency of suit in the former Court—Decree for plaintiff by Subordinate Court—Petition to District Court by mortgagee for permission to appeal, if competent—Appeal by mortgagee against decree of Subordinate Judge's Court, whether maintainable.

A plaint filed in a District Munsif's Court was, on objection taken by the defendant to the valuation of the suit, ordered to be returned and was presented in the Subordinate Judge's Court. While the suit was pending in the District Munsif's Court, the suit property was mortgaged by the defendant to the appellant. On the suit being decreed by the Subordinate Judge in favour of the plaintiff, the defendant did not prefer an appeal; the appellant, as the mortgagee of the suit property pending suit, alleging collusion between the plaintiff and the defendant, filed an application in the District Court under Order XXII, rule 10, for an order allowing him to prefer an appeal, and also preferred an appeal against the decree. The District Judge dismissed both the petition and the appeal as incompetent. The appellant preferred to the High Court a Civil Miscellaneous Appeal and a Second Appeal against the decisions respectively:

Held, that Order XXII, rule 10, only governs applications made to continue a suit and that an application presented after the termination of the suit was not within the rule;

Subba Pillai v. Rungasami (1917) M.W.N., 306, and *The Collector of Muzaffernagar v. Husaini Begam* (1896) I.L.R., 18 All., 86, followed.

Held also, that, under section 146 of the Civil Procedure Code, it was competent to the mortgagee to prefer an appeal to the District Court against the decree of the Subordinate Judge, and that the District Judge was bound to dispose of the appeal on the merits, notwithstanding the dismissal of the petition under Order XXII, rule 10.

* Second Appeal No. 1153 of 1916 and Civil Miscellaneous Appeal No. 74 of 1916.

Where a plaint is returned for presentation to the proper Court any devolution of interest during the pendency of proceedings in the first Court must be taken to be a devolution of interest during the pendency of the suit in the second Court.

Seshagiri Row v. Vapa Velayudam Pillai (1913) I.L.R., 36 Mad., 492, distinguished.

SECOND APPEAL against the decree of K. SRINIVASA RAO, the District Judge of Ganjām at Berhampur, in Appeal No. 200 of 1915, preferred against the decree of T. JIVAJI RAO, the Temporary Subordinate Judge of Ganjām at Berhampur, in Original Suit No. 25 of 1914.

Appeal against the order of K. SRINIVASA RAO, the District Judge of Ganjām, in Appeal No. 200 of 1915.

The material facts appear from the judgment.

K. V. L. Narasimham for the appellant.

G. Srinivasan for S. Varadachariar for the first respondent.

The Judgment of the Court was delivered by

SESHAGIRI AYYAR, J.—Plaintiff, the mother, sued her son, the defendant, for a declaration that the property in suit was her stridhanam. The suit was first filed in the District Munsif's Court and on objection being taken to valuation, it was returned for presentation to the Court of the Subordinate Judge and was tried in that Court. When the suit was in the Munsif's Court, the defendant executed a mortgage in favour of the present appellant. The suit was decided by the Subordinate Judge in favour of the plaintiff. It is alleged that while the son was taking steps to file an appeal he colluded with his mother and gave up the idea of preferring an appeal. Thereupon the present appellants filed an application to the District Court under Order XXII, rule 10, for an order that he be allowed to prefer an appeal, as the right to the property in suit devolved on him pending the suit. At the same time, he filed memorandum of appeal against the decree of the Subordinate Judge. On the application the District Judge held that Order XXII, rule 10, was not applicable and dismissed it. On the appeal he held that his order on the application concluded the right of the appellant. Against these two decisions a Civil Miscellaneous Appeal and a Second Appeal have respectively been preferred. As regards the dismissal of the application we agree with the conclusion of the District Judge though not with the reasons given by him. He has

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relied on *Seshagiri Rao v. Vapa Velayudam Pillai*(1) for the proposition that the suit in the Munsif's Court was not continued in the Court of the Subordinate Judge. We reserve our opinion on the exact point decided in *Seshagiri Rao v. Vapa Velayudam Pillai*(1). That decision is authority only for the proposition that for purposes of limitation, the suit in the Court of the Subordinate Judge was different from that which was first filed in the Munsif's Court. As at present advised we are inclined to think that when a plaint is returned for presentation to the proper Court, any devolution of interest which took place while the proceedings were pending in the first Court must be taken to be a devolution in the course of the suit which was subsequently tried in the second Court. But the order of the District Judge can be supported on the ground that when the appellant applied to the District Judge, there was no suit pending. Order XXII, rule 10 only governs applications made to continue a suit. Consequently the application presented after the termination of the suit was not within the rule. The recent decision of this Court in *Subba Pillai v. Rungasami*(2), takes that view which is also supported by *The Collector of Muzaffernagar v. Husaini Begam*(3). We agree with the view taken in these decisions. Following them we hold that the District Judge was right in rejecting the application and we dismiss the Civil Miscellaneous Appeal with costs.

The District Judge is clearly wrong in holding that the appeal failed by reason of his rejection of the application. Apparently his attention was not drawn to the provisions of section 146 of the new Code of Civil Procedure. It is rather anomalous that if the person claiming under a party applied to continue the suit while it was pending, the Court had a discretion to permit him to do so or to refuse his application while the effect of section 146 is to grant such a person an undeniable right to prefer the appeal which his assignor could have preferred. But the language of the section is clear and we are not at liberty to go behind its plain terms. The proceeding contemplated by the section would include an appeal and the expression *claiming under* is wide enough to cover cases of devolution, etc., mentioned in Order XXII, rule 10. We

(1) (1913) I.L.R., 36 Mad., 482. (2) (1917) M.W.N., 306.
(2) (1896) I.L.R., 18 All., 88.

therefore hold that the appellant was entitled to prefer the appeal to the District Judge. That appeal must now be heard on the merits. We reverse the decree of the District Judge and remand the appeal to him for disposal. Costs of the Second Appeal will abide the result.

K.R.

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APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Srinivasa
Ayyangar.

MUTHAMMAL (PLAINTIFF), APPELLANT,

v.

RAZU PILLAI AND FIVE OTHERS (DEFENDANTS), RESPONDENTS.*

*Mortgage—Suit and decree by prior mortgagee without impleading puisne mortgagee
—Purchase of mortgage property by prior mortgagee in execution—Receipt of
rents and profits thereafter—Mode of accounting between the two mortgagees.*

A mortgage decree obtained by a prior mortgagee without impleading a puisne mortgagee does not affect the latter and the amount therefore payable by the latter in discharge of the prior mortgage is not the amount of the decree but that which is due on the footing of the prior mortgage as if no suit had been brought; and if the prior mortgagee buys the mortgage property in execution of his decree and gets possession of the same, the rents and profits received by him cannot be set off as equivalent to the interest due for the period of possession but must be accounted for and deducted from the amount payable by the puisne mortgagee.

Unes Chunder Sircar v. Zahur Fatima (1891) I.L.R., 18 Cal., 161 (P.C.) and *Ganga Pershad Sahu v. The Land Mortgage Bank of India* (1894) I.L.R., 21 Cal., 366 (P.C.), applied. *Syed Ibrahim Sahib v. Armugathayee* (1915) I.L.R., 38 Mad., 18, considered.

APPEAL against the decree of S. MAHADEVA SASTRIYAR, the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 54 of 1914 (Original Suit No. 108 of 1912 on the file of the Subordinate Judge of Madura).

The facts are given in the first paragraph of the judgment of the High Court.

M. D. Devadoss, T. V. Gopalaswami Mudaliyar and A. Ganesa Ayyar for the appellant.

K. Bhashyam Ayyangar, S. Aravamudu Ayyangar and A. Krishnaswami Ayyar for the respondent.

* Appeal No. 398 of 1914.

1917,
February,
19 and 22,
March, 29,
and
November, 14.

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SRINIVASA
AYYANGAR, J.

The Judgment of the Court was delivered by
SRINIVASA AYYANGAR, J.—This is an appeal by the plaintiff from the decree of the Temporary Subordinate Judge of Ramnad, dated 21st September 1914, in a suit to enforce a mortgage. The question is what amount is due to the fourth defendant on two prior mortgages which, it is agreed, should be deemed to be still outstanding against the plaintiff. On March 29, 1899, defendants Nos. 1 to 3, the owners of certain houses in the town of Madura, mortgaged them to the Hindu Permanent Fund of that town to secure the repayment of the sum of Rs. 1,500 and interest. On the 26th September of the same year they again mortgaged the same houses and certain lands of theirs to Sevugan Chetty, the fourth defendant, to secure the repayment of Rs. 1,000 and interest. On February 9, 1901, they again mortgaged the houses alone to the plaintiff's husband (deceased) to secure the repayment of Rs. 500 and interest. Sevugan Chetty sued on his mortgage in the Madura Munsif's Court, obtained a decree for Rs. 1,265-10-0 and further interest till payment, and for sale of the mortgaged properties, brought them to sale and purchased the houses on the 15th April 1904 for Rs. 1,100 and the lands on the 21st August 1905 for Rs. 500, and soon after obtained possession. His decree was satisfied except for a small sum of about Rs. 95. As the Fund had a first mortgage on the houses, Sevugan Chetty after his purchase paid to the Fund Rs. 2,537-6-11 on June 18, 1906, that being the sum then due for principal and interest and redeemed the mortgage. Plaintiff's husband was not a party to Sevugan Chetty's suit, and was not bound by the proceedings therein. He, in September 1906, claimed to redeem Sevugan Chetty, unless he was himself redeemed; Sevugan Chetty was quite willing to be redeemed on payment of the sum due on foot of both his mortgages, but nothing was done as plaintiff's husband probably found that the properties were not worth more than the value of the prior mortgages. Sevugan Chetty has subsequently sold the properties and the purchasers of the houses are parties to this suit. Plaintiff's husband died in August 1912, without taking any steps to enforce his mortgage. In the meantime house property in Madura has risen considerably in value and the plaintiff instituted this suit in December 1912, claiming

over Rs. 5,000 on her mortgage offering to redeem Sevugan Chetty or his assignees, but claims to do so on payment of what would be found due on the prior mortgages up to the date of delivery of possession to Sevugan Chetty. Sevugan Chetty and his assignees on the other hand claim the whole amount that would be found due according to the terms of the deeds of mortgage up to the date of payment, without taking into account the profits or the income which they have received from the lands and houses. The learned Judge in the Court below has substantially accepted the contention of Sevugan Chetty, and allowed the amount due up to the date of the written statement in this suit—why that particular date was fixed is not clear—though in calculating the sum due he made a mistake. The question then is on what basis is to be calculated the amount due on the prior mortgages which must be deemed to be still outstanding as against the plaintiff.

A number of cases were referred to in which the question has come up for decision, but before we deal with them let us first consider how the matter stands on principle. A mortgagee who sues for foreclosure of the equity of redemption or for the sale of the secured properties, if he succeeds, gets the title of the mortgagor as it stood on the date of his mortgage or transfers that title to the purchaser, free from all interests or liens subsequently created by the mortgagor, provided he makes the owner of such interests or liens parties to the suit; but if he omits to make any of them parties, their rights or liabilities are not affected, but the purchaser (we are concerned in this case only with sales, though the same principle would apply to foreclosure also) would acquire the rights in the mortgaged properties of all the persons who were parties, just as if he had obtained an assignment from all of them, without however a merger of the interests or extinction of the liens so acquired. It is immaterial whether the purchaser is the mortgagee who sued, or another person except that the latter would be subrogated to the rights of the mortgagee only to the extent to which the debt was paid out of the price. It must, however, be remembered that the several interests or liens so acquired are kept distinct or kept alive only against the excluded party; for example, the purchaser at a first mortgagee's sale (in a suit against the mortgagor to which the puisne encumbrancer is not a party cannot by

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subrogation claim to keep alive the first mortgage debt against the mortgagor. This is a matter of substantive rights and no mere conveyancing device can give a larger right; and the same result would follow if instead of a purchase in a court-sale, the purchaser had obtained by private treaty a transfer of the first mortgage and the equity of redemption subject to that mortgage. In such a case as between himself and the mortgagor, the purchaser assumes the payment of the mortgage and whether on payment he extinguishes the debt or takes a transfer, cannot in any way affect the mortgagor. Further if a purchaser agrees with the mortgagor to pay all the encumbrances, he cannot by paying an earlier mortgage keep it alive as against a puisne encumbrance, for he has got all he bargained for, and by merely performing his own obligation cannot get a larger right. The matter may also be viewed in another aspect which brings it closer to the present question. The mortgagor having given money's worth to the purchaser to pay all the encumbrances, when the purchaser pays them or any of them he does so really with the money of the mortgagor and the mortgage is extinguished in just the same way as if it had been paid by the mortgagor himself, provided that the purchaser is not deprived of the property given to him. If, before he is deprived of the property given to him by the mortgagor, he has derived any benefit from it, to that extent it is the mortgagor's money in his hands for which he must account in a suit to redeem him. It follows therefore that if the mortgagor or the owner of the final equity of redemption is not made a party to the suit, the purchaser at the sale at the best acquires only the interest of the mortgagee and he can be redeemed on payment of whatever is due on the mortgage at the time of payment, on taking accounts, as if such purchaser was a legal assignee of the mortgages. *Sivathi Odayin v. Rama Subbayar*(1), *Dadoba Arjunji v. Damodar Raghunath*(2). If the mortgage was a simple mortgage the purchaser would be entitled to the whole of the principal and interest then due. If however such a purchaser takes possession claiming to do so as purchaser of the equity of redemption, though he did not obtain the title, he would be accountable; for the profits derived from the property

(1) (1898) I.L.R., 21 Mad., 84.

(2) (1892) I.L.R., 16 Bom., 486.

for such profits would be money of the mortgagor in his hands. If after such purchase he does not get possession as purchaser of the equity of redemption, but by subrogation by paying a mortgagee with possession, he can only be called on to account on foot of the mortgage with possession when that mortgage is sought to be redeemed. If the owner of the equity of redemption is a party to the suit, but a puisne encumbrancer is not, the purchaser becomes the assignee of the mortgage sued on, as well as the transferee of the equity of redemption subject to the mesne mortgage, and if the purchaser obtains possession on sale from the owner, he must account for the profits at least in cases where the price he pays is not more than sufficient to pay the mortgage sued on; for in such a case the purchaser pays nothing for the equity of redemption and the profits of the land are to be considered as the money of the mortgagor placed in the hands of the purchaser to discharge the mortgage *pro tanto*. If beyond the value of the mortgages a price is paid for the equity of redemption and the purchaser gets possession from the owner of the equity of redemption who is and who is entitled to be in possession, it may be the purchaser would not be bound to account for the profits (Jones on Mortgages, Volume II, Section 1118(a)); but we think justice requires that there should be an apportionment of the profits between the value of the mortgage and of the equity of redemption.

In this case all the three mortgages are simple mortgages and the mortgagees as mortgagees were not entitled to possession either before or after default. The price paid at the court-sale was not sufficient even to pay the mortgage sued on. The fourth defendant and his assignees would therefore be entitled to the principal and interest due on foot of the two mortgages dated March and September 1896 and be bound to account for the rents and profits of the properties from the respective dates on which the fourth defendant obtained possession through Court, the account being carried up to the date fixed for payment.

This view is consistent with and we think supported by the authority of the cases, binding on us. In *Umes Chunder Sircar v. Zahur Fatima*(1), Zahur Fatima sued on a mortgage dated the 29th July 1873 executed to her predecessor-in-title, obtained

(1) (1891) I.L.R., 18 Cal., 164 (P.C.).

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a decree in 1875, brought the mortgaged property to sale, purchased it herself in 1879 and soon after obtained possession. She did not join as parties to her suit, the owners of the encumbrances created before the institution of her suit. The plaintiff became the assignee of these mortgages and sued to enforce them. Zahur's mortgage carried 24 per cent interest which was reduced to 6 per cent per annum, after it had passed into a decree. The trial Judge held that her mortgage was not extinguished by the decree and she was entitled to the amount due under it irrespective of the price paid at the sale, but was entitled to interest only at 6 per cent per annum the rate fixed in the decree after its date, and that no interest was to be calculated after the date of the purchase, as the profits of the land were to be considered a *fair* equivalent for further interest. Their Lordships in the Privy Council altered the rate of interest to that provided in the bond, and the reasons given by their Lordships for their alteration is this ;

"The court's power to regulate interest is given by section 10 of Act XXIII of 1861, which answers to the 209th section of the present Civil Procedure Code. That power is given when a plaintiff sues for money due to him, and it is a discretionary power to give such rate as the court may think proper by decree. The decree can only operate between the parties to the suit and those who claim under them. The plaintiff getting the security of a decree has his interest reduced in the generality of cases. But the plaintiff in this case comes to take away from Zahur the benefit of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of the decree. His case is, that as to him Zahur is still but a mortgagee, and if so, she would be allowed such benefit as her mortgage gives her. If Zahur had not got a decree, and the plaintiff had come to redeem her mortgage, he must have paid whatever interest her contract entitled her to, and the court would have had no jurisdiction to cut it down; and that is the position in which the parties are placed by the decree in this suit."

That to our minds is conclusive to show that the mortgage which is revived against the puisne mortgagee though extinguished against the mortgagor is kept alive to the fullest extent as if no action had ever been brought on it. The price of redemption must be the same whether it is the puisne incumbrancer or the mortgagor who redeems. It is on this principle that the

purchaser in the prior mortgagee's execution sale is required to account for the profits. On the same principle if the purchase was for a sum less than the amount due on the mortgage sued on and if the mortgagor paid the balance, the puisne mortgagee would be entitled to redeem on payment of the price, i.e., the amount due on the mortgage less the amount paid by the mortgagor: see *Bradley v. Snyder*(1). As to the other rule, viz., that the profits should be taken as equivalent to the interest, their Lordships observe that the rule appears just and convenient and is not objected to by either party, will relieve Zahur from giving an account of her receipts and will deprive her of interest from the time she took possession. We understand that observation to mean that in that particular case, the profits and the interest were taken to be fairly equal as a matter of fact—that obviously must be the reason for the parties not objecting to it—and we do not think their Lordships meant to lay down, as a matter of law, that even if either party insisted, there should be no account of profits or allowance of interest. This was the view taken in two cases in this Court after discussion; *Thenappa Chettiyar v. Marimuthu Nadan*(2), *Ponnambala Chetti v. Muthusami Pillai*(3) and it is materially strengthened by what happened in *Ganga Pershad Sahu v. The Land Mortgage Bank of India*(4) a decision of the Privy Council after *Umes Chunder Sircar v. Zahur Fatima*(5). There also the rights of the parties as finally settled by the decision were exactly the same as those in the previous case. The decree of the High Court directed accounts of profits to be taken and allowed interest up to the date of redemption at the rate fixed in a previous decree against the mortgagor: see the decree set out at page 370 of the report. The Privy Council altered the rate of interest to that in the bond and confirmed the rest of the decree, namely, that portion which directed the taking of accounts. The judgment in both the cases was delivered by Lord Hobhouse. It is to be observed that the amount of profits is to go in reduction of the amount due for principal and interest and not to be set off against the interest alone. The same principle appears to

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(1) (1853) 58 Amer. Dec., 564.

(2) (1908) I.L.R., 31 Mad., 258.

(3) (1912) 23 M.L.J., 284.

(4) (1901) I.L.R., 21 Calc., 366 (P.C.). (5) (1891) I.L.R., 18 Calc., 164 (P.C.).

MUTHAMMAL have been adopted in Calcutta, *Girish Chunder Nandi v. Kader Nath Kundu*(1), *Satnarain Tewari v. Chowdhuri Sheo Baran Singh*(2).

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Counsel for the appellant however relied on a later case in this Court in which the learned Judges apparently adopted the rule of disallowing interest after the date of purchase; *Syed Ibrahim Sahib v. Arumugathayee*(3). There the plaintiff's father had a first and second mortgage of which the first was a usufructuary mortgage, the profits being taken in lieu of interest. He purchased the property from the mortgagor, the price settled being Rs. 900, of which Rs. 830 was the amount due till then for the principal of the two mortgages and interest on the simple mortgage, Rs. 55 due to the mortgagee for certain taxes and other small sums lent to the mortgagor; the balance Rs. 15 was paid in cash. Before the sale the mortgagor had mortgaged the same property to the defendant who sued the plaintiff who had succeeded to her father, brought the properties to sale and purchased them himself subject to the previous encumbrances of the plaintiff. The plaintiff in her turn sued to recover the amount due on her mortgages and claimed interest till payment on the simple mortgage at the rate fixed in the bond. The learned Judges held that during the period the plaintiff or her father was in possession as vendee, interest should cease. The reasons given for this conclusion are (1) that as the mortgagee and mortgagor agreed that after the sale the property should be enjoyed for the price settled, the mortgagee is not entitled to any compensation in the shape of interest for his money so long as he had the enjoyment; (2) that the prior mortgage is kept alive only to a limited extent, and in each case the Court is to determine how far it is kept alive for doing justice. We very respectfully differ from both these propositions. It is to be observed that it is because the agreement is not binding on the mesne incumbrancer, that he is entitled to ignore it, and it is difficult to see why he should have any benefit out of it. It often happens that a person is willing to pay much more to obtain an absolute title than what he would be willing to lend on the same property as usufructuary mortgagee. The mortgagee

(1) (1908) I.L.R., 33 Cal., 590.

(2) (1911) 14 O.L.J., 500.

(3) (1915) I.L.R., 38 Mad., 18.

may pay a large price for the equity of redemption which he may wholly lose by the action of the puisne encumbrancer. On principle we do not think that it is possible to sustain the doctrine of partial revivor against the puisne mortgagee and the illustration given by the learned Judges, viz., a stipulation for lower rate of interest does not support it. Such a stipulation operates to extinguish or release a portion of the debt and there is no question of merger against the mortgagor and no merger against the mesne encumbrancers. The puisne mortgagee pays the same price for redemption as the mortgagor and that as we have said already is the test, namely, what amount the mortgagor could have to pay if there had been no sale. If for instance in the case under reference the mortgagee had the transfer of the equity of redemption made to a trustee for him, there can be no merger in law and there would apparently be nothing to prevent the mortgagee from recovering the whole amount due on the mortgages if a subsequent mortgagee brings the equity of redemption to sale. So long then as the prior mortgage is kept alive, the senior mortgagee is entitled to the rights and is subject to the liabilities under his mortgage against the puisne encumbrancer. We therefore think that in that case the plaintiff was entitled to the interest on the simple mortgage, as she was entitled to take the profits in lieu of interest on the usufructuary mortgage, and there was no money of the mortgagor in her hands for which she was bound to account. The attention of the learned Judges does not appear to have been drawn to *Thenappa Chettiyar v. Marimuthu Nadan*(1) and *Ponnambala Chetti v. Muthusami Pillai*(2); the latter decision had not then been reported. They however refer to certain decisions which we shall consider now. The first is the decision of the Privy Council in *Unes Chunder Sircar v. Zahur Fatima*(3) to which we have already drawn attention. In *Gangadhara v. Sivarama*(4), the mortgagor borrowed Rs. 3,500 in May 1878 on the security of certain lands and paid Rs. 1,900 out of it to discharge a mortgage decree on a mortgage of 1866 on some of the lands. Plaintiff in the suit was an intermediate mortgagee. It was held that the later mortgagee had priority over the plaintiff to the

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(1) (1908) I.L.R., 31 Mad., 258.

(2) (1912) 23 M.L.J., 284.

(3) (1891) I.L.R., 18 Cal., 164 (P.C.). (4) (1885) I.L.R., 8. Mad., 246.

MUTHAMMAL extent of Rs. 1,900, the sum paid to discharge the previous mortgage. Apparently no subsequent interest was allowed. It does not appear from the report whether the subsequent mortgagee or the mortgagor had possession. If the former had possession the interest on his mortgage was being discharged from the usufruct and as he was not entitled to interest against the mortgagor, he was not entitled to it against the puisne mortgagee. If the mortgagor was in possession, then even according to the decision in *Syed Ibrahim Sahib v. Arumugathayee*(1) interest should have been allowed, for the decision in *Sgamalarayudu v. Subarayudu*(2) where interest was allowed is distinguished on that very ground. In *Seetharama v. Venkatakrishna*(3) the suit was, as finally decided, by a prior simple mortgagee against the mortgagor and the puisne encumbrancer who had sued on his mortgage and purchased the property without making the first mortgagee a party. There was a remand for a finding as to the amount due and the finding was that the plaintiff was entitled to Rs. 300 for principal and interest thereon at 9 per cent and this finding was accepted. In the report no mention is made of the interest. Curiously enough the decree as drafted here omits mention of interest, though apparently the judgment allowed it. In *Vanmikalinga Mudali v. Chidambara Chetty*(4), the mortgagee who claimed priority by subrogation had a usufructuary mortgage. Under the bond there was no interest payable and the usufruct was to be taken in lieu of it. It is to be observed that in this last case as well as in *Chetwynd v. Allen*(5) and in other cases where a mortgage was executed in renewal of or to pay off a previous mortgage, the mortgage was in force against the mortgagor himself and the agreement charging a lower rate of interest or no interest accrued to the benefit of the mortgagor, as well as the puisne mortgagee. The mesne incumbrancer in such cases does not repudiate the subsequent transaction between the mortgagor and the mortgagee but seeks to avail himself of it as a discharge or extinguishment of the debt while such is not its effect as between the parties to the transaction.

(1) (1915) I.L.R., 38 Mad., 18.

(2) (1898) I.L.R., 21 Mad., 143.

(3) (1893) I.L.R., 16 Mad., 94.

(4) (1906) I.L.R., 29 Mad., 37.

(5) (1899) 1 Ch., 353.

A number of decisions of the Allahabad High Court were cited in which it appears to have been held that the profits should be taken in lieu of interest after purchase. In the first of these cases *Dip Narain Singh v. Hira Singh*(1), BANERJI and AIKMAN, JJ., held that the puisne mortgagee can only redeem on payment of the full amount due on the prior mortgage, just the same amount as the mortgagor himself would have to pay if a suit had not been brought against him, and refer as authority to the judgment of the Calcutta High Court in *Ganga Pershad Sahu v. The Land Mortgage Bank of India*(2) and of the Bombay High Court in *Dadoba Arjunji v. Damodar Raghunath*(3); in the former interest was allowed at the bond rate and accounts were directed of the profits, and in the latter interest was allowed at the bond rate till decree without accounts as the mortgagee had no possession. In answer to the contention that the profits should be accounted for, the learned Judges say that considering the amount of profits arising from the property it would be fair not to take the profits into consideration at the same time not to allow interest on the mortgage money (i.e.) not, as we understand it, as a rule of law, but as being fair in that case. In a later case *Sri Ram v. Keseri Mal*(4), it was ruled that the prior mortgagee cannot claim interest after the purchase, giving credit for the profits realized; the reason given being the same as that given in *Syed Ibrahim Sahib v. Arumugathayee*(5), viz., that every person who purchases property for a certain value must be presumed to pay such value as would yield to him a sufficient return for the money invested by him in the property. In this case there were three mortgages. An intermediate mortgagee purchased the property by private sale for a price enough to pay all the three mortgages, the price being reserved with the vendee for that purpose. The vendee paid the first mortgagee and paid himself the amount due on his. He did not pay the third mortgagee who sued to enforce his security. We do not understand how the vendee was allowed to set up the prior mortgages which were extinguished by payment of the money belonging to the mortgagor, the party primarily liable to pay, and how by merely

(1) (1897) I.L.R., 19 All., 527 at p. 534.

(2) (1894) I.L.R., 21 Calc., 366 (P.C.). (3) (1892) I.L.R., 16 Bom., 486.

(4) (1904) I.L.R., 26 All., 185.

(5) (1915) I.L.R., 38 Mad., 18.

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performing his duty the vendee obtained an advantage. The third mortgage under the circumstances became the first. It is not a case of a person who did not get what he bargained for and the vendee was not entitled to even the principal of the mortgages which he paid, much less to interest. This case however was followed in *Jugal Kishore v. Bahal Rai*(1) in the same Court and the learned Judges held, setting aside the accounts taken by the lower Court, that the profits and interest must be deemed equal. But in the latest case in that Court *Phul Chand v. Roshan Lal*(2), under circumstances precisely similar to those in *Syed Ibrahim Sahib v. Arumugathayee*(3) the learned Judges one of whom was BANERJI, J., came to just the opposite conclusion, and held that a purchaser at a senior mortgagee's execution sale who obtains possession from a prior usufructuary mortgagee whom he redeemed after his purchase was entitled to the whole of the principal and interest at the contract rate till the date of the suit. The purchaser in this case, who knew of the previous usufructuary mortgage subject to which he bought, must on the reasoning in *Sri Ram v. Kesri Mal*(4), be presumed to have paid such value for the property, i.e., the equity of redemption and the first mortgage as would yield a sufficient return for his money, in which case he should not get any interest after the date of the purchase. We do not propose to deal with the other cases as they follow one or other of the cases mentioned above.

The conclusion then we come to which is supported by preponderance of authority is that if either party insists accounts of the profits must be taken, allowing interest on the mortgage as provided in the bond. It is, however, unnecessary to express dissent from *Syed Ibrahim Sahib v. Arumugathayee*(3) as the learned Judges do not lay down an inflexible rule, but say that each case should be dealt with on the merits. The circumstances here strongly support the suggestion of the learned Judge in the Court below that owing to the considerable increase in the value of house property in Madura, the plaintiff in this suit is now attempting to revive a claim which was practically abandoned by her husband. The fourth defendant and his assignees have made considerable improvements in the property and it would not be

(1) (1913) 21 L.C., 593.

(2) (1916) 14 A.L.J., 37.

(3) (1915) I.L.R., 38 Mad., 18.

(4) (1904) I.L.R., 26 All., 185.

fair to them not to allow interest on the prior mortgages, as it is fairly certain that the income from the properties even in the improved condition would be wholly insufficient to meet the interest. We are therefore unable to accept the contention of the appellant. We are equally unable to accept the contention of the fourth defendant who claims the whole of the principal and interest due on the mortgages without accounting for the profits. The learned Judge in the Court below misunderstood the decision in *Ponnambala Chetti v. Muthusami Pillai*(1) which he purported to follow, but the learned pleader for the fourth defendant argues that as his client was entitled to and obtained possession of the mortgaged properties only as purchaser of the equity of redemption (for which however he paid nothing), he was entitled to the enjoyment of the properties as the transferee of the mortgagor; and inasmuch as the mortgagor if he had remained in possession would not be accountable for the profits, similarly he too should not be obliged to account for them. He relied on a passage in section 1118 (a) of Jones on Mortgages, Volume II, and a similar passage in Dr. Ghose's book which appears to be really based on Jones's book. He was not able to refer us to any report. It is to be remembered that in some States, the English theory of mortgages as a conditional transfer of the fee, with an equitable right to redeem is adopted, in others, probably the largest number, a mortgage is considered to be merely a security though for certain purposes, as between the parties, it is considered to be a conveyance of the property and in yet others a mortgage is only a lien, the mortgagee not being entitled to foreclosure under any circumstances: see *Broboot v. Brock*(2) *McMillan v. Richards*(3), *Goodenow v. Ewer*(4) and *Frische v. Kramer's Lessee*(5). It would therefore be necessary to examine with care any particular decision which may be relied on as supporting an incident of the mortgage relation in India as our statute recognizes different kinds of mortgages. In *Moulton v. Cornish*(6), from New York where sale is the ordinary remedy in a case similar to the present, it was held that the purchaser was bound to account, though he obtained possession from the

(1) (1912) 23 M.L.J., 284.

(2) 10 Wallace, 519.

(3) (1858) 70 Am. Dec., 655 at p. 658.

(4) (1860) 76 Am. Dec., 540.

(5) (1847) 47 Am. Dec., 368.

(6) 20 L.R.A., 370.

MUTHAMMAL owner of the equity of redemption after sale. To the same effect is the decision in *Anson v. Anson*(1), from another State. In *Harrison v. Wyse*(2), the mortgagee had first entered on the property and then purchased the equity of redemption. It was held he was bound to account as mortgagee in possession though the mortgagor would not be, if he was in possession. It would therefore appear that there is no authority in support of such a broad contention as that raised here by the respondent. However that may be the decision of the Privy Council and the decisions of this Court to which we have already referred are conclusive on this point and there is no need to speculate on the theoretical basis of this doctrine, though we have ventured to point out that on principle the purchaser may justly be held liable to account for the profits in cases like the present.

Two further points were raised—one by the appellant and the other by the sixth respondent. As we have already stated the purchase by the fourth defendant included the lands on which the plaintiff has no lien. In these lands the fourth defendant acquired absolute rights and he has sold them to persons who are not parties now. The plaintiff claims that the mortgage money due to the fourth defendant on his mortgage should be apportioned among the several properties, according to their value and the plaintiff allowed to redeem on payment of that portion of the mortgage debt that is chargeable on the houses on such apportionment. He has not laid any basis in his plaint or evidence to claim marshalling, and he has not made the owners of the lands parties to the suit so as to claim contribution. We have tried to see if the plaintiff cannot be allowed to redeem a portion of the mortgage on the ground that the mortgage has been split by the mortgagee purchasing the equity of redemption in a part of the secured property (see last clause of section 60 of the Transfer of Property Act), but on consideration we think the plaintiff is not entitled to a decree for partial redemption. As she sues to redeem ignoring the purchase, she cannot be allowed to treat it as good in part against the prior mortgagee purchaser.

The sixth respondent, the transferee of the houses from the fourth respondent, claims the value of improvements. According

(1) (1865) 89 Am. Dec., 514.

(2) (1855) 63 Am. Dec., 152.

to the decision in *Syed Ibrahim Sahib v. Arumugahayee*(1) she is not entitled to them (see also *Rangiah Chettiar v. Parthasarathy Naicker*(2)). It is argued that she is entitled to them as a *bona fide* purchaser for value under section 51 of the Transfer of Property Act. Assuming that that section applies to this case, the sixth respondent cannot be considered to be a *bona fide* purchaser as the sale certificate to the fourth defendant of which the sixth defendant had notice before her sale, distinctly mentions the encumbrance to the plaintiff's husband as a subsisting lien. In determining the amount due to the fourth defendant on the mortgage to the fund the learned Judge in the Court below allowed compound interest at 2 per cent per mensem. The bond provides only for simple interest after the period fixed for repayment and the amount due to the fourth defendant should be calculated on that basis. Before passing a final decree it would be necessary to have a finding on the amount due to the fourth defendant on taking accounts on the basis above set out. New evidence may be allowed as to the amount of profits. Time for the submission of the findings will be till the re-opening of this Court after summer recess and seven days will be allowed for objections.

The memorandum of cross objections filed by the sixth respondent will be dismissed with costs.

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Ramnad found that the amount due to the fourth defendant from the plaintiff up to 31st August 1917 was Rs. 12,400.

On return of the finding their Lordships (ABDUR RAHIM and OLDFIELD, JJ.) accepted the same and passed on 24th November 1917 a mortgage decree accordingly.

N.R.

(1) (1915) I.L.R., 38 Mad., 18.

(2) (1897) I.L.R., 20 Mad., 120.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Bakewell.

BARADWAJA MUDALIAR (FIRST DEFENDANT), APPELLANT,

v.

ARUNACHALA GURUKKAL AND FOUR OTHERS (PLAINTIFFS
AND DEFENDANTS 2 TO 4), RESPONDENTS.*

1917,
October, 29
and 30, and
November,
15.

Limitation Act (IX of 1908), arts. 4, 7, 101, 102 and 120—Hereditary archakas of a temple—Suspension by trustees—Suit by archakas for pay, perquisites and damages against trustees—Limitation for suit—Provincial Small Cause Courts Act (IX of 1887), Sch. Art. 13—Suit, whether cognisable by a Small Cause Court—Appeal against order of remand, whether competent.

The plaintiffs, who were hereditary *archakas* in a temple, were suspended from their office in June 1912, by the trustees of the temple; the order was passed on the 19th June 1912 and the suspension lasted till 3rd July 1912. The plaintiffs, alleging that the suspension was illegal and unjust, sued on the 28th June 1915 to recover their pay and perquisites as well as damages for mental distress, loss of dignity, etc., for an amount below Rs. 500 as against the trustees, the *peishkar* of the temple and the person who performed the duties of their office during their suspension. The lower Appellate Court having held that the suit was not barred by limitation as regards pay and perquisites and remanded the case to the Court of First Instance, one of the trustees preferred an appeal against the order of remand, contending that the suit was wholly barred. The respondents (plaintiffs) raised a preliminary objection that the appeal was incompetent as the suit was of a small cause nature:

Held, that an appeal lay to the High Court against the order of remand, as the suit was not cognizable by a Small Cause Court; that article 102 of the Limitation Act applied to the suit as against the trustees as regards the pay and the perquisites if payable by the temple, and the suit was not barred as regards such claims; that article 36 applied to the claim for perquisites if payable by third persons, as well as to the claim for damages, and the claims were barred; and that, as against the *peishkar*, there was either no cause of action or it was barred under article 36 of the Limitation Act.

APPEAL against the order of T. S. TYAGARAJA AYYAR, the Subordinate Judge of North Arcot, in Appeal No. 100 of 1916 preferred against the decree of T. SUNDARAM AYYAR, the District Munsif of Tiruvannamalai, in Original Suit No. 616 of 1915.

The plaintiffs, claiming to be the hereditary *archakas* of the temple of Tiruvannamalai, sued for a declaration that the order

of suspension passed against them by the first and second defendants who were the trustees of the temple, was illegal and improper and for recovery of the pay and the perquisites during the term of their suspension from office and for damages for mental distress, loss of dignity, etc. The third defendant, who was the *peishkar* of the temple, was impleaded as he issued the suspension order under the authority of the trustees. The order of suspension was passed on the 19th June 1912 and lasted till 3rd July 1912 when the *archakas* were restored to their office. The fourth defendant was the person who performed the duties of the office under the order of the trustees during the period of suspension. The plaintiffs claimed Rs. 4-4-0 for pay, Rs. 25 for perquisites from other sources, and Rs. 50 for damages for mental distress, loss of dignity, etc., and instituted the suit in the District Munsif's Court of Tiruvannamalai, on 21st June 1915, on which day the Court reopened after summer vacation. The District Munsif dismissed the suit holding that the entire claim was barred by limitation under article 36 of the Limitation Act. On appeal the Subordinate Judge held, that the suit was not barred in respect of pay and perquisites, on the ground that article 120 of the Act applied but that the claim for damages was barred under article 36 of the Act; and he remanded the suit for trial to the Court of first instance. The first defendant (one of the trustees) preferred an appeal to the High Court against the order of remand, contending that the suit was entirely barred by limitation. The respondents (plaintiffs) raised a preliminary objection that no appeal lay against the order of remand, as the original suit was of a nature cognizable by Small Cause Court. The preliminary objection was overruled and the question of limitation was decided by the following judgment of their Lordships:

T. Narasimha Ayyangar and N. S. Rangaswami Ayyangar for the appellant.

Hon. Mr. T. Rangachariar, K. Bhashyam Ayyangar and R. T. Krishnamachariar for the respondents.

SADASIVA AYYAR, J.—The first defendant is the appellant. The appeal is against the order of remand passed by the appellate Court which held that the plaintiffs' suit was not wholly barred by limitation, the Court of first instance, having held otherwise and dismissed the suit.

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* Appeal against Order No. 113 of 1917.

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The material allegations in the plaint are as follows:—

(a) The two plaintiffs (father and son) are the hereditary *archakas* of the famous temple at Tiruvannamalai. The first defendant, appellant before us, is the trustee of the temple. The third defendant is the temple *peishkar*. The first defendant in June 1912 suspended the plaintiffs from office. The third defendant intimated this fact to the plaintiffs on 19th June 1912 and the suspension of the plaintiffs lasted till 3rd July 1912;

(b) The plaintiffs contend that the suspension order was illegal and unjust and that the third defendant maliciously made misrepresentations to the first defendant and made the first defendant pass such an unjust order; and

(c) The fourth defendant discharged the duties of the office during the fourteen days during which the plaintiffs remained under suspension. The plaint concluded for the following reliefs:—(1) Pay for the days of suspension Rs. 4-14-4, (2) the value of perquisites from other sources during such period Rs. 25 and (3) damages for mental distress, loss of dignity, etc., Rs. 50. Total Rs. 79-14-4.

The District Munsif dismissed the suit applying article 36 of the Limitation Act which allows two years for a suit for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not specially provided for. The suit was brought on 28th June 1915, the cause of action having arisen on 19th June 1912, more than two years before the suit was brought. The plaint was filed on the day on which the Tiruvannamalai District Munsif's Court opened after the summer vacation and if the limitation period of three years under article 62 or article 102 applied, the claim for at least Rs. 4-14-4 (the pay) was not barred. If article 120 applied, which provides six years to the claim for pay, then also, the District Munsif was not justified in dismissing the whole claim as barred.

The Subordinate Judge in appeal held that article 120 applied so far as the claim for the pay (Rs. 4-14-4) and the perquisites (Rs. 25) against the defendants Nos. 1 to 3 was concerned. As regards the claim against the fourth defendant (the locum tenens during the plaintiff's suspension), the Subordinate Judge was inclined to apply article 62 (and only in the alternative article 120), the fourth defendant having "constructively received" the

"money" made up of the pay and the perquisites "for the plaintiff's use." So far as the claim for Rs. 50 was concerned, that is, the compensation for mental distress, loss of dignity, etc., he held that article 36 applied and concurred with the District Munsif in dismissing that portion of the claim as barred. He then remanded the suit for disposal in respect of the claim for Rs. 29-14-4.

The contention of the first defendant, the only appellant before us, on appeal is that the whole claim including the claim for salary and perquisites is a claim for damages for tort and not for a breach of contract and hence article 36 alone applied and the suit even for this portion of the claim was barred by limitation.

A preliminary objection was taken by the respondents to the appeal on the ground that the suit was of a small cause nature and of the value of less than Rs. 500. We overruled it following the decision of SRINIVASA AYYANGAR, J., in *Subraya Acharya v. Kesava Upadhaya*(1), that the learned Judge having held that a suit to recover an amount alleged to be due to a hereditary *archaka* as the dues of his office falls under article 13 of the schedule to the Provincial Small Cause Courts Act. [If any portion of a claim is not cognizable by a Small Cause Court, the whole claim ought to be brought in the regular Court: see *Mulambath Kunhammad v. Parakal Kathiri Kutti*(2)].

I shall now consider the question of limitation. The suit in *Subbier v. Ranga Ayyangar*(3) was brought by a hereditary *Stanikam* office holder against the *dharmakarta* for the recovery of emoluments wrongfully withheld between the date when the plaintiff brought a former suit for the recovery of the office against the trustee and the date when he recovered possession of the office in execution of the decree in that suit. The relevant portion of the judgment is very short and is as follows:—

"We are unable to agree with the contention that article 36 of the Limitation Act applies. The case is not specifically provided for and in our opinion comes under article 120."

(1) (1915) M.W.N., 846; S.C., 31 I.C., 206. (2) (1916) 31 M.L.J., 829.
(3) (1899) 9 M.L.J., 143 at p. 163.

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I think that neither article 36 nor article 120 which are very generally worded articles should be applied if any other more specifically worded article applies to a case. Article 102 applies to suits for "wages not otherwise expressly provided for by this schedule." "Wages" is a very general term; though it is usually used in connexion with daily wages, it also includes the wages paid as monthly salary: see *Kalichurn Mitter v. Mahomed Soleem*(1). Article 4 which prescribes a period of six months applies to wages accruing due under the Employers and Workmen Act; article 7 prescribing one year applies to the wages of a household servant, artisan or labourer not provided for by article 4; article 101 for a seaman's wages and prescribes a limitation period of three years. The plaintiff's claim in this case does not fall under any of the three articles. It therefore clearly falls under article 102. The plaintiff is a servant of the temple paid in monthly wages though a hereditary servant. In *Seshadri Aiyangar v. Ranga Bhattar*(2). BENSON and SUNDARA AYYAR, JJ., say at page 633:—

"The position of an archaka, though he may have a hereditary tenure in the office, is, in our opinion, essentially that of a servant. The trustee is the representative of the temple and the archaka must be subject to his disciplinary authority."

So far therefore as the claim for the pay Rs. 4-14-4 due to plaintiff is concerned, I think article 102 applies and the suit is therefore not barred by limitation. As regards the perquisites (Rs. 25) if they are payable by the temple they are part of the wages (that is, remuneration for work done and payable by a master to his servant) and the claim for them as against the defendants Nos. 1 and 2, trustees, also falls under article 102. If the perquisites are received from third persons, they are not wages, article 102 will therefore not apply and the plaintiff's claim as against the defendants 1 and 2 will be in tort and article 36 might apply. As regards the third defendant (the temple *peishkar*) there is either no cause of action against him or the claim against him falls under article 36 and it is therefore barred. As regards the fourth defendant if article 62 applies, that is, if it could be held that he received the plaintiff's salary and perquisites for the plaintiff's use [see *Sankunni Menon v. Govinda*

(1) (1866) 6 W.R., 3.

(2) (1912) 1 L.R., 35 Mad., 631.

Menon(1)], the claim against him for such salary and perquisites is not barred. I shall not finally decide just now whether, in law it could be so held.

In the result, I would modify the order of remand by confirming it to the plaintiff's claims against the defendants Nos. 1, 2 and 4 alone. The appeal has substantially failed against the contesting respondents. The first defendant (appellant) will therefore pay the plaintiff's (contesting respondents') costs in this appeal.

BAKEWELL, J.—I agree.

K.R.

BAKEWELL, J.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Phillips.

SUNDARAM AYYAR (ACCUSED), APPELLANT,

v.

THE KING-EMPEROR, RESPONDENT.*

1917,
November,
21.

Criminal Procedure Code (Act V of 1898), sec. 582—Indian Penal Code (Act XLV of 1860), sec. 420—Section 582, whether applicable to a conviction under section 420.

The word "cheating" in section 582 of the Code of Criminal Procedure does not cover the form of cheating punishable under section 420 of the Indian Penal Code.

Emperor v. Ramjan Dudubhai (1915) 16 Cr. L.J. 781, approved and followed.

Harnarain v. Ramji Das (1915) 12 A.L.J., 465, dissented from.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code by G. F. PADDISON, the District Magistrate of Madura, in his letter, dated the 7th September 1917, R.O.C. No. 1370/17 Magl.

Two women were waiting in the Madura railway passenger shed to purchase tickets for Sholavandan. There was a crowd at the ticket-door and so the women could not get near. The

(1) (1912) 14 I.C., 254.

* Criminal Revision Case No. 655 of 1917 (Referred case No. 98 of 1917).

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accused offered to buy the tickets for them. The women trusted the accused and each gave him three annas which they thought was the price of a ticket for their destination. Accused received the money and went away promising to get the tickets for them. After some time the accused returned and gave a ticket and three pies to each of the women. The women could not understand how they received three pies each. The accused tried to satisfy them by saying that it was a local train for which the fare was three pies less. While this was going on, a police constable turned up and looked at the tickets and found that the two tickets were for Sholavandan which cost accused only one anna nine pies each. On searching the accused, the two annas he had saved by the deception practised by him on the two women was found on him. The constable seized the accused, took a statement from one of the women and charged him before the Subdivisional First-class Magistrate of Madura. The accused pleaded guilty and was convicted by the Magistrate of an offence under section 420, Indian Penal Code, but considering the youth of the accused and the readiness with which he admitted his guilt, the Magistrate took action under section 562 of the Code of Criminal Procedure. The District Magistrate of Madura doubting the legality of the procedure of the First-class Subdivisional Magistrate, reported the case to the High Court under section 438 of the Code of Criminal Procedure.

K. S. Jayarama Ayyar for the accused.

C. Narasimha Achariyar for the Public Prosecutor for the Crown.

The ORDER of the Court was delivered by

AYLING, J. AYLING, J.—The question for decision in this case is whether we can give an extended meaning to the word “cheating” in section 562 of the Criminal Procedure Code so as to cover an offence under section 420 of the Indian Penal Code (cheating and dishonestly inducing delivery of property, etc.).

We should be glad to do so, as we recognize that equally strong reasons on public and humanitarian grounds may exist for lenient treatment of an offence under either section. On the other hand a careful consideration of the wording of section 562 of the Criminal Procedure Code seems to preclude the possibility of such a construction. If the term “cheating” is to be held to

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cover offences under section 412, 419 and 420 of the Indian Penal Code which are included with section 417 in the same group in schedule II to the Criminal Procedure Code, a similar extension must be allowed to the terms “theft” and “dishonest misappropriation.” The former must be held to cover offences under sections 380, 381 and 382 of the Indian Penal Code and the latter offences under section 404 of the Indian Penal Code. But such a construction is impossible in face of the fact that the legislature has specifically mentioned “theft in a building” (section 380, Indian Penal Code), in section 562 of the Criminal Procedure Code in addition to simple theft (section 379). The inference is irresistible that “theft in a building” was not intended to be included in the term “theft,” and we cannot give a narrow interpretation in the case of “theft” and a wide one in the case of “cheating.”

The view we have taken is in accord with that expressed by a Bench of the Bombay High Court in *Emperor v. Ramjan Dadubhai*(1). The only authority to the contrary is that of a single Judge in *Harnarain v. Ramji Das*(2), from which we must respectfully dissent.

We set aside the Order of the Subdivisional Magistrate and direct him to dispose of the case according to law.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

PARAMASIVA UDAYAN (PLAINTIFF), APPELLANT,

v.

KRISHNA PADAYACHI AND ANOTHER (DEFENDANT),
RESPONDENTS.*

1917,
November,
21.

Evidence Act (I of 1872), sec. 68—Attesting witness, meaning of—Writer of a document, whether can be regarded as an attesting witness.

The writer of a document who signed the same as a scribe, can be regarded as an attesting witness, if he saw the signing of the document by the executant.

(1) (1915) 16 Cr.L.J., 781.

(2) (1915) 12 A.L.J., 465.

* Second Appeal No. 262 of 1916.

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Veerappudayan v. Muthukaruppan Tharan (1913) 24 M.L.J., 534 *Ayyasami Iyengar v. Ky'asam Pillai* (1915) 26 I.C., 409 and *Ranu v. Lazman Rao* (1909) I.L.R., 33 Bom., 44 referred to.
Badri Prasad v. Abdul Karim (1913) I.L.R., 35 All., 254 and *Ram Bahadur Singh v. Ajodhya Singh* (1916) 20 C.W.N., 609, dissented from.

SECOND APPEAL against the decree of H. O. D. HARDING, the District Judge of Trichinopoly, in Appeal No. 101 of 1915, preferred against the decree of R. KRISHNASWAMI AYYAR, the Principal District Munsif of Kulittalai, in Original Suit No. 1562 of 1913.

The material facts appear from the judgment.

T. V. Muthukrishna Ayyar for the appellant.

M. D. Devadoss and T. A. Anantha Ayyar for the respondents.

The judgment of the Court was delivered by

SESHAGIRI
Ayyar, J.

SESHAGIRI AYYAR, J.—In this case, the deed of mortgage sued on was attested by two witnesses and was signed by the scribe as the writer thereof. One of the attesting witnesses is dead and the plaintiff has not taken steps to examine the other witness who is said to be still alive. He has, however, examined the writer of the document who deposed that he saw it executed. The Courts below have held that this proof is not sufficient and have dismissed the suit.

We are unable to agree with them. The fact that a person calls himself a scribe is not proof that he was not an attesting witness as well. It may be that the writer left the place immediately after he had written the document and before it was signed by the executant. In such a case, he cannot be regarded as an attesting witness. The essence of attestation is that the person must have seen the document executed. The question is one of qualification but not of the use of any set phraseology. There is plenty of authority for the proposition that a scribe can also be an attesting witness. *Veerappudayan v. Muthukaruppan Tharan*(1) was relied on for the appellants. That decision lays down that the fact that a scribe wrote the endorsement after the document was executed and attested was some evidence in favour of regarding him as an attesting witness. This was followed by a Bench in which one of us sat in

(1) (1913) 24 M.L.J., 534.

Ayyasami Iyengar v. Ky'asam Pillai(1). It would greatly depend upon the facts of each case whether a scribe is also an attesting witness. As pointed out in *Ranu v. Lazman Rao*(2), the time and place of the scribe's endorsement may show that he did not witness the execution. Under such circumstances, to examine him as an attesting witness may give room to perjured evidence being let in. As regards *Badri Prasad v. Abdul Karim*(3), relied on by the learned vakil for the respondent, there can be no doubt that the decision was right on the facts found. The scribe signed his memorandum before the document was executed. If that decision lays down that under no circumstances can a scribe be an attesting witness, we are unable to agree with it. Mr. Justice CHAMIER who was a party to this judgment took part in the decision reported in *Ram Bahadur Singh v. Ajodhya Singh*(4), as Chief Justice of the Patna High Court. In this case the learned Judge expresses himself more uncompromisingly than in the Allahabad judgment. Mr. Justice JWALAPRASAD while concurring with the Chief Justice on the facts of the case points out that a scribe is not necessarily debarred from being an attester. In *Raj Narain Ghose v. Abdur Rahim*(5), the same view was taken of the position of a scribe. We do not think *Shamu Patter v. Abdul Kadir Ravathan*(6) is opposed to this view. In this country, less attention should be paid to the name by which a person chooses to style himself than to the character he fills. It will be a question in each case, whether a scribe was intended to witness the execution of a document. That is a matter for the trial Court. We must therefore hold that the *a priori* conclusion come to by the Courts below that because a person had called himself a scribe, he was incapable of being regarded as an attesting witness is not a proposition which we can accept.

We must therefore reverse the decrees of the Courts below and remand the case for trial to the Court of first instance in the light of the above observations. Further evidence may be taken. Costs will abide the result.

K.R.

(1) (1915) 26 I.C., 409.

(2) (1909) I.L.R., 33 Bom., 41.

(3) (1913) I.L.R., 35 All., 254.

(4) (1916) 20 C.W.N., 609.

(5) (1901) 5 C.W.N., 454.

(6) (1912) I.L.R., 35 Mad., 607 (P.C.).

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APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

MUNICIPAL COUNCIL OF VIZAGAPATAM (DEFENDANT),

APPELLANT,

v.

FOSTER (PLAINTIFF), RESPONDENT.*

1917,
November,
26 and 27
and
December,
14.

Torts—Negligence—Municipalities, liability of—Repair of road—Independent contractor—Heaping of gravel on road without light—Injury to plaintiff—Damages—Statutory bodies, liability of—District Municipalities Act (IV of 1884), ss. 172 and 173—Madras Motor Vehicles Act (I of 1907)—Absence of licence, effect of.

The plaintiff sued the Municipality of Vizagapatam to recover compensation for injuries sustained by him owing to the negligent stacking of gravel in a municipal road which was being repaired by a contractor employed by the municipality. The defendant pleaded non-liability under the general law and also on the ground that it had employed an independent contractor for the repair of the road:

Held, that the municipality was liable to pay damages to the plaintiff for the injuries sustained by him.

Per SESHAGIRI AYYAR, J.—In laying and maintaining a road, municipalities in this country are not exercising purely sovereign functions and consequently they are liable for misfeasance.

The Secretary of State v. Cockcroft (1916) I.L.R., 39 Mad., 251, distinguished.

The absence of a provision for payment of damages in the District Municipalities Act which directs the application of the Municipal fund in a particular manner, does not affect the right of a person against whom a wrong has been committed by the statutory body to recover compensation for such injury.

The fact that the plaintiff did not obtain a licence under the Madras Motor Vehicles Act at the time of the accident did not disentitle him to damages.

Although an employer is not ordinarily liable for illegality or neglect on the part of a contractor employed by him, there are certain recognized exceptions to the rule, namely:—

(1) Where the employer is aware that the doing of a contract work involved a public danger, he ought to see that the contractor so discharges his duty as to avoid such a danger;

The Corporation of the Town of Calcutta v. Anderson (1884) I.L.R., 10 Cal., 445, referred to.

(2) Where statutory bodies are entrusted with the performance of a public duty, their liability cannot be shifted to a contractor;

* Second Appeal No. 1434 of 1916.

Hardaker v. Idle District Council (1896) 1 Q.B., 335, referred to.

Per NAPIER, J.—(1) A statutory body like a municipal council cannot be said to be either the servant or the agent of the Crown unless it is so constituted by the provisions of the Act.

(2) With regard to statutory bodies, the liability does not depend on their levying tolls or taxes on account of the work undertaken by them.

(3) Section 173 of the District Municipalities Act does not control the provisions of section 172 of the same Act.

(4) Where a statutory authority has power to do something to a road which will make it dangerous while it is being done, it is liable for any negligence in the doing of that which has to be done, whether the action be that of its own servant or of an independent contractor.

SECOND appeal against the decree of A. L. HANNAY, District Judge of Vizagapatam, in Appeal Suit No. 256 of 1914, preferred against the decree of V. V. S. AVADHANI, the Temporary Subordinate Judge of Vizagapatam, in Original Suit No. 2 of 1913.

The plaintiff sued the Municipality of Vizagapatam for compensation for injuries sustained by him while he was riding on a motor-bicycle at about 6 p.m. in a road maintained by the municipality. The defendant had employed a contractor to repair the road, and in the course of doing the work, the contractor had stored up heaps of gravel along the road to a breadth of 9 feet in the roadway which was 27 feet in breadth. No lights had been put on the heaps so as to warn passers-by of their existence. The plaintiff had not taken out a licence for his motor-bicycle at the time of the accident. The plaintiff who rode on his bicycle came against the heaps and sustained personal injuries on various parts of his body, and was obliged to give up his employment for some months and incurred loss in several ways. The plaintiff sued the municipality in the Temporary Subordinate Judge's Court of Vizagapatam to recover Rs. 4,500 as damages in respect of the injuries and loss sustained by him on the ground that the injury was caused by the negligence of the Municipal Council. The defendant council pleaded non-liability in law and also that there was no negligence on its part and that it was not liable for the acts or omissions of the contractor. The council also raised the plea that the plaintiff, not having registered his motor-bicycle under Madras Act I of 1907, was not competent to sue for damages.

The Subordinate Judge decreed the plaintiff's claim for Rs. 3,285 and odd. The defendant preferred an appeal to the

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District Judge, while the plaintiff filed a memorandum of objections for increase of damages and for costs.

The District Judge dismissed the appeal and allowed the memorandum of objections, increasing the amount of damages to Rs. 4,180 and odd and by awarding also costs in favour of the plaintiff. The defendant preferred this second appeal against the decree of the District Judge.

Hon. Mr. B. N. Sarma for the appellant.

P. Narayanamurti for the respondent.

SENHAGIRI
AYYAR, J.

SENHAGIRI AYYAR, J.—The plaintiff sued the Municipality of Vizagapatam for compensation for injuries sustained by him owing to the negligent sticking of gravel in a municipal road. The Subordinate Judge awarded damages to the extent of about Rs. 3,200 and odd. The amount was increased on appeal by the District Judge.

In this second appeal, I shall deal with the various questions involved in the case, in the order in which they were argued by Mr. Sarma.

The first contention for the appellant was that Municipalities in India have only delegated powers from the local Governments and that consequently their liability is subject to the same restrictions as that of the Government. This contention was raised with reference to an observation of mine in *The Secretary of State v. Cockcroft* (1) where I pointed out that in laying out roads, the Municipal Corporations in America were exercising to some extent sovereign functions. I took care in that judgment to reserve my opinion whether the principle on which American Municipal Corporations are exempted from liability can apply to Indian Municipalities. The various sections to which Mr. Sarma drew our attention point to the conclusion that the Municipal Councils in India are statutory bodies whose powers are very much circumscribed. Section 21 as regards constitution, sections 113, 114 and 115 as regards limitations in the application of funds and section 4 (b) which relates to the suspension of municipalities show that Indian Councils are not self-governing in the sense that Municipal Corporations in England are. As regards the latter, charters have been conferred upon various towns since the days of Henry VI empower-

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ing the inhabitants to govern themselves completely. They have power to make laws, they have jurisdiction to administer justice, and they have got their quarter sessions. In most respects the English Corporations are complete governing bodies. Although I do not wish it to be understood that Municipal Institutions in this country are a department of Government, there can be no doubt that their powers are derived from the Government and are controlled by the provisions of the District Municipalities Act. I may draw attention in this connexion to the Act which created the first municipality in this country. Act X of 1842 which was passed by the President of the Council of India was an enabling Act. The preamble shows that it was intended to enable the inhabitants of any place of public resort or residence under the Presidency of Fort William within the town of Calcutta to make better provision for purposes connected with public health and convenience. This Act was subsequently repealed and Act 26 of 1850 was passed. In this Act also the powers were very much limited. These enactments which have been subsequently repealed and re-enacted in a more comprehensive form show that the powers conferred upon municipalities are of a very restricted character; they therefore do not stand on the same footing as Municipal Corporations in England. To this extent I am in agreement with Mr. Sarma.

The further question is whether, in making roads, the Indian Municipalities are exercising sovereign functions. The extract quoted by the learned vakil for the appellant from 28 American Encyclopædia shows that it is only in certain States that the Municipalities in the United States are exempted from liability for injuries caused by the negligence of the Municipal Corporations in maintaining streets. In other States the liability has been enforced—vide page 1340 (19d).

The principle of liability in such cases was laid down in *Parnaby v. The Lancaster Canal Company* (1). In that case it was laid down that a canal company which levied tolls was liable for negligence. TINDAL, C.J., said:

"We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop,

(1) (1839) 11 Ad. & Ell., 223.

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liable for neglect on leaving a trap door open without any protection by which his customers suffer injury."

It was contended before us that it is only where a profit is derived by the levying of tolls that the principle enunciated in this case, can be held applicable. I find no justification for this distinction. In most cases where a Corporation is charged with liability for misfeasance in the discharge of its duty it would be almost impossible to prove that the particular department in administering which the misfeasance was committed was giving a surplus income to the Corporation. It is not denied that a road-cess is included in the general taxes levied by the Municipality. The question as to whether that cess resulted in giving an income over expenditure is not the criterion for enforcing liability. The only question is whether the laying of the road, as in *The Secretary of State v. Coccraft*(1), was a purely Governmental function for which no sort of tax is levied upon persons using that road or whether it is a road for using which some sort of consideration is being paid by persons frequenting it. In *The Mersey Dock Trustees v. Gibbs*(2), it was definitely laid down that a corporate body authorized to perform a work and receiving tolls in respect of it, though obtaining no profit for itself from such tolls but collecting them for the maintenance of the work and the possible future benefit of the public is responsible for the injuries arising from the improper performance of that work; and that the funds thus obtained must be applied for the discharge of that liability. Lord CRANSWORTH said that

"a body of trustees constituted by statute having the right to levy tolls for their own profit in consideration of making and maintaining a dock or a canal is no doubt under a liability to make good to the person using the dock or canal any damage occasioned by neglect in not keeping the works in proper repair."

The other learned Lords agreed with this view. Reference may also be made to *Hartley v. Rochdale Corporation*(3), *Geddis v. Proprietors of Bann Reservoir*(4), *The Queen v. Williams*(5), *Sanitary Commissioners of Gibraltar v. Orfila*(6), *Foreman v. Mayor of Canterbury*(7), *Gilbert v. Corporation of Trinity*

(1) (1916) I.L.R., 39 Mad., 351.

(3) (1908) 2 K.B., 194.

(5) (1884) 9 A.C., 418.

(2) (1886) L.R.I. H.L., 93.

(4) (1878) 3 A.C., 430.

(6) (1890) 15 A.C., 460.

(7) (1871) 6 Q.B., 214.

House(1), and to the latest judgment of LUSH, J., in *McChelland v. Manchester Corporation*(2). The observation in *Harris and wife v. Baker*(3) that only an indictment lies has no application to this country and I doubt whether it is any longer law in England. In this country the principle of making Corporations liable for neglect of duty has been uniformly enforced. The decision in *The Corporation of the Town of Calcutta v. Anderson*(4) is a strong authority for that proposition; notwithstanding the criticisms of the learned vakil for the appellant that that decision turned on the language of the particular section therein commented on, I feel no doubt that it enunciated a general principle of liability for neglect by Corporation.

Rajendralal v. Surat City Municipality(5), *Dholka Town Municipality v. Patel Desai*(6) and *McMerny v. Secretary of State for India*(7) all point to the same conclusion. I am therefore of opinion that in laying and maintaining a road, municipalities in this country are not exercising purely sovereign functions and that consequently they are liable for misfeasance. In this view the decision in *P. and O. Steamship Co. v. The Secretary of State*(8) which discriminates between the liability of the East India Company for purely sovereign functions and other functions which involve transactions which can be carried on by private individuals is fully satisfied in this case.

The next point argued by Mr. Sarma was that as there is no provision for damages in the District Municipalities Act, no claim for damages can lie. I see no force whatsoever in this contention. The Act no doubt directs the application of municipal funds in a particular manner. That is a direction given by the Government to the statutory body. That direction is not binding upon a person against whom a wrong has been committed by the statutory body. If authorities were necessary for this proposition I may refer to the case in *Attorney-General v. Leves Corporation*(9) where it was held by Swinfen Eady, J., that the fact that the Public Health Act of 1875 provides a statutory

(1) (1886) 17 Q.B., 795.

(3) (1915) 4 M. & S., 27.

(5) (1909) I.L.R., 33 Bom., 393.

(7) (1911) I.L.R., 38 Cal., 796.

(2) (1912) I K.B., 118.

(4) (1884) I.L.R., 10 Cal., 415.

(6) (1914) I.L.R., 35 Bom., 116.

(8) (1961) 5 Bom., H.C.B. Appx., 1.

(9) (1911) 2 Ch., 495.

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remedy by complaint to the Local Government Board in the case of a local authority making default

'in the maintenance of existing sewers does not preclude a private individual from obtaining damages and an injunction against that local authority in respect of a common law nuisance arising from that default': vide also *Khagendra Nath Mitter v. Bhupendra Narain Dutt*(1).

One other minor contention of Mr. Sarma may be disposed of in a few words. He argued that as the plaintiff did not obtain a licence under the Madras Motor Vehicles Act I of 1907, he is not entitled to damages. It would lead to startling results to hold that because a person passes in a vehicle in a public highway without obtaining a licence for that vehicle he can recover no damages for injuries caused to him by the negligence of the municipality. No authorities were quoted for this proposition nor is it possible to find any.

The next point on which a great deal of learned argument was addressed to us by Mr. Sarma and by Mr. Narayanamurti related to the question whether the municipality can be held liable, inasmuch as it had given a contract for the making of the road to a contractor. I am in agreement with Mr. Sarma that the contractor to whom the work was entrusted must be taken to be an independent contractor notwithstanding the finding of the learned District Judge that supervision was exercised over his work by municipal subordinates. In *Evans v. The Trustees of the Port of Bombay*(2) and *Ullman v. The Justices of the Peace for the Town of Calcutta*(3) it was held that an independent contractor would not be liable for torts. In *Steel v. The South Eastern Railway Company*(4) CROWDER, J., with the concurrence of the other Judges, said:—

'The circumstance of the work being done by Furness under a contract, negatives his being a servant of the Company'.

The Full Bench laid down that where work is being done for a Railway Company under a contract (parol or otherwise), the company are not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it, and to direct what

shall be done. In *Peachey v. Rowland*(1), it was held that if one employs another to do an act which may be done in a lawful manner, and the latter in doing it unnecessarily commits a public nuisance whereby injury results to a third person, the employer is not responsible. The principle of these decisions is that an employer is entitled to expect of the contractor that he will perform the duty lawfully and without negligence. Therefore, if there has been illegality or neglect on the part of the contractor the employer is not ordinarily liable. Reference may also be made to 28 American Encyclopædia, page 1280. But there is an exception to this rule even in the case of private employers and that is this. That where the employer is aware that the doing of a contract work involved a public danger he ought to see that the contractor so discharges his duty as to avoid such a danger. That was the principle enunciated in *The Corporation of the Town of Calcutta v. Anderson*(2). There is another exception which is even more pertinent to the present case, namely, that in the case of statutory bodies entrusted with the performance of a public duty their liability cannot be shifted to a contractor. This principle is pointedly illustrated by the decision of LINLEY, L.J., in *Hardaker v. Idle District Council*(3). The distinction between the liability of the contractor to the employer and the liability of the employee to the employer in the construction of public works is thus stated by the LORD JUSTICE:—

'This principle lies at the root of the modern decisions on the subject, and the distinction between the two classes is well illustrated by comparing *Reedie v. London and North-Western Railway Company*(4) with *Hole v. Sittingbourne and Sheerness Railway Company*(5). In the first of these cases the defendants employed a contractor to build a bridge. One of his men carelessly let a stone fall on the plaintiff, and the defendants were held not liable. In the second case the defendants' duty was to build a bridge which would open and let vessels pass. They employed a contractor, who built a bridge which would not open. The plaintiff was injured thereby, and the defendants were held liable for the consequences. The principle to which I am referring is further illustrated by *Pickard v. Smith*(6) (the coal cellar case) and *Gray v. Pullen*(7), in

(1) (1853) 13 C.B., 1167.

(3) (1836) 1 Q.B., 235.

(5) (1861) 6 H. & N., 488.

(2) (1884) 11 L.R., 445.

(4) (1849) 4 Ex., 244.

(6) (1861) 10 C.B. (N.S.), 470.

(7) (1864) 5 B. & S., 970.

(1) (1911) 11 L.R., 33 Cal., 296.

(3) (1887) 11 L.R., 11 Bom., 22.

(2) (1871) 8 B.L.R., 245.

(4) (1855) 16 C.B., 553.

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which the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, held the employer of a contractor liable for injury caused to the plaintiff by the contractor's failure to make good a pavement under which he had constructed a drain.'

The learned LORD JUSTICE quotes with approval a passage from Lord BLACKBURN's judgment in *Dalton v. Angus*(1).

'On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it.'

The present case comes within the principle above enunciated. Story on Agency, section 454, enunciates the same principle.

The next point urged for the appellant was that the stacking of the gravel on the road was not the proximate cause of the injury done to the plaintiff. The finding of the District Judge in paragraph 7 is against this contention. Mr. Sarma referred to the fact that the road was 27 feet in width and that the projection of the stacked gravel only extended to nine feet from the base. Even though there was a large margin for travellers to go through, the liability of the municipality is not lessened by that circumstance. It was pointed out in *Queen Empress v. Bolappa*(2) that the passer-by has a right to use the full breadth of the road: see also *Wednesbury Corporation v. Lodge Holes Colliery Company*(3). The finding of the learned District Judge disposes of any contention regarding contributory negligence. It was not disputed that no red lights warning passers-by were fixed upon the gravel stacked in the road. I find no justification for reopening the question that the plaintiff was racing along the road when he sustained injury. I must therefore disallow this contention also.

The last point related to the amount of damages. A great deal of argument was addressed to us on this subject. There can be no doubt that for two months after the accident the plaintiff was normally discharging his duties. It seems also

(1) (1881) 6 A.C., 740.

(2) (1864) I.L.R., 11 Mad, 343.

(3) (1905) 2 K.B., 823.

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clear that he neglected a caution conveyed to him by his medical adviser in using his right hand. It was after two months that he was told that he must get his arm set right by a specialist in England. It is open to doubt whether the necessity for going to England would have risen had the plaintiff been more careful or had he been more prompt in getting his injuries redressed. I am therefore unable to agree with the District Judge that the cost of going to and returning from England should be charged against the Municipality. On the whole, considering the various items of charges, I have come to the conclusion that the plaintiff's damage should be reduced to Rs. 2,500. He will be entitled to cost upon the Rs. 2,500 from the appellant. The appellant will bear his own costs. The decree of the District Judge will be modified to this extent. In other respects the second appeal will be dismissed.

NAPIER, J.—This is an appeal from the decision of the District Judge of Vizagapatam, confirming the decision of the Temporary Subordinate Court of Vizagapatam awarding damages to the plaintiff against the Municipal Council of Vizagapatam, in respect of injuries received by the plaintiff through the faulty condition of the road under the defendant's control. The lower Appellate Court has found that the injuries were caused owing to the plaintiff being thrown from his motor-bicycle in consequence of collision with a heap of gravel projecting 9 feet into the roadway which was left unprotected by a light during the night. It has also found that there was no contributory negligence in the plaintiff. The District Judge has awarded him damages to the amount of Rs. 4,180-15-0.

To these findings and to this amount of damages several objections have been raised in this Court. The first is, that no suit will lie against a Municipal Council in respect of any such injuries; the second is that even if a suit will lie, the liability is confined to a narrow class of public or private bodies to which the defendant Municipality does not belong; the third is, that the Council are protected by the fact that they employed a competent contractor and that the most that can be charged against them is a non-feasance; and the fourth is, that the greater part of the damages is too remote. The first objection is said to be based on the decision of this Court in *The Secretary*

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of *State v. Cockraft*(1), which, it is contended, lays down that the making of roads by Government is an act done in exercise of sovereign powers; and it is sought to apply that doctrine to the present case by the argument that Municipal bodies act only as agents of the State in respect of such matters. In my opinion the decision is not an authority for the broad proposition asserted. That case decided that the provision and maintenance of a military road is a function of Government carried on in exercise of sovereign powers and that accordingly a person who receives injuries owing to the negligence of a servant of Government in stacking gravel on such a road cannot recover in a suit against the Secretary of State. I am not prepared, without further argument, to accept the proposition that the making of all roads and the repairing of all roads by the State is necessarily an act in exercise of sovereign powers. But I reserve my opinion on this subject until the point comes for decision before me. But even if it be so, the proposed extension of the principle to the making and repairing of roads by a statutory body seems to be without foundation.

Mr. Sarma in his able argument before us, assumed, I think too lightly, that a statutory body acts as an agent of the State and thus comes within the protection accorded by that decision to the State and its servants. The foundation of this protection is set out in the case under consideration and in the decision in *P. and O. Steamship Co. v. The Secretary of State*(2), which was followed. The proposition shortly stated is, that by operation of statutes the same protection is given to the Secretary of State and his servants in respect of torts committed by them in the exercise of the functions of sovereign powers as is granted to the Crown and its servants in respect of all torts, and that a suit will no more lie against the former than a petition of right will lie against the Crown or a suit against its servants. During the course of the argument, I asked for any authority from England that statutory bodies, in whom roads and the right to repair are vested, came under the protection given to the servants of the Crown, and the learned vakil was unable to give me any. I am unable to see how a statutory body can be said to

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be either the servant or the agent of the Crown unless it is so constituted by the provisions in the Act.

It may be that prior to the introduction of legislation in this country, where the East India Company granted a charter to a body to exercise such functions, such body might be an agent or servant of the Company, but bearing in mind the cases in which such bodies holding charters from the Crown have been held responsible in England, I should be slow to accept even this proposition. I would especially refer to the case of the *Mayor and Burgesses of Lyme Regis v. Henley*(1). There the borough of Lyme Regis held by Letters Patent from the King a certain pier on condition among others, that they should repair and maintain it if necessary. The plaintiff's premises having been injured by the sea in consequence of the disrepair of the pier, he brought a suit against the Mayor and Burgesses. It was held that the obligation to repair being one which concerned the public, an indictment would lie in case of non-repair against the Mayor and Burgesses for their general default; and an action on the case for a direct and particular damage sustained in consequence by an individual. Throughout the argument of counsel I can find no trace of this theory of agency, nor is it suggested in the judgment of the Court.

With regard to a statutory body it seems to me to be impossible to suggest that they are servants or agents. They are not appointed by Government, but are created by the Legislature. Mr. Sarma argues from the language of the District Municipalities Act that Government has power to suspend. That is undoubtedly so, but that power, like the body itself, is the creation of the statute and must be exercised within the limits imposed. Without such a statutory power the Government could not dissolve or suspend a statutory body and it seems to me beside the question to examine, as the learned vakil has asked us to do, the sections of the Act for the purpose of ascertaining the rights that are vested in Government. I therefore hold that the doctrine pressed on us has no application to this case.

The next point is that only a narrow class of public or private bodies can be made liable. This argument is founded on

(1) (1851) 3 B. & Ad., 77.

(1) (1916) I.L.R., 39 Mad., 352. (2) (1861) 5 Bom. H.C.R., Appx. I.

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observations in two old cases, *Parnaby v. The Lancaster Canal Company*(1) and *Gibbs v. The Mersey*(2). In the first case it was held that a common law liability arose in a Canal Company which took tolls for navigation to use reasonable care in making the navigation secure, and in the second case, that a private person or a company having a right to levy tolls in respect of performance of a particular work would be liable in damages for injuries occasioned by performing it improperly. In neither case however is it stated that the absence of profit or tolls would have made a difference in the decision of the case, and even assuming that that view was taken in these earlier cases, and even if that is good law at the present time, it can have no application to public bodies as appears from other decisions by the House of Lords to which I shall now refer. The first is a decision of the Privy Council in the *Bathurst Berrugh v. William Macpherson*(3). That was a suit arising out of injuries caused to the plaintiff by a non-repair of a drain. Some doubt has been cast on this case in later decisions, but not on the point now under consideration. The next is another decision of the Privy Council in *Orfila v. The Sanitary Commissioners of Gibralt'ar*(4). In this case, the Board repudiated the liability of the commissioners, but in neither case did their Lordships consider the bearing of the question whether these public bodies levied a toll. Later cases are *Cowley v. The New Market Local Board*(5), *Municipality of Pictou v. Geldert*(6), and *Burke v. The Sydney Municipal Council*(7), the last two being decisions of the Privy Council. In none of these was this ground even argued. If therefore this principle has any application in these days, it must be confined to private bodies, such as the Canal Company and the Dock Company.

The next point taken was that the Municipality had been at most guilty of a mere nonfeasance for which they are not legally responsible, and that any misfeasance found was that of a contractor for which the Municipality was not responsible. Mr. Sarma argued that the only breach of duty which could be laid

(1) (1833) 11 Ad. & Ell., 223.
(2) (1868) 11 H.L., 685.
(3) (1879) 4 H.L., 256.
(4) (1810) 15 A.C., 400.
(5) (1892) A.C., 315.
(6) (1893) A.C., 524.
(7) (1895) A.C., 433.

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in this case was under section 172 of the District Municipalities Act, which requires that a Municipal Council shall during the repair of any street take proper precaution for guarding against accidents and shall cause every such street during its repair to be sufficiently lighted and guarded during night. He wished us to read that section with section 173 as applying to the facts of this case. Section 173 provides that no person shall cause any obstruction in any street, without the written permission of the Chairman and that when such permission is granted, such person shall take proper steps to prevent accidents. His argument was that a contractor executing repairs to a road under the orders of the Council was a person to whom section 173 applied. I am clearly of opinion that this section has no application. It has reference to temporary obstructions to a thoroughfare by the erecting of pandals or arches by a private person, a procedure with which we are familiar. All the sections grouped together under Chapter IV, "Streets (a)" refer to projections and obstructions created by private persons, and have nothing whatever to do with execution of repairs by employees of the Municipality itself. This argument therefore fails, and in this view I do not think it necessary to discuss at any length the difficult question whether a public body is liable for mere non-feasance. It was undoubtedly so held in a case above referred to, *Bathurst Borough v. Macpherson*(1), where the liability was put on the broad proposition that neglect to repair a drain caused a nuisance in the highway for which the borough was liable, and their Lordships expressly say that there is no principle upon which a distinction in this respect between non-feasance and misfeasance can be supported. There are however later cases, such as the *Pictou Municipality* case and the *Sydney Municipality* case above referred to, which directly negative that view, and draw a distinction which the Board in the earlier case said, should not be drawn. The question will require fuller consideration in the light of the latest decisions of the Board when it arises necessarily for decision before this Court. In my opinion the liability of the Council must rest on the admitted fact that a heap of gravel was thrown on to the side of the road and allowed to project 9 feet into the roadway. This is an undoubted misfeasance. The

(1) (1879) 4 H.L., 256.

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question is, whether the fact that it was done by an independent contractor will protect the defendant. Mr. Sarma relied strongly on *Daniel v. The Metropolitan Railway Co.*(1). The injury caused to the plaintiff in that case was due to the fall of an iron girder on a train, which girder was being erected by a contractor. The decision was that the accident was not one which the company was bound to anticipate and against which it was bound to take precautions. Although there are observations in the judgment of the learned Lords about persons over whom the Railway contractors have no control, I have no doubt that the basis of the decision in that case was absence of any negligence, that being at all events the only ground on which Lord COLONSAY bases his decision. At all events all the learned Lords agree in holding that there was no misfeasance by the contractor. The true proposition seems to me to be contained in the proposition laid down in *Orfila v. The Sanitary Commissioners of Gibraltar*(2), with the corollary to be found in the language of Lord BLACKBURN in *Dalton v. Angus*(3). The first case decides that the powers conferred on a body created by statute must be executed with due care. In the absence of contrary intention its duties and liabilities are the same as those imposed by the general law on a private person doing the same thing. And the corollary is as follows:—A person causing something to be done, the doing of which casts on him a duty, cannot escape from responsibility attaching on him of seeing that duty performed by delegating that to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed. But he cannot thereby relieve himself from liability to those injured by the failure to perform it. This proposition of law was quoted by LINDLEY, L.J., in *Hardaker v. Idle District Council*(4), and treated as an authoritative exposition on the law. In that case the District Council employed a contractor to construct a certain sewer. In consequence of his negligence in carrying out the work a gas main was broken with the result that an explosion took place by which injury was caused to the wife of the plaintiff and to his premises. The

(1) 5 E. & I.A., 45.
(3) (1881) 8 A.C. 740.

(2) (1890) 15 A.C. 400.
(4) (1896) 1 Q.B., 335.

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Court of Appeal presided over by the eminent Judge mentioned held that the District Council were responsible for the contractor's negligence. LINDLEY, L.J., in paraphrasing Lord BLACKBURN'S view says, that in *Hughes v. Percival*(1), Lord BLACKBURN points out that the employer's duty was to see that his contractor did his work properly and adds:

"Lord WATSON, in the same case, said the same thing."

The doctrine was applied in a later case which is on all fours with the present case. That is *Penny v. The Wimbledon Urban District Council*(2), which is also a decision of the Court of Appeal. There, their Lordships pointed out the limitation to the doctrine which will also be found in Lord BLACKBURN'S judgment. They say that where the act of negligence is a mere casual or collateral act, such as a workman employed on the work negligently leaving a pick-axe or such like on the road, the council would not be responsible for that negligence of the contractor's servant. That is the proposition of law stated in *Pickard v. Smith*(3). But the Court held it had no application to a case where a statutory authority has power to do something to a road which will make it dangerous while it is being done, for then there is a duty cast upon them to take care that the Queen's subjects are not injured by any carelessness in the doing of that which has to be done, whether that action be the action of their own servants or of an independent contractor. This decision and the principles stated in it cover the present case exactly. I am therefore of opinion that the employment of a contractor did not relieve the council of their liability.

On the question of remoteness of damage I do not think it necessary to say anything more than that I agree with my learned brother on this point, that the damages should be reduced to the sum of Rs. 2,500. The decree will be in the terms proposed by him.

K.R.

(1) (1893) 8 A.C. 446.
(2) (1899) 2 Q.B., 72. (3) (1861) 10 C.B. (N.S.), 470.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Kumaraswami Sastriyar.

1917,
December, 19.

RAJAH VENKATA RAMAYYA AND ANOTHER (PLAINTIFFS)
PETITIONERS,

v.

VEERASWAMI AND EIGHT OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XLIII, and sec. 115—Suit for rent in a Revenue Court—Service inam—Discontinuance of service—Ryoti land—Decree in Revenue Court—Appeal—Jurisdiction of Revenue Court—Plaint ordered by District Judge to be returned for presentation to Civil Court—Appeal to the High Court against order of District Judge, if competent—Order whether a decree—Estates Land Act (Madras Act I of 1908), sec. 192, cl. (a)—Prohibition of appeals—Conversion of appeal into civil revision petition.

A landholder sued for arrears of rent in a Revenue Court from the defendants who originally held the lands on service tenure but had ceased to perform the services prior to the suit. The Revenue Court passed a decree in favour of the plaintiff. On appeal, the District Judge set aside the decree holding that the Revenue Court had no jurisdiction to entertain the suit and ordered that the plaint should be returned to the plaintiff for presentation to a proper Court. On plaintiff preferring an appeal to the High Court, the respondent raised a preliminary objection that the appeal did not lie.

Held, that no appeal lay against the order of the District Judge, because section 192, clause (a), of the Estates Land Act prohibited the applicability of Order XLIII of the Civil Procedure Code to proceedings under the Act, and the order was not a decree under the Civil Procedure Code.

Held also, that the appeal should be converted into a civil revision petition under section 115 of the Civil Procedure Code, as the latter section was not excluded by section 192 of the Act; and that the Revenue Court had jurisdiction to entertain the suit, as the lands were ryoti lands and did not fall within the exception to ryoti land in section 3 of the Act, inasmuch as the services were not performed at the date of the suit.

The Secretary of State for India v. Cholekani Rama Rao (1916) I.L.R., 39 Mad., 617 (P.C.), distinguished.

PETITION under section 115 of the Code of Civil Procedure praying the High Court to revise the order of E. PAKENHAM-WALSH, Acting District Judge of Kistna at Masulipatam, in appeals Nos. 110 and 173 of 1914, preferred against the decree of B. SURIYANARAYANA RAO PANTULU Garu, Suits Deputy

* Civil Revision Petition No. 1312 of 1917.

Collector, Ellore, in Summary Suit No. 1089 of 1913 (Summary Suit No. 724 of 1913, Narasapur Division).

The suit was instituted by the Receiver of Nidadavole and Medur Estates to recover arrears of rent from the defendants. It was alleged in the plaint that defendants Nos. 1 to 8 were originally granted the suit land as service inam for performing washerman services, that they ceased to do services and conveyed a portion of the land to the ninth defendant and that plaintiff was consequently entitled to recover the full rent claimed. The plaintiff admitted that the land was ryoti land but claimed that he could recover full assessment as the defendants had ceased to perform services, for which the land was granted by a former Zamindar. The defendants claimed the land as ryoti lands in which they had occupancy rights and for which they had been paying uniform rent for a long time and contended that consequently the rent could not be raised. The Revenue Court decreed the suit in favour of the plaintiff. The ninth defendant appealed to the District Court. The District Judge held that the suit was not maintainable in the Revenue Court and ordered the return of the plaint to the plaintiff for presentation to the proper Court. Against the order of the District Judge, the plaintiff preferred a civil miscellaneous appeal to the High Court. The respondent raised a preliminary objection that no appeal lay against the order of the District Judge. The High Court allowed the preliminary objection of the respondent but permitted the appellant to convert the civil miscellaneous appeal into a civil revision petition, as the question raised was one of jurisdiction of the Court to entertain the suit.

P. Nagabushanam for appellant.

K. V. Venkatasubramani Ayyar and *B. Narashimha Rao* for respondent.

The judgment of the Court was delivered by

KUMARASWAMI SASTRIYAR, J.—The Receiver of the Nidadavole and Medur Estates who is the appellant sued the respondent in the Revenue Court to recover Rs. 323-11-7, arrears of rent for faslis 1320 to 1322. The case for the plaintiff was that the lands were granted by the former Zamindar at low rent to defendants Nos. 1 to 8 who were performing washerman services, that they ceased to do so and conveyed a portion of the land to the ninth defendant and that plaintiff was consequently entitled to recover

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the full rent claimed. Defendants Nos. 1 to 8 were *ex parte*. The ninth defendant pleaded inter alia that the lands were ryoti lands, that he has been paying the rent reserved ever since his purchase, that plaintiff has no power under the Estates Land Act to enhance the rent and that the suit was bad for misjoinder of parties. No question was raised as to the jurisdiction of the Court and at the trial plaintiff conceded that the lands were ryoti lands and that the defendants had occupancy rights. The Suits Deputy Collector decreed Rs. 51-13-9 as the proper rent payable. The ninth respondent appealed, but not on the ground that the Revenue Court had no jurisdiction. The grounds of appeal on the contrary proceed on the footing that the Estates Land Act applied. When the appeal was argued before the District Judge however a preliminary objection was taken by the appellant in the District Court to the effect that the lands were service inams and that plaintiff ought to have sued in a Civil Court, the Revenue Courts having no jurisdiction.

The District Court upheld the contention and directed the plaint to be presented to the proper Court. The appeal before us is against the order of the District Judge.

A preliminary objection has been taken by the respondent that no appeal lies against the order of the District Judge as the order was passed under Order VII, rule 10, Civil Procedure Code, 1908 (corresponding to section 57 of the old Code) and Order XLIII, rule 1, clause (a), which gives the right of appeal against the order passed under Order VII, rule 10, is made inapplicable to suits in Revenue Courts by virtue of section 192 of the Estates Land Act which specifies the provisions of the Civil Procedure Code applicable to suits, appeals and other proceedings under the Act and excludes Chapter XLIII of the old Code which corresponds to Order XLIII of the present Code. For the appellant it is contended that an appeal from the District Court to the High Court is not a proceeding under the Act, but from one Civil Court to another and that Order XLIII applies to such appeals.

There can be little doubt that if the Suits Deputy Collector had returned the plaint presented to him under section 77, clause (1), of the Estates Land Act, no appeal would lie to the District Court.

The question however is whether a second appeal lies to the High Court where the order directing the return of the plaint is passed for the first time by the District Court which is not a Revenue Court.

Section 189 provides that decrees and orders passed by the Revenue Courts shall be subject to appeal as provided in the schedule. No further appeals are specially given by the Act except to the Board of Revenue under section 190. The schedule to the Madras Estates Land Act gives the description of the suit and the Court to which an appeal lies. In respect of suits for rent under section 77 of the Act an appeal lies to the District Court. Section 190 gives a right of second appeal to the Board of Revenue against certain orders passed on appeal by the Collector. So far as appeals from decrees of the District Court are concerned a second appeal has, though not expressly given by the Estates Land Act, been held to lie by virtue of section 100 of the new Civil Procedure Code of 1908 and Chapter XLIII of the old Code which are not excepted by section 192—vide *Ravi Veeraraghavulu v. Venkata Narasimha Naidu Bahadur*(1) and *Venkataramaiah v. Vythilinga Thambiran*(2). As regards orders not coming within the definition of 'decree' in the Civil Procedure Code, section 192, clause (a) of the Estates Land Act enacts that Chapter XLIII which corresponds to Order XLIII and relates to appeals from orders shall not apply to appeals or other proceedings under the Estates Land Act. It is argued that this section can only apply to appeals from the Revenue Court to the District Court, because it is only such appeals as are appeals under the Act and that for appeals from the District Court to the High Court we have to fall back upon the provisions of the Civil Procedure Code as appeals from orders of the District Court to the High Court are not appeals or proceedings under the Estates Land Act. Reference has been made to *The Secretary of State for India v. Chelekani Rama Rao*(3) and it is argued that the observations of their Lordships of the Privy Council at page 624 to the effect that when proceedings reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders and decrees the ordinary rules of the Civil Procedure Code apply would cover

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(1) (1914) I.L.R., 37 Mad., 443.

(2) L.W., 89.

(3) (1916) I.L.R., 39 Mad., 617 at p. 624 (P.C.).

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equally cases of appeals under the Estates Land Act. The Forest Act does not contain any provision analogous to section 192 of the Estates Land Act excluding the operation of certain sections and chapters of the Civil Procedure Code and *The Secretary of State for India v. Chelekan Rama Rao*(1) can be distinguished on that ground. There is a great deal to be said for the contention of the appellant, but the matter is not *res integra*. The point is covered by authority and we think we are bound by the decision of this Court to the contrary when the question directly arose for determination.

In *Madura Minakshi Sundareswarar Devasthanam v. Periya Karuppan*(2) and *Vilvathatha Mudaliar v. Mannar Naidu*(3) where it was held by AYLING and SESHAGIRI AYYAR, JJ., and by AYLING and NAPIER, JJ., that no second appeal lies against an order of remand under Order XLI, rule 23, of the Civil Procedure Code; and in *Subba Ayyar v. Kamalammal*(4), AYLING and PHILLIPS, JJ., held that no second appeal lies against an order dismissing a suit for default. The contention now raised by the appellant before us that appeals from the District Court to the High Court are not appeals contemplated by the Estates Land Act and the question of the effect of the observations of the Privy Council in *The Secretary of State for India v. Chelekan Rama Rao*(1) were not raised in the above cases but as already pointed out, there is nothing in section 10 of the Forest Act which excludes any of the provisions of the Civil Procedure Code from its operation and second appeals have not been expressly excluded. It has been argued that section 190 of the Estates Land Act would render the decision of the District Judge, who returns a plaint to be presented to the Civil Court on the ground that the suit does not relate to an estate within the definition of the Act, *res judicata* in all subsequent proceedings and can only be set right by the High Court in second appeal from the decision of the Civil Court to which the plaint is presented under orders of the District Judge, that proceedings will then have to be begun *de novo* in the Revenue Courts and that it could hardly have been the intention of the legislature that this circuitous course should be followed when an appeal from the order of the District Court to the

(1) (1916) I.L.R., 39 Mad., 617 (P.C.).

(2) Appeals against orders Nos. 349 to 353 of 1915.

(3) 1 L.W., 667.

(4) Second Appeal No. 235 of 1917.

High Court would be a quick and adequate remedy. We have to construe the plain meaning of section 192, however desirable it may be, that the legislature should amend section 192 by giving a right of appeal against orders of remand.

It is argued by the appellant's vakil that if Order XLIII of the Code is not to apply to suits under the Estates Land Act then the order directing the return of the plaint would be a decree within the meaning of the Civil Procedure Code as it would be an adjudication as to which no appeal would lie under Order XLIII by virtue of section 192 of the Estates Land Act. It is difficult to see how the definition of 'decree' in the Civil Procedure Code can be controlled by anything in the Estates Land Act.

The preliminary objection must therefore prevail.

We have been asked to treat the appeal as a revision petition under section 115 of the Civil Procedure Code. This section is not excluded by section 192 of the Estates Land Act and we have power to deal with the appeal as a revision petition as the question in issue is one of jurisdiction.

The case for the plaintiff is that the land is ryoti land and that the defendants Nos. 1 to 8, who are pattadars, are liable to pay the rent claimed. The ninth defendant is treated as a sub-tenant. It is open to the plaintiff under section 145 of the Estates Land Act to assent to the transfer of 5 acres and odd out of the 13 acres and odd held by defendants Nos. 1 to 8 in favour of the ninth defendant and we take it that the suit against the ninth defendant amounts to an assent. All that the ninth defendant pleaded was that the lands are jirotya lands and that the rent was being paid for a long time. He also claimed occupancy rights. Defendants Nos. 1 to 8 raised no defence. At the trial plaintiff's vakil admitted that the lands were ryoti lands and that the defendants had occupancy rights. The only question that remained for consideration was whether the rent due was at the rate claimed by plaintiff or the rate admitted by the ninth defendant. Section 3 no doubt excludes lands granted on service tenure at favourable rent so long as the service tenure subsists but in the present case it is not alleged by the defendants in the written statement that the lands are now held on service tenure and on the evidence the Deputy Collector finds that the service is no longer rendered. There is no particular formality or

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procedure prescribed by the Act for putting an end to service tenures or anything which the landlord has to do in case services are discontinued in order to make the lands ryoti lands in cases where lands which were once ryoti lands are given to the occupancy ryot on a favourable rent in consideration of services to be rendered. Under the circumstances of this case it cannot be said that the lands must be deemed to be held under service tenure on the date of the suit. When the allegations in the plaint bring the case within section 77 of the Act the suit must be filed in the Revenue Court and the jurisdiction of the Court will not depend upon any pleas the defendant might raise. The fact that the Court may have to go into complicated questions as the right of resumption by the landlord of the continuance of the service on which lands were granted on favourable tenure will not affect the jurisdiction of the Revenue Court [vide *Polemera Thammu Naidu v. Sri Maharani Lady Janakiyamma*(1)].

We are of opinion that on the admission of the plaintiff and ninth defendant, that the lands were at the date of suit ryoti lands it must be taken that the lands in the possession of the ninth defendant were not held on service tenure on the date of the suit so as to bring the case within the exception to the definition of ryoti land in section 3. Whether lands continue to be held on service tenure is a question of fact which must be raised on the pleadings.

We set aside the decision of the District Judge and remand the appeal for disposal on the merits. Costs will abide and follow the result.

K.E.

(1) (1910) M.W.N., 431.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Ayling, Mr. Justice Coutts Trotter and
Mr. Justice Seshagiri Ayyar.*

CHIDAMBARA PILLAI AND THREE OTHERS (PLAINTIFFS),
APPELLANTS,

v.

RANGASAMI NAICKER AND THIRTY-SEVEN OTHERS
(DEFENDANTS), RESPONDENTS.*

*Hindu Law—Mitakshara joint family—Power of adult coparcener to appoint
by will a guardian for minor coparceners' property.*

Held by the Full Bench that the only adult coparcener of a Mitakshara family consisting of himself and his minor coparceners, is not competent to appoint a testamentary guardian to the coparcenary properties of the minor coparceners. Cases on the subject reviewed.

APPEAL against the decree of G. KOTHANDARAMANUJALU NAYUDU, the Temporary Subordinate Judge of Tanjore, in Original Suit No. 3 of 1913.

This suit was filed by the plaintiffs against the first defendant and other defendants for an account of the management of their properties by the first defendant during their minority and for the setting aside of the alienations made by him in favour of the other defendants. The circumstances under which the suit was filed were as follows:—

One Chidambaram Pillai died, leaving two undivided sons Ramasami Pillai, the father of the fourth plaintiff, and Appukutti Pillai, the father of the first, second and third plaintiffs. Ramasami Pillai died in 1900 and Appukutti Pillai in 1902. At the time of Appukutti Pillai's death all the plaintiffs were minors and he was the only adult member of the undivided family. He left a will dated the 6th October 1902. The material portion of the will was as follows:—

"As my sons and my elder brother's sons are minors, I have appointed Venkatachella Pillai, son of Teagaraja Pillai of Pudukuthur, Negapatam taluk, executor, herein, having requested him regarding the management of the affairs for the purpose of looking

1917,
August, 31
and Sep-
tember, 19
and 1918,
February, 20.

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after all the affairs of the family after my death till the minors come of age as he is a near relative of mine being maternal uncle and a reliable man who would faithfully look after the affairs and take pains in improving the property . . . If the creditors press for payment the land in Orathu Kannur vattam, Vadakathalai village, shall be sold to him who wants the same. The properties after paying up the debts shall be added to the family property."

The first defendant who was appointed executor took possession of the estate and made the alienations complained of in the plaint. The first plaintiff attained majority in September 1907 and the first defendant was alleged to have severed his connexion with the estate and to have put the first plaintiff in possession of the properties that then remained.

The first defendant pleaded *inter alia* that the will was genuine and valid, that the alienations were necessary, having been made to discharge the debts of the family mentioned in the will, and that the income of the family properties was all spent for family purposes. The other defendants, viz., the alienees, adopted the pleas of the first defendant. The lower Court found in favour of the pleas of the defendants and dismissed the suit. The plaintiffs preferred this appeal.

K. Srinivasa Ayyangar, C. Krishnamachariar and S. Venugopal Chettiar for the appellant.

Hon. Mr. *T. Rangachariar, T. R. Ramachandra Ayyar, T. R. Krishnaswami Ayyar, N. Malim Sahib, S. T. Srinivasagopalachariar, G. S. Ramachandraraiar and V. Narasimhachariar* for the respondent.

This appeal came on for hearing in the first instance before WALLIS, C.J., and KUMARASWAMI SASTRIYAR, J., who delivered the following ORDERS OF REFERENCE TO A FULL BENCH:—

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KUMARASWAMI SASTRIYAR, J.—This appeal arises out of a suit filed by the appellants against the first defendant and several others for an account of the management of their properties by the first defendant during their minority and for the setting aside of the alienations made by him in favour of the other defendants. The case of the plaintiffs is that one Chidambaram Pillai died, leaving two undivided sons Ramasami Pillai, the father of the fourth plaintiff, and Appukutti Pillai the father of the first, second and third plaintiffs. Ramasami Pillai died in 1900 and Appukutti Pillai in 1902. At the time of Appukutti

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Pillai's death all the plaintiffs were minors and he was the only adult member of the undivided family. He left a will, dated the 6th October 1902. The material portion of the will runs as follows:—

"As my sons and my elder brother's sons are minors, I have appointed Venkatachella Pillai, son of Teagaraja Pillai of Puduputhur, Negapatam taluk, executor herein having requested him regarding the management of the affairs for the purpose of looking after all the affairs of the family after my death till the minors come of age as he is a near relative of mine being maternal uncle and a reliable man who would faithfully look after the affairs and take pains in improving the property . . . If the creditors press for payment the lands in Orathu Kannur vattam, Vadakathalai village, shall be sold to him who wants the same. The properties after paying up the debts shall be added to the family property."

This defendant who was appointed executor took possession of the estate and made the alienations complained of in the plaint. The first plaintiff attained majority in 1908 and the first defendant is alleged to have severed his connexion with the estate and to have put him in possession of the properties that then remained. The alienations made by the first defendant are impeached on the ground that the will is invalid under Hindu Law and that there was no necessity for the alienations.

As the will on its face purports to deal with joint family properties it cannot confer any title on the first defendant so far as the properties are concerned as section 4 of the Probate and Administration Act expressly provides that no property which would otherwise have passed by survivorship shall vest in the executor or administrator.

It is argued that the will is valid in so far as it appoints the first defendant the guardian of the minor members of the undivided family and that under the terms of the will the appointment of the first defendant as executor and the conferring upon him of the powers of management (set out in detail) amounted to his appointment as a testamentary guardian.

The question for determination therefore is whether a Hindu who is the only adult member of a co-parcenary consisting of himself, the sons and nephews, can appoint a testamentary guardian to his minor co-parceners.

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So far as appointment of a guardian to the person of minors is concerned the power of a Hindu father is not disputed. In *Dr. Albrecht v. Bathee Jellamma*(1), WALLIS, C.J., and ABDUR RAHIM, J., held following *Soobah Doorgah Lal Jha v. Raja Neelanund Singh*(2) that a Hindu father was entitled to appoint a guardian for his child by will so as to exclude the mother from the guardianship. This decision was followed by SADASIVA AYYAR and MOORE, JJ., in *Alagappa Ayyangar v. Mangothai Ammangar*(3) where the learned Judges held that it was competent to a Hindu father to appoint a guardian by will to the person of his minor son though he could not do so in respect of undivided family properties.

As regards appointment of a guardian to the properties of minor co-parceners there is a conflict of authority. In *Soobah Doorgah Lal Jha v. Raja Neelanund Singh*(2) it was held that under Hindu Law the father has power to appoint either orally or by writing a person to be the guardian of his minor children.

The facts appearing in the report show that the parties were governed by the principles of Hindu Law current in Mithila where the Mitakshara is the leading authority though it is supplemented by the Vivada Ratnakara and the Vivada Chintamani. In dealing with the powers of the father, LOCH, J., observed:—

“We think the Principal Sudder Ameen has taken an erroneous view of the Hindu Law as regards the power of a parent to appoint a guardian for his children. No doubt the mother is the natural guardian of her child; and were any person to attempt to deprive her of this right without authority, her right would, under ordinary circumstances, be supported; but we are not aware of any provisions of the Hindu Law, nor have any such been shown in support of the Principal Sudder Ameen's view, which prohibit a father from appointing by writing or by word any other person than the mother to be the guardian of his minor children. The Principal Sudder Ameen has found the will to have been duly executed. If his finding in this respect be correct, the will, though inoperative as regards the disposition of the property which is contrary to the principles of the Hindu Law current in Mithila, is not so as regards the appointment of a guardian.”

(1) (1912) 22 M.L.J., 247 at p. 248.

(2) (1887) 7 W.R., 74.

(3) (1917) I.L.R., 40 Mad., 672.

The decision has not been questioned in any of the subsequent decisions and is clear authority for the proposition that a will though invalid as a disposition of property can be effective to create a testamentary guardian.

In *Bindaji v. Mathura Bai*(1), JENKINS, C.J., and ASTON, J., held that the principle that no guardian can be appointed to the property of a minor who is a member of a joint and undivided Hindu family and whose only property is his interest on the joint property does not apply to cases where all the members of the family are minors and that a testamentary guardian can be appointed subject to the limitation that it would be open to any minor on attaining majority to apply for the removal of the guardian so appointed. This case was followed in *Ramachandra v. Krishna Rao*(2). In *Mahableshvar Krishnappa v. Ramachandra Mangesh*(3) SCOTT, C.J., and BEAMAN, J., after referring to *Soobah Doorga Lal Jha v. Raja Neelanund Singh*(4) and *Raj Lukhee Dabea v. Gokool Chunder Chowdhry*(5) were of opinion that it was competent to a Hindu father to appoint a testamentary guardian to the property of his minor children and to give directions for management.

A contrary view however has been taken in *Kanagasabhai Mudaliar v. Ponnusami Mudaliar*(6) by SADASIVA AYYAR, J., and SPENCER, J. The appeal arose out of an application to remove a guardian who purported to act as guardian appointed by a will of the father of certain minor.

It appears from the report that ABDUR RAHIM and SPENCER, JJ., without expressing any opinion called for a finding as to whether the properties dealt with by the will were ancestral or self-acquired. On receipt of the finding SADASIVA AYYAR and SPENCER, JJ., observed as follows:—

“On the finding that the properties are ancestral properties of the testator (petitioner's father) he had no right to appoint guardians by will in respect of such properties which survived to his sons”

and treated the guardian as a “mere trespasser.” No authorities seem to have been cited at the bar and the judgment

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(1) (1906) I.L.R., 30 Bom., 152.

(3) (1914) I.L.R., 38 Bom., 94.

(5) (1889) 13 M.I.A., 209.

(2) (1908) I.L.R., 32 Bom., 259.

(4) (1867) 7 W.R., 74.

(6) (1913) 21 I.C., 848.

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In *Krishna Aiyar v. Chakrapani*(1), Mr. Justice OLDFIELD was of opinion that a testamentary guardian was not a person "appointed by a competent authority" within the meaning of Order XXXII, rule 6 (2) of the Civil Procedure Code so as to entitle him to draw moneys from Court without giving security. The learned Judge simply followed *Kanakasabhai Mudaliar v. Ponnusami Mudaliar*(2) and *Budhalal v. Morariji*(3).

The question again arose for decision in *Alagappa Ayyangar v. Mangathai Ammangar*(4). Mr. Justice SADASIYA AYYAR who delivered the judgment of the Court was of opinion that though a Hindu father can appoint a testamentary guardian to the person of his minor sons he was incompetent to appoint a guardian to the joint family properties which on his death survived to his minor sons. The learned Judge after referring to *Soobah Doorgah Lal Jha v. Raja Neelanund Singh*(5) and distinguishing *Dr. Albrecht v. Bathoe Jellamm*(6) as only deciding that it was competent to a Hindu father to appoint testamentary guardian [though the decision followed without reservation the broader rule laid down in *Soobah Doorgah Lal Jha v. Raja Neelanund Singh*(5)] preferred and followed the decision in *Kanakasabhai Mudaliar v. Ponnusami Mudaliar*(2).

In *Chidambaram Pillai v. Veerappa Chettiar*(7) the question again came up for consideration before Justices SADASIYA AYYAR and SPENCER and they differed as to the testamentary capacity of the father to appoint a guardian to the properties of his minor sons. SADASIYA AYYAR, J., after distinguishing the cases reported in *Soobah Doorgah Lal Jha v. Raja Neelanund Singh*(5) and *Raj Lukhee Dabee v. Gokool Chunder Chowdhry*(8) as being cases under *Dayalbag Law* and *Ramachandra v. Krishna Rao*(9) as being a case deciding the power of Courts to appoint dissented from the decision of the Bombay High Court in *Mahableshvar Krishnappa v. Ramachandra Mangesh*(10). SPENCER, J., after referring to the conflict between the Bombay

(1) (1915) 23 I.C., 475.

(3) (1907) I.L.R., 31 Bom., 413.

(6) (1867) 7 W.R., 74 at p. 75.

(7) (1917) 8 L.W., 640.

(9) (1908) I.L.R., 32 Bom., 259.

(2) (1913) 21 I.C., 848.

(4) (1917) I.L.R., 40 Mad., 672.

(6) (1912) 22 M.L.J., 247 at p. 248.

(8) (1869) 13 M.I.A., 209.

(10) (1914) I.L.R., 38 Bom., 94.

and Madras views was inclined to follow *Ramachandra v. Krishna Rao*(1) and *Mahableshvar Krishnappa v. Ramachandra Mangesh*(2). He observed that there might be exceptional cases where a Hindu father may validly and properly appoint by will a guardian to manage the joint family property during the minority of his sons where he was the only adult male member of the coparcenary at the time of his death, such an act being "a natural act on the part of a prudent Hindu father dying without grown-up sons or agnates."

I can find nothing either in the Mitakshara or the Smritis which prohibits a father from providing for the care and management of property during the minority of his sons. The only possible ground for negating the power of a Hindu father governed by the Mitakshara to exercise his natural right (conferred by every civilized system of jurisprudence) to make provisions for the care and custody of properties of his minor children on his death is that under the Mitakshara he cannot dispose of property by will to the prejudice of his coparceners, but I do not think that arrangements made for the protection of property for the benefit of minors amount to a disposition of property or a disturbance of the rights of the minor coparceners to take the property by survivorship. *Soobah Doorgah Lal Jha v. Raja Neelanund Singh*(3), which as I have already pointed out is a case under the Mitakshara, clearly points out and recognizes the distinction between a disposition of property contrary to the provisions of Hindu Law and an arrangement for its preservation and management. The limitation to the power of the testamentary guardian to the period when any one of the minors comes of age and so becomes competent to exercise his right of management which as an adult coparcener he would have in a Mitakshara family so far as the other minor coparceners are concerned would effectually remove any conflict. The decision of the Privy Council in *Gharib Ullah v. Khalak Singh*(4) only prevents a Court and by a parity of reasoning a father or other adult coparcener from appointing a guardian to the property of minor members of a joint family where there is an adult coparcener. *Bindaji v. Mathura Bai*(5)

(1) (1908) I.L.R., 32 Bom., 259. (2) (1914) I.L.R., 38 Bom., 94.

(3) (1867) 7 W.R., 74 at p. 75. (4) (1903) I.L.R., 25 All., 407 (P.C.).

(5) (1906) I.L.R., 30 Bom., 152.

CHIDAMBARAM PILLAI v. RAMACHANDRA MANGESH(1) distinguish *Gharib Ullah v. Khalak Singh*(2) on this ground and are clear authorities for the view that the decision in *Gharib Ullah v. Khalak Singh*(2) has no application when all the coparceners are minors.

As observed by SCOTT, C.J., in *Mahableshvar Krishnappa v. Ramachandra Mangesh*(3) and by SPENCER, J., in his judgment in *Chidambaram Pillai v. Veerappa Chettiar*(4) it is a matter of practical convenience and necessity that a dying adult member of a coparcenary where all the other coparceners are minors should be able to make arrangements for the guardianship of the minors and the management of the coparcenary property and I am of opinion that unless there is any express prohibition in the Hindu Smritis or commentaries recognized as authorities in this Presidency there is no reason why the rulings of the Calcutta and Bombay High Courts should not be followed. In view of the conflict of authorities referred to by me between the Madras and other High Courts I think it desirable that the question should be settled by a Full Bench and would refer the following question for determination:—

“Whether it is competent to the only adult coparcener of a Mitakshara family consisting of himself and his minor coparceners to appoint a testamentary guardian to the coparcenary properties of the minor coparceners?”

WALLIS, C.J. WALLIS, C.J.—I agree to this reference.

ON THIS REFERENCE—

K. Srinivasa Ayyangar and *C. Krishnamachariar* for the appellant.—The reference must be answered in the negative. Rights in property consist of (1) management, (2) alienation and (3) testamentary disposition. On the subject of guardianship of minor's properties in ancient Hindu Law, see Manu, Chapter 8, section 27 and Chapter 9, sections 146, 190 and 191 and Colebrooke's Digest, Volume 2, pages 574 to 577, where all the texts on the subject are collected; see also *Ranganaiiki Animal v. Ramanuja Aiyangar*(5). A father cannot appoint by testament a guardian for his minor son's property—*Kanakasabhai*

(1) (1914) I.L.R., 33 Bom., 94.

(3) (1914) I.L.R., 33 Bom., 94 at p. 103.

(2) (1903) I.L.R., 25 All., 407 (P.C.).

(4) (1917) 6 L.W., 640.

(5) (1912) I.L.R., 35 Mad., 728.

Mudaliar v. Ponnusami Mudaliar(1), *Krishna Aiyar v. Chakrapani*(2), *Alagappa Ayyangar v. Mangathai Ammangar*(3) and *Chidambaram Pillai v. Veerappa Chettiar*(4). He referred to and explained *Soobah Doorgah Lal Jha v. Raja Neelanund Singh*(5). If the last case can be said to decide anything against the above view it is wrong. Similar remarks apply to *Mahableshvar Krishnappa v. Ramachandra Mangesh*(6). This last case is based upon a misapprehension of *Raj Lukhee Dabea v. Gokool Chunder Chowdhry*(7) which is a case of the Dayabhaga school, where a father by his will could have disposed of the property itself. I rely also on *Kovuri Therupathi Raju v. Venkata Raju*(8). The right to guardianship of property in England and other countries is well summarized in 21 American Cyclopædia, pages 12 and 19 and Simpson on Infants, page 105. In England testamentary guardianship is based only on statute (12 Charles II, cap. 24) and not on common law or custom. There is no natural right to appoint by testament a guardian either in English, Roman or any other law.

T. R. Ramachandra Ayyar for respondents.—The question must be answered in the affirmative. The power to appoint a guardian for the property of minor co-parceners is not an incident of proprietary right. It is a natural right of the father; compare the father's power to give his son in adoption and thus deprive him of his rights in the family property. The right contended for is not prohibited by any texts of Hindu Law. Reference was made to Madras Court of Wards Regulation V of 1804, sections 18 and 19, Guardian and Wards Act (VIII of 1890), sections 5, 6 and 7, Hindu Widows Remarriage Act (XV of 1856), section 3, Strange's Hindu Law, page 72 (a). Kulluka in commenting on Manu's verse quoted by the appellant says that the king takes charge of the property of a minor who is an 'anadha,' i.e., one who is without a protector and not of one to whose property a guardian has been appointed. I rely on *Soobah Doorgah Lal Jha v. Raja Neelanund Singh*(5), *Raj Lukhee Dabea v. Gokool Chunder Chowdhry*(7), *Bindaji v*

(1) (1913) 21 I.C., 848.

(2) (1915) 29 I.C., 475 at p. 476.

(3) (1917) I.L.R., 40 Mad., 672 at p. 675.

(4) (1917) 6 L.W., 640.

(5) (1867) 7 W.R., 74.

(6) (1914) I.L.R., 38 Bom., 94 at p. 103.

(7) (1869) 13 M.I.A., 209.

(8) (1917) 40 I.C., 418.

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Mathura Bai(1), *Ramachandra v. Krishna Rao*(2) and *Mahabhar Krishnaappa v. Ramachandra Mangesh*(3). *Kanakasabhai Mudali v. Ponnusami Mudaliar*(4) is wrong and mistakes *Soobah Doorgah Lal Jha v. Raja Neelanund Singh*(5) is a Dayabagha case and gives no reasons. Similarly *Krishna Aiyar v. Chakrapani*(6) *Alagappa Ayyangar v. Mangalhai Ammangar*(7) simply follows *Kanakasabhai Mudaliar v. Ponnusami Mudaliar*(4). See SPENCER, J.'s view in *Chidambaram Pillai v. Veerappa Chettiar*(8). He referred to *Sami Row v. Eliavatha Row*(9) and *Gharib Ullah v. Khalak Singh*(10).

The Court delivered the following OPINIONS :—

AYLING, J.

AYLING, J.—I have had the advantage of perusing the judgment which my learned brother, SESHAGIRI AYYAR, J., is about to pronounce; and I agree in the conclusion arrived at by him. It is impossible to contend that the power of appointing a testamentary guardian is supported by anything in the ancient texts; and the attractive doctrine that anything which is not expressly forbidden should be held lawful, if expedient, seems to me one, which has its dangers, and requires careful consideration before application. In the present case, the power claimed seems to run counter to the conception of a Hindu joint family in which every member obtains an interest at birth. I can only agree with SADASIWA AYYAR, J.'s remark in *Chidambaram Pillai v. Veerappa Chettiar*(8) in which that learned Judge says:

"On principle I find it difficult to hold that a man who cannot deal with a particular species of property by will can make arrangements for the management of that property by will after his death or can appoint guardians to manage that property for minor owners who obtain it by survivorship after his death."

This seems to me to sum up the whole matter.

I am not even clear that considerations of general expediency support respondents' contention. The reference covers the case not only of the adult co-parcener's own minor sons, but of his minor nephews, and even minor brother regarding whom the natural right of a father discussed by KRMASWAMI SASTRI, J.,

(1) (1906) I.L.R., 30 Bom., 152. (2) (1908) I.L.R., 32 Bom., 259.

(3) (1914) I.L.R., 38 Bom., 91 at p. 103.

(4) (1913) 21 I.C., 848.

(5) (1897) 7 W.R., 74.

(6) (1915) 29 I.C., 475.

(7) (1917) I.L.R., 40 Mad., 672 at p. 675.

(8) (1917) 6 L.W., 640.

(9) (1905) 16 M.L.J., 257.

(10) (1903) I.L.R., 25 All., 407 (P.C.).

in his order of reference can have no application. Even as regards sons, I think the interests of the minors are sufficiently protected by the power of the Court to appoint a guardian; and while the expressed wishes of the father are sure to receive attention at the Court's hands, nothing further is required.

I would answer the question in the negative.

COUTTS TROTTER, J.—I also have had the advantage of perusing my learned brother SESHAGIRI AYYAR's judgment. I only abstain from simply expressing my own concurrence in it, because my doing so might seem to be associating myself with a familiarity with the ancient authorities which I cannot pretend to possess. I therefore put what I have to say in my own words.

To speak of natural rights has always been recognized as a slippery path for the political thinker to tread from the days of Hobbes and Rousseau. It is an even greater pitfall to a lawyer. To appoint a guardian to the person of his infant children may be a 'natural' right vested in the father. To clothe him with authority over property which belongs to so complex an institution as a Hindu joint family may seem to me to be something which cannot be derived from nature, but must be founded on some legal warrant. In England the warrant is statutory, and it is not pretended that there is any statutory authority in force in India. The citations from Manu seem to show that the original conception was that the custody of properties of the joint family where there was no adult member should be the care of the king, which in modern language means the Courts of the country. No case has been cited which can be said to recognize the suggested right. *Soobah Doorgah Lal Jha v. Raja Neelanund Singh*(1) contains expressions which tend to show that the learned Judges supposed that such a power would be possible; but they do not definitely so decide. Mr. K. Srinivasa Ayyangar supported that judgment on the ground that as the properties dealt with were the properties of the father absolutely and were not joint properties, his right to appoint a guardian for them might be considered as an inherent part of his total right of ownership. That again seems to me to be lapsing into abstract speculation, and it may be that Mr. T. R. Ramachandra Ayyar's attack on this theory—which not

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insignificantly formed almost the whole of his argument—was well-founded. Beyond that his argument seemed to me to come merely to this. The thing is convenient, it is consonant with all right notions of what a father ought to be able to do for his children; it is nowhere expressly prohibited; therefore it can be done. To me on the contrary it seems that to put a person in a definite legal relation to property of which he is not the owner is a step which cannot be taken unless there is legal authority for taking it. Its convenience and justice may be admirable reasons for the legislature to take action. They cannot in my opinion suffice to set in motion a court of law.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—The question referred for our consideration is whether it is competent to the only adult coparcener of a Mitakshara family consisting of himself and his minor coparceners to appoint a testamentary guardian to the coparcenary properties of the minor coparceners.

It was argued before us that the real point for decision is whether the manager of a Hindu family, be he the father, the uncle or an elder brother, can appoint a testamentary guardian for the property of his minor coparceners. In the Hindu Law there is no provision for the appointment of a testamentary guardian. That may be due to the fact that the idea of making a will is of recent origin. The only texts of Hindu Law which relate to this subject are all collected in Colebrooke's Digest, vol. II, pages 574 to 577. These authorities cast upon the king the duty of protecting the property of a minor.

Mr. T. R. Ramachandra Ayyar for the respondents drew our attention to the commentary of Kullookha Bhatta on Manu's text and argued that the protection of the king should be invoked only where the infant was otherwise unprotected. I do not understand the commentator to indicate by the use of the expression 'anadha' that the deceased father or manager is competent to appoint a guardian and that it is only in default of such an appointment the king can step in. On the other hand it is clear from Manu's verses that the primary right of guardianship is in the king, and it is only by reflection that the father during his lifetime exercises that right (as if by delegation by the sovereign).

On principle, it appears to me that a person who is not capable of making a gift of his property or to dispose of it by testament cannot be in a position to control that property after

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his death. However convenient it may be and [however consonant with natural justice, that a father or manager should indicate his preference of an individual as guardian by a testament, in my opinion it would be inconsistent with the theory of survivorship that he should have the power to dictate to the king or to the Judges appointed by him as to who should be the guardian of his minor coparceners. In the majority of cases the wishes of the father or manager would be acted upon by the Courts. But to say that his directions should be regarded as amounting to a legal appointment is opposed to the principle underlying the Mitakshara system of law.

In the order of reference Mr. Justice KUMARASWAMI SASTRIYAR refers to the natural right of a father to appoint a guardian and says that such a power is conferred by every civilised system of jurisprudence. Mr. K. Srinivasa Ayyangar in a very learned argument has drawn our attention to the theories of guardianship enunciated in the ancient and modern systems of jurisprudence. An examination of the citations shows that whereas the right of appointing a guardian for the person of an infant has been in some systems regarded as the natural or the nurlural right of the parent, in none of them has it been stated that the right to appoint a guardian of property is a common law right. In Roman Law just as in the Hindu Law, the protection of property was enjoined upon the State. In English Law the power to appoint a testamentary guardian was first given by 12 Carl. II, cap. 24 (see Simpson on Infants, page 105). It is stated in the text-book that the right of appointing a testamentary guardian is not a common law right. In America where the Civil Law of Rome and the English Law have been further developed, it is clear that the right of appointing a testamentary guardian is not regarded as an inherent right in the parent (see 21 American Cyclopædia page, 12). Therefore I am unable to accept the statement of the learned Judge that in other systems of jurisprudence the right of appointing a testamentary guardian exists as a common law right in the parent.

I shall now discuss the cases. The earliest decision upon the subject barring the decision of Sudder Adawlat of the High Court of the North West Provinces is *Soobah Doorgah Lal Jha v. Rajah Neelanund Singh*(1). There are undoubtedly observations

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in that judgment which show that the learned Judge believed that he had the authority of the Hindu Law in holding that a testamentary guardian can be appointed for Mitakshara minor. The actual decision itself is supportable upon other grounds. There were two classes of property in respect of which a person preparing to act on behalf of the minor had entered into a compromise on behalf of the minor. This person was appointed guardian by the father in his will; he was also recognized by the Civil Court as the guardian *ad litem* of the minor. The compromise in the suit related to ancestral property. It was upheld. It is well settled that where a guardian is appointed by the Court and an honest compromise is come to in the presence of the Court it is *prima facie* binding upon the minor unless the latter can show that his guardian was guilty of fraud or other invalidating circumstances. There was another species of property in regard to which the guardian appointed by the will had entered into a compromise outside the Court. That property was the self-acquisition of the father. In respect of such property, it can hardly be disputed that it is open to the testator to appoint a guardian to manage it. Therefore the conclusion come to in the case is right. The observations of the learned Judge that Hindu Law sanctions the appointment of a guardian receive no support from any citation made by him or from any authority to which we have been referred to in the course of the argument in this case. I am therefore not prepared to follow the obiter dicta contained in that judgment.

The next case very strongly relied upon by Mr. T. R. Ramachandra Ayyar is the decision of the Judicial Committee in *Raj Lukhee Dabea v. Gokool Chunder Chowdhry*(1). It was a case under the Dayabhaga law under which it was competent to a father to dispose of property notwithstanding the existence of sons. The suit was brought to set aside the alienation made by the widows of one Guruprasad Sarma. The latter had executed a document in favour of the widows under which the alienees claimed that the widows had ample power of disposition. The Judicial Committee came to the conclusion that the document conferred no rights of property on the widows. They regarded it as providing only "a species of trust for management and that

(1) (1869) 13 M.J.A., 209.

it did not interfere with the devolution of the estate according to the ordinary law of succession under the Hindu Law." Following this view, their Lordships of the Judicial Committee considered whether the disposition by the widows as managers of the property of Guruprasad's sons was impeachable. It is clear from the facts that the question before the Committee did not relate to coparcenary property or to the power of a Mitakshara father to appoint a testamentary guardian. Notwithstanding the argument of the learned vakil for the respondents, I am unable to see why a person who is competent to devise his property whether to his own children or to strangers should not deal in his testament only with the right of management of that property. It is not necessary to validate such an appointment of a guardian or manager that the testament should make a gift of the property as well. The right over property involves two definite rights—the right of management and the right of enjoyment. A person may devise the right of management only by providing that his legal heirs shall have the benefit and advice of a person in whom the testator had confidence. That was really what happened in the Bengal case. Sir JAMES COLVILLE in delivering the judgment points out that the right of succession under the Hindu Law was not interfered with by the testator. I see nothing in the judgment of the Board in that case to warrant the contention that a person who cannot deal with a species of property by a testamentary document can devise the right of management over such property. *Mahableshvar Krishnappa v. Ramachandra Mangesh*(1) was the next case referred to. I cannot help saying that the learned Judges have not correctly understood *Raj Lukhee Dabea v. Gokool Chunder Chowdhry*(2), on which they base their conclusion; I feel constrained to differ from that decision. These are all the cases in the other High Courts. So far as Madras is concerned the preponderance of authority is in favour of holding that a Mitakshara father has no power to appoint a testamentary guardian to his sons' property, *a fortiori* a Mitakshara manager has no power to appoint such a guardian. The first decision is *Kanakasabai Mudaliar v. Ponnuswami Mudaliar*(3) to which Mr. Justice SPENCER was

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(1) (1914) I.L.R., 33 Bom., 94.

(2) (1869) 13 M.J.A., 209.

(3) (1913) 21 I.C., 843.

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a party. *Krishna Aiyar v. Chakrapani*(1) is to the same effect. In *Alagappa Ayyangar v. Mangathai Ammayar*(2) Mr. Justice SADASIVA AYYAR and Mr. Justice MOORE came to the same conclusion. In *Chidambaram Pillai v. Veerapa Chettiar*(3) Mr. Justice SADASIVA AYYAR once again expressed the same view. Mr. Justice SPENCER seems to think that the matter requires further consideration. The learned Judge does not give any definite opinion on the point at issue. Mr. T. R. Ramachandra Ayyar attacked the view of Mr. Justice SADASIVA AYYAR on two points. I do not think that the criticism really affects the main conclusion at which the learned Judge has arrived. It is true that his reference to *Soobah Doorgah Lal Jha v. Rajah Neelanund Singh*(4) as a Dayabagha case is not quite accurate, and something may be said also against his reference to the Privy Council decision, but the principle enunciated by him has my entire approval.

Some other cases were referred to by Mr. T. R. Ramachandra Ayyar, viz., *Sami Row v. Eliavatha Row*(5) and *Gharib Ullah v. Khalak Singh*(6). In the first of these cases the property dealt with was the self-acquired property of the testator. The second case has really no bearing upon the point. The learned vakil referred to the enactments dealing with guardianship, viz., the Court of Wards Regulation, the Guardians and Wards Act and the Widow Remarriage Act and contended that these legislative provisions preserve the right of a Hindu father to appoint a guardian. I do not think these Acts give any statutory authority for the appointment of a testamentary guardian in respect of coparcenary property. They only refer to cases in which such power of appointment is permissible under the law, for example, cases of self-acquired property in Madras or the Dayabagha property in Bengal.

The case has been very fully argued by the two learned vakils, and my answer to the question referred to us is in the negative.

N.R.

(1) (1915) 29 I.C., 475.
(3) (1917) 6 L.W., 640.
(6) (1905) 16 M.L.J., 357.

(2) (1917) I.L.R., 40 Mad., 672.
(4) (1867) 7 W.R., 74.
(5) (1903) I.L.R., 25 All., 407.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

CHINDAN NAMBIAR (FIRST DEFENDANT), APPELLANT,

v.

KUNHI RAMAN NAMBIAR AND TWENTY-NINE OTHERS (PLAINTIFFS),
RESPONDENTS.*

1917,
December, 3
and
1918,
March, 4.

Malabar Law—Karnavan appointed by family karar—Right of other members to remove such karnavan by suit, for misconduct.

Held by the Full Bench that a person appointed as karnavan of a tarwad by an agreement (karar) of the members of the tarwad is liable to be removed for gross misconduct by a suit at the instance of the junior members.

Cheria Pangi Achan v. Unnalachan (1917) M.W.N., 185, explained.

SECOND APPEAL against the decree of M. G. KRISHNA RAO, the Temporary Subordinate Judge of Tellicherry, in Appeal No. 535 of 1913, preferred against the decree of P. SANKUNNI MENON, the District Munsif of Taliparamba, in Original Suit No. 39 of 1910.

This is a suit by the plaintiffs, junior members of a Malabar tarwad (a) to remove on account of mismanagement the first defendant from the office of karnavan to which he was appointed by a family karar (arrangement), Exhibit B, in 1892 and (b) for the appointment of first plaintiff as karnavan in his place. The karar was executed under the following circumstances:—

The third defendant (who has since died) was the senior in age and was the *de jure* karnavan. He was removed by a karar. Then the second defendant, who is also now dead, and who was next in age, was in management. During this period, the members of the tarwad were dissatisfied with the way the affairs were being conducted. Therefore there was a family council and Exhibit B, dated the 17th May 1892, came into existence. All the members of the tarwad were parties to that document. By its terms, the second defendant was removed from the general management and the first defendant who was admittedly the senior anandiravan was constituted the karnavan. The second

* Second Appeal No. 1177 of 1916 (F.B.).

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defendant was allowed to manage a family temple and to utilize the surplus income for his maintenance. The first defendant contended *inter alia* that he was not guilty of any of the charges of mismanagement and that it was not in the interests of the *tarwad* to remove him and to appoint first plaintiff as *karnavan*. Finding that the first defendant was guilty of mismanagement, both the lower Courts removed him from the office of *karnavan* and appointed the first plaintiff in his place. The first defendant preferred this Second Appeal to the High Court.

C. V. Anantakrishna Ayyar for the appellant.

T. R. Ramachandra Ayyar and A. Sivarama Menon for the respondents.

This Second Appeal coming on for hearing in the first instance before SESHAGIRI AYYAR and NAJIB, JJ., the following ORDER OF REFERENCE TO A FULL BENCH was made by

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—This is a suit to remove a *karnavan*. The Courts below directed his removal. Mr. Ananthakrishna Ayyar for the appellant contested the findings regarding the charges framed against the *karnavan*. There is evidence to support the findings and we are not prepared to differ from the Courts below on these points. The next contention was that even if the charges are proved, they are not serious enough to entail the removal of the *karnavan*. One of them which relates to the assignment of a satisfied decree to the sixteenth defendant, the son of the *karnavan*, to enable the said defendant to bring *tarwad* properties to sale is a very serious one. Both the Courts below have found that the conduct of the *karnavan* in this respect was fraudulent. Other charges also have been proved against him. They are all detailed in the judgments of the Courts below. We think that taking them all together, there is enough justification for the decree passed in the case.

Mr. Anantakrishna Ayyar relied on *Cheria Pangi Achan v. Unnalachan*(1) and contended that the suit was not maintainable, as the first defendant was not the *de jure karnavan*, but was appointed to his position by a family *karar*. The facts necessary to understand this contention are these:—

The third defendant (who has since died) was the senior in age and was the *de jure karnavan*. He was removed by a

(1) (1917) M.W.N., 185.

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karar. Then the second defendant, who is also now dead and who was next in age, was in management. During this period, the members of the *tarwad* were dissatisfied with the way the affairs were being conducted. Therefore there was a family council and Exhibit B, dated the 17th May 1892, came into existence. All the members of the *tarwad* were parties to that document. By its terms, the second defendant was removed from the general management and the first defendant who was admittedly the senior *anandiravan* was constituted the *karnavan*. The second defendant was allowed to manage a family temple and to utilize the surplus income for his maintenance.

The result of the *karar* was that the second defendant, the *karnavan*, was substantially removed from his office and his duties were entrusted to the first defendant. As both the defendants were parties to this *karar*, it was argued that the second defendant must be deemed to have renounced his rights by his assenting to it. The decision in *Kenath Puthen Vittil Tavazhi v. Narayanan*(1) on which Mr. Ramachandra Ayyar relied, seems to enunciate the following propositions:—(a) The renunciation by a *karnavan* is binding on the *tarwad* and is irrevocable by him, (b) this renunciation may be by a unilateral act or by being a party to the contract by which his rights are superseded, and (c) by such renunciation, the next in age becomes the *karnavan de jure*. Applying these conclusions to the present case, it may be said that the first defendant who was the senior in age after the second defendant became the *de jure karnavan* by virtue of the renunciation implied by the *karar*. It is true that some powers which ought ordinarily to have been exercised by the *karnavan* were entrusted to the second defendant. This may be taken to have entailed some restrictions on the full powers of the first defendant. In other respects his rights as *karnavan* were recognized and confirmed by the *karar*. If this is the correct view of Exhibit B, we think that a suit will lie to remove the first defendant. This conclusion is, in our opinion, not inconsistent with the decision in *Cheria Pangi Achan v. Unnalachan*(2). But Mr. Anantakrishna Ayyar argued that this decision is authority for the larger proposition that whenever a *karnavan* is designated by a *karar*, he is not liable to

(1) (1905) I.L.R., 28 Mad., 182.

(2) (1917) M.W.N., 185.

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AYYAR, J.

be removed by a suit. We express no opinion on the question whether, even though the *karar karnavan* is not the senior in age, a suit may not lie at the instance of some of the parties to the *karar* to remove him. But we think that when a *de jure karnavan* is recognized by the *karar*, he does not acquire a higher status than that which he originally possessed. However the question raised is a very important one, affecting as it does the rights of management in numerous families in Malabar. We have, therefore, resolved to refer the following questions for the decision of the Full Bench:—

- (a) Where a *de jure karnavan* is a party to a family *karar* by which his general rights as *karnavan*, subject to some minor exceptions, are taken away, can he be said to have renounced his rights as *karnavan*?
- (b) When under the above circumstances, the next in age to the *karnavan* is recognized as the *karnavan* by the *karar*, whether a suit will not lie to remove him from the *karnavanship*?

ON THIS REFERENCE—

U. V. Anantakrishna Ayyar for appellant.—By the *karar* (agreement) to which all the members of the *tarwad* were parties, the second defendant who was the previous *karnavan* was continued as before the *de jure karnavan* and the first defendant was appointed only as manager under him. A suit will not lie to remove such a manager: see *Cheria Pangi Achan v. Unnaluchan*(1). Even if the second defendant be considered to have been removed from his position and the first defendant appointed in his place by the *karar*, it is only the *tarwad* that can take away the management that it entrusted to the first defendant and not the Court.

T. R. Ramachandra Ayyar and *A. Sivarama Menon* for respondent, were not called upon.

The Court expressed the following OPINIONS:—

SADASIWA
AYYAR, J.

SADASIWA AYYAR, J.—It is clear to my mind that the *karar*, Exhibit B, dated in 1892, deprived the second defendant of his *karnavastanam* though with his consent and vested the office in

(1) (1917) M.W.N., 185.

the first defendant. The fact that the *tarwad* (including the new *karnavan*) gave the management of a temple and its income to the removed *karnavan* did not affect the other results of the *karar*, namely, the putting an end to the tenure of the second defendant's office as *karnavan* and the appointment of the first defendant to the said office. The supersession of second defendant's rights by the family *karar* cannot, of course, be affected by any subsequent unilateral act or expression of intention on his part.

The first defendant became not only the *de facto karnavan* but also the *de jure karnavan* under the *karar* and he can therefore be removed by suit for gross misconduct.

As soon as a *karnavan* ceases to be such by death or removal, the next in order of seniority becomes the *karnavan*, and any family *karar* binding on the person who has ceased to be the *karnavan* ceases to have any effect on the new *karnavan* "except perhaps where he has himself agreed in that *karar* to be bound by those restrictions whenever he succeeded to the *stanom*." There is no scope for the framing of a scheme of management by a Court under those circumstances. This was all that I intended to express in *Cheria Pangi Achan v. Unnaluchan*(1).

A family *karar* to which all the adult members of a *tarwad* are parties and by which a person is deprived of his status as *karnavan* is not the same thing in the eye of the law as an unilateral act of relinquishment of his office by the *karnavan* though the result on his status as *karnavan* may be the same.

I think that the question (a) referred to us does not arise for decision on the above view of the legal nature and effect of the family *karar* (Exhibit B) and I would answer as regards question (b) that a suit will lie to remove the *karnavan* recognized as such by a family *karar*.

WALLIS, C.J.—I agree.

SPENCER, J.—I agree.

WALLIS, C.J.

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(1) (1917) M.W.N., 185.

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APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1917,
December, 5
and
1918,
March, 4 and
13.

VASUDEVAN MOOSAD (FIRST DEFENDANT), APPELLANT,

v.

ITTIRARICHAN NAIR (PLAINTIFF), RESPONDENT.*

Pre-emption—Right of, in involuntary sales.

Held by the Full Bench:—In the absence of any statutory reservation of the right, a right of pre-emption does not exist in cases of involuntary sales; hence a Malabar *otti* mortgagee has no right of pre-emption against a purchaser in Court auction of the mortgage property and he is not entitled to any notice of the intended court sale or of the price fetched at the sale.

SECOND APPEAL against the decree of G. H. B. JACKSON, the District Judge of South Malabar, in Appeal Suit No. 789 of 1915, preferred against the decree of P. K. RAMUNNI MENON, the First Additional District Munsif of Calicut, in Original Suit No. 844 of 1914.

This is a suit for pre-emption by an *ottidar* of the suit property. The jenmi granted a second mortgage in favour of the deceased brother of the first defendant who brought a suit thereon and in execution of the same purchased the property subject to the plaintiff's *otti* right. First defendant who succeeded to his brother's right then sued (in O.S. No. 505 of 1912) for the redemption of the *otti* and obtained a decree, the Court holding that the first defendant had the right to redeem till the plaintiff established his right of pre-emption in a regular suit. Alleging that he came to know of the purchase by the first defendant's brother in Court auction only after the institution of O.S. No. 505 of 1912 and that he was not given notice of the sale, plaintiff brought this suit to enforce his alleged right of pre-emption. The first defendant pleaded *inter alia* that the plaintiff had not a valid and subsisting *otti* right at the time of the institution of this suit and that the plaintiff had due notice of the Court sale. Rejecting the defendant's pleas, the Court of first instance gave a decree for pre-emption.

* Second Appeal No. 1288 of 1916.

On appeal by the first defendant, the lower Appellate Court confirmed the same by the following judgment:—"I think that there is no doubt that as the law stands at present it is the duty of the *otti* mortgagor to inform the *otti* mortgagee of the price bid at the Court sale for the property over which the mortgagee has the right of pre-emption. A notice merely informing the mortgagee that a sale will be held is not valid unless the mortgagee by attending the sale himself renders it unnecessary to supply him with further particulars of the price which has been bid. No other question has been raised in the appeal which is dismissed with costs."

The first defendant preferred a Second Appeal.

C. V. Anantakrishna Ayyar and K. P. Ramakrishna Ayyar for the appellant.

C. Madhavan Nayar for the respondent.

This Second Appeal came on for hearing before AYLING and PHILLIPS, JJ., who made the following ORDER OF REFERENCE TO A FULL BENCH:—

PHILLIPS, J.—In this case the plaintiff is an *ottidar* of the plaintiff property. The jenmi granted a second mortgage, and in execution of a decree upon that mortgage, first defendant's brother purchased the property subject to plaintiff's *otti* right. First defendant then sued for redemption of the *otti* and obtained a decree. Plaintiff now sues to enforce his right of pre-emption. The question for consideration is the nature of the rights of an *ottidar*, when the property, over which he holds the *otti*, is sold in Court auction.

In *Cheria Krishnan v. Vishnu*(1) it was held that an *otti* mortgagee was entitled "to be fully informed what price he is to pay before he makes up his mind to buy" and that although he has notice of the sale by auction but fails to bid, he is not precluded from subsequently exercising his right of pre-emption. In *Ammotti Haji v. Kunhayen Kutti*(2) a somewhat different view was taken and it was held that an *ottidar* in Malabar loses his right of pre-emption if he fails to bid at a Court sale of the land after having been specially invited to attend and exercise his right, and makes no offer to take the property for a long time after the Court sale. The only distinction between the two

(1) (1882) I.L.R., 5 Mad., 198.

(2) (1892) I.L.R., 15 Mad., 480.

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cases is that in the former the ottidar had only public notice of the sale, whereas in the latter he had had special notice. In *Kanaran Nair v Raman Nambiar*(1), this Court followed the ruling in *Cheria Krishnan v. Vishnu*(2) although the ottidar had had special notice of the sale and distinguished *Ammotti Haji v. Kunhayen Kutti*(3) on the ground that there may have been evidence in that case on which it could be held that the ottidar had been placed in a position to elect.

It is very difficult to reconcile these three decisions and I think it advisable that the question should be finally determined by a Full Bench, and I am further inclined to the opinion that the decision in *Cheria Krishnan v. Vishnu*(2) goes too far. An ottidar is a mortgagee with a right of pre-emption. It is contended for respondent that the pre-emption right of an otti mortgagee in Malabar is something higher than the right of pre-emption as ordinarily understood, it being a right based on custom. The right of an ottidar has been considered by Courts in Madras from 1854 onwards but the question of whether his right of pre-emption was greater than the ordinarily recognized rights of pre-emption in other places does not appear to have been discussed. In *Cheria Krishnan v. Vishnu*(2) however the learned Judges say that:—

“the right of pre-emption is well understood. The otti mortgagee must pay for pre-emption whatever sum is *bona fide* offered to the jenmi for the purchase, if he has the offer made to him by the jenmi and is rightly informed of the circumstances in reference to the offer. If he does not pay such sum, then his right of pre-emption is gone.”

In *Mammali v. Kunhipakki Haji*(4) the previous cases on the subject of otti were reviewed and it was held that the right of an ottidar consists in a right to elect when there has been an attempt on the part of the owner of the property to sell it to a third person, whether he will buy it for the same price as that offered by the third person or not. There would seem to be no difference between the right defined as above and the ordinary right of pre-emption (as understood in Muhammadan and other law).

(1) (1893) 4 M.L.J., 46.
(3) (1892) I.L.R., 15 Mad., 480.

(2) (1882) I.L.R., 5 Mad., 198.
(4) (1915) I.L.R., 38 Mad., 67.

When, therefore, the owner intends to sell the land by private treaty, the ottidar is entitled to come in and buy it at the same price, and according to *Cheria Krishnan v. Vishnu*(1) and *Vasudevan v. Kesavan*(2) he is further entitled to have an offer to that effect from the owner of the property, although this further right is doubted in *Mammali v. Kunhipakki Haji*(3). When the property is to be sold by Court, it is an involuntary sale and presumably one contrary to the wishes of the owner. In such a case he cannot predict the price at which the property will be sold, and consequently he cannot offer the property to the ottidar for a certain fixed price. If he is to offer it after the sale is completed, he will be making an offer which may have the effect of upsetting a sale by Court even after it is confirmed. It is questionable whether it is desirable that the right of pre-emption should be allowed to that extent, unless it is clearly established that the right does go so far. In *Baij Nath v. Sital Singh*(4) MAHMOOD, J., held that the right of pre-emption, whether claimed under Muhammadan Law, the compact of the *Wajib-ul-arz* or local usage and custom does not arise in respect of compulsory sales, and in this view followed *Abdul Jabel v. Khelatchandra Ghose*(5), *Shaikh Ferasut Ali v. Ashootosh Roy Singh*(6) and *Sheikh Nuzmoodeen v. Kanye Jha*(7). This aspect of the question does not appear to have been considered in relation to the pre-emptive rights of an ottidar in Malabar, but the arguments of MAHMOOD, J., in support of his view would equally apply to such rights. In equity the ottidar would be entitled to notice of the sale of property in which he has so large an interest, but I can see no ground for showing him any greater consideration. His right of pre-emption arises out of a contract between him and the owner, and when by order of Court the owner is prevented from intimating the exact amount of the sale price, he should in equity be deemed to have completed his part of the contract when he has informed the ottidar that a sale is to take place and has thus afforded him an opportunity of buying at the price which the property would properly fetch, assuming

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(1) (1882) I.L.R., 5 Mad., 198.
(3) (1915) I.L.R., 38 Mad., 67.
(5) (1868) 1 B.L.R.A.C., 105.

(2) (1884) I.L.R., 7 Mad., 309.
(4) (1891) I.L.R., 13 All., 224.
(6) (1871) 15 W.R., 455.

(7) (1863) Marshall, 555.

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that the right of pre-emption arises in such cases. There is no question of his being driven to give a fancy auction price, as remarked in *Cheria Krishnan v. Vishnu*(1) for he is not compelled to buy—can cease bidding whenever the bidding has reached the amount which he is willing to pay for the land.

We therefore refer the following questions for decision by a Full Bench:—

(1) Does the right of pre-emption of an otti mortgagee arise in the case of an involuntary sale?

(2) If so, is he entitled to be informed of the sale price before he can be called upon to exercise or forego his right; or is mere notice of the auction sale sufficient?

AYLING, J.—I agree to the proposed reference: and am inclined to share my learned brother's view as to the applicability of the right of pre-emption in relation to enforced sales.

ON THIS REFERENCE—

C. V. Anantakrishna Ayyar and K. P. Ramakrishna Ayyar for the appellant.—The right of pre-emption cannot be claimed in case of involuntary sales and cannot be exercised as against the auction purchaser. The right is personal and arises only as a result of a contract between the mortgagor and the mortgagee. No such right is preserved by the Legislature. The rules of the Civil Procedure Code relating to proclamation of sale show that proclamation is sufficient notice to all intending purchasers including the otti mortgagee. If he does not choose to bid at the sale, he must be deemed to have waived his right—*Baij Nath v. Sital Singh*(2), *Kanhai Lal v. Kalka Prasad*(3), *Ammotti Haji v. Kunhayen Kutti*(4) and *Vasudevan v. Kesavan*(5) and Amir Ali's Muhammadan Law, Volume I, page 717. Under the Muhammadan Law as obtaining in Bengal and North-West Provinces the right of pre-emption of a co-sharer arises only in case of private sales. *Mammali v. Kunhipakki Haji*(6) and *Kanaran Nair v. Raman Nambiar*(7) are wrong. It has been held in *Ramasami Pattar v. Chinnan Asari*(8) that a covenant for pre-emption does not run with the land.

(1) (1882) I.L.R., 5 Mad., 198. (2) (1891) I.L.R., 13 All., 224 at p. 227.
(3) (1905) I.L.R., 27 All., 670 at p. 677.
(4) (1892) I.L.R., 15 Mad., 480. (5) (1884) I.L.R., 7 Mad., 309.
(6) (1915) I.L.R., 38 Mad., 67. (7) (1893) 4 M.L.J., 46.
(8) (1901) I.L.R., 24 Mad., 449 at p. 461.

C. Madhavan Nair for the respondent.—The judgment-debtor's right which is sold in Court auction is subject to the customary right of pre-emption obtaining in Malabar: see *Moore's Malabar Law*, pages 249 to 251; Ramachandra Ayyar's *Malabar Law*, section 120. I rely on *Cheria Krishnan v. Vishnu*(1), *Mammali v. Kunhipakki Haji*(2) and *Kanaran Nair v. Raman Nambiar*(3). The reasons stated in *Baij Nath v. Sital Singh*(4) are not applicable to the case of a Malabar ottidar; see *Kanharankutti v. Uthotti*(5) and *Shaikh Ferasut Ammotti Haji v. Kunhayen Kutti*(6). *Ali v. Ashootosh Roy Singh*(7) is a case of contract. Reference was made to Tyabji's Muhammadan Law, pages 441 to 449.

K. P. Ramakrishna Ayyar in reply, referred to *Manchester Ship Canal Company v. Manchester Race Course Company*(8) as showing that the right of pre-emption is not exercisable in the case of involuntary sales.

The Court expressed the following OPINIONS:—

WALLIS, C.J.—It is strange that in none of the cases in this Court dealing with the ottidar's right of pre-emption in Malabar, *Cheriya Krishnan v. Vishnu*(1), *Vasudevan v. Kesavan*(9), *Kanharankutti v. Uthotti*(5), *Ammotti Haji v. Kunhayen Kutti*(6), *Kanaran Nair v. Raman Nambiar*(3) or *Mammali v. Kunhipakki Haji*(2) has the question been considered, how far such a right can be exercised in the case of Court and revenue sales consistently with the provisions of the statute law regulating such sales. Both in Bengal and in Northern India, where cases of pre-emption are much more numerous than they are here, it appears to be well settled that it cannot in the absence of statutory provision being made for its exercise, as in the case of some revenue sales in the United Provinces. In *Baij Nath v. Sital Singh*(4), MAHMOOD, J., after reviewing the authorities, states:

"It may therefore be taken as a rule of law settled by a long and uniform course of decision that a compulsory sale, such as a sale in execution of a decree or a sale under an authoritative order of the revenue authorities for arrears of Government revenue, does

(1) (1882) I.L.R., 5 Mad., 198. (2) (1915) I.L.R., 38 Mad., 67.
(3) (1893) 4 M.L.J., 46. (4) (1891) I.L.R., 13 All., 224 at p. 227.
(5) (1890) I.L.R., 13 Mad., 490 at p. 491.
(6) (1892) I.L.R., 15 Mad., 480. (7) (1871) 15 W.R., 455.
(8) (1901) L.R., 2 Ch., 87. (9) (1884) I.L.R., 7 Mad., 309.

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not render pre-emption enforceable, whether such right is claimed under Muhammadan Law, the terms of *Wajib-ul-arz*, or on the ground of local custom or private contract; but that such compulsory sales being the creation of statute law do furnish occasion for the exercise of the pre-emptive right where such right is provided subject to the rules and restrictions prescribed by those legislative enactments themselves."

And he goes on to refer to the provisions of section 310 of the Code of 1882 and other local statutory provisions. The other learned Judges did not differ from MAHMOOD, J., on this point, but on the question whether such special statutory provisions had been made in the particular case, and the law as laid down by him was accepted as settled in *Kanhai Lal v. Kalka Prasad*(1).

On a careful consideration of the question I agree with the law as laid down by MAHMOOD, J. I find it quite impossible to reconcile the statutory provisions of the Civil Procedure Code as to sale in execution of decrees with the ottidar's right of pre-emption as now claimed. Section 60 of the Code makes immoveable property belonging to the judgment-debtor liable to attachment and sale in execution of a decree, and section 65 provides that, where property has been sold in execution of a decree and the sale has become absolute, it is to vest in the purchaser. Under Order 21, rule 92, it becomes absolute where no application is made under rules 89, 90 or 91 of the Code of Civil Procedure, 1908, or where such application is made and disallowed. The rules in question do not provide for the exercise of a right of pre-emption.

There is a very limited recognition of the right of pre-emption in rule 88, and if any further recognition had been intended, it would have been expressly provided. Having regard to the course of the decisions and the importance of the right of pre-emption in Northern India, I can only infer that the omission to make such provision was deliberate. In *Manchester Ship Canal Company v. Manchester Race Course Company*(2) it was contended on the one side and not denied on the other that a right of pre-emption was quite incompatible with a sale by auction.

(1) (1905) I.L.R., 27 All., 670 at p. 677.

(2) (1901) L.R., 2 Ch., 87.

In these circumstances we are bound, in my opinion, even at this late stage to uphold the objection taken and to answer the questions in the negative.

SADASIVA AYYAR, J.—I entirely agree and have nothing to add.

SPENCER, J.—I also agree.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield.

G. S. RAMASWAMI AYYAR (PRISONER), APPELLANT,

v.

THE KING-EMPEROR, RESPONDENT.*

Indian Penal Code (Act XLV of 1860), ss. 29, 30, 464, 467 and 474—Forgery—Document, meaning of—Valuable security—Incomplete document—Material alteration of incomplete document, effect of.

An agreement in writing, which purported to be entered into between five persons, was signed by only two of them; it was altered by the addition of some material terms by the accused who was one of the two executants without the consent or knowledge of the other executant and was not signed by the other parties to the agreement. The accused was in possession of the instrument which was altered by him:

Held, by OLDFIELD, J. (on a reference under section 429, Criminal Procedure Code, owing to difference of opinion between SADASIVA AYYAR and PHILLIPS, JJ.),

that the accused was guilty of the offence of forgery of a valuable security under section 467, or of being in possession of a forged document under section 474 of the Indian Penal Code.

The instrument, though not signed by all the parties thereto, fulfilled the requirements of the definition of a 'document' in section 29 of the Code.

The document was a valuable security because it imposed an obligation on the actual executants and an option on the others and there was no express or implied condition precedent to be found in the document or established by independent evidence that the document was to be inoperative against the executants until all the parties executed it. It was open to the accused to plead and to prove that the alterations were not made fraudulently or dishonestly, because they represented what accused in good faith believed to be the truth and intended to use to support what in good faith he claimed or might claim.

* Criminal Appeal No. 811 of 1917.

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2, 3, 17, 28
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November,
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Queen-Empress v. Syed Hussain (1885) I.L.R., 7 All., 403; *Queen-Empress v. Sheo Dyal* (1885) I.L.R., 7 All., 459; *Queen v. Kishan Pershad* (1870) 2 N.W. P.H.O.R., 202; and *Manicka Asari v. Emperor* (1915) M.W.N., 278, referred to.
Regina v. Turpin (1849) 2 O. & K., 820, disapproved;
R. v. Bingley (1821) R. & R., 449, referred to.
R. v. Lee (1848) 3 Cox., 80 and *Reg. v. Harper* (1881) 7 Q.B.D., 78, followed.

APPEAL against the order of E. H. WALLACE, the Sessions Judge of Tanjore, in calendar case No. 27 of 1917.

The accused was charged with having committed offences under sections 467 and 474 of the Indian Penal Code in respect of an agreement in writing which purported to be entered into between five persons including the accused. The document was signed by only two out of the five persons named therein; after the signatures of the two persons, one of whom was the accused, were made, the accused made certain alterations therein which were found by the Court to be material alterations made without the consent or knowledge of the other executant. The three other persons who were mentioned as parties to the instrument did not sign the document. The heading of the document (Exhibit B) was as follows:—

‘Agreement entered into on 11th December 1912 between Vengappier, son of Vaithyanatha Ayyar, Brahman, Saivite, *miras*, residing in Kullur in the Kumbakonam taluk and Suryanarayana Ayyar, son of Ramaswami Ayyar, Brahman, Saivite, *miras*, residing in Ganapathy Agraharam in the Papanasam taluk (1), G. S. Ramaswami Ayyar (2), G. S. Balasundaram Ayyar (3) and G. S. R. Swaminatha Ayyar (4), of the said caste, religion and *miras*, sons of the said Suryanarayana Ayyar.’

The agreement was for the sale of some lands by Vengappier, the second prosecution witness, to the other parties named therein including the accused for a sum of Rs. 12,250.

It was admitted on both sides that, after the body of the document was written by the accused, short sentences or clauses were added in four or five places in accused's writing. One added sentence at the end of the second paragraph provided that the accused's family should lose their present enjoyment of the lands to be sold to them by prosecution second witness if they failed to pay Rs. 12,250 within 13th April 1913. At the end of the third paragraph an addition was made that vessels, jewels and articles remaining with prosecution second witness should be returned. In another portion (a few lines before the

list of the property to be given over to accused's mother), the accused inserted words, again indicating that the lands were then being enjoyed by accused's father, accused, etc. One word “செய்த” in the first paragraph alleged to be an addition by the prosecution after the body was written was denied by the accused to be an addition. The other admitted additions related to the enjoyment of the lands by the accused's family notwithstanding their absolute ownership in prosecution second witness (which was fully admitted in the document) and to the return of jewels, vessels, etc. (value not mentioned), by prosecution second witness. The accused was charged with the offence of forgery of a valuable security under section 467 and of being in possession of a false document, etc., under section 474 of the Indian Penal Code. The accused pleaded *inter alia* that he was not guilty of the offences (1) as he *bona fide* believed in the truth of his claim contained in the alterations made by him, and (2) as the instrument in question was only an incomplete document and was consequently of no effect in the absence of the signatures of all the parties thereto, the alteration under the circumstances was not an offence. The learned Sessions Judge convicted the accused under both the sections. On appeal, the case was heard by SADASIYA AYYAR and PHILLIPS, JJ., who differed in their opinion, and delivered the following JUDGMENTS:—

G. S. Ramachandra Ayyar, G. S. Venkatarama Ayyar, and S. Varadachariar for the appellant.

E. R. Osborne, the Acting Public Prosecutor, for the Crown.

SADASIYA AYYAR, J.—The appellant has been convicted of the offence of forgery of a valuable security under section 467 of the Indian Penal Code or in the alternative of being in possession of a valuable security knowing it to be forged and intending to use it as genuine under section 474 of the Indian Penal Code.

His Lordship mentioned the facts, dealt with the evidence and proceeded as follows:—

* * * *

The material questions for decision therefore are (1) whether the alterations about the enjoyment of the lands and the return of the vessels and jewels were in the document (Exhibit B) before prosecution second witness signed it, (2) whether

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such alterations were made dishonestly and fraudulently by the accused if they were put in by him after his father-in-law signed it and without his knowledge or consent, (3) assuming again that the alterations were subsequently made without prosecution second witness's knowledge or consent, whether Exhibit B thereby became a forged document.

His Lordship then referred to the evidence on the first question and proceeded as follows :—

* * * *

Except therefore as regards the alleged addition of the word “*உரிமை*” I would concur with the finding of the learned Sessions Judge that the other additions were made by the accused subsequent to the signing of the document by prosecution second witness, by the accused and by the attestors.

Coming to the second point, I am of opinion on the evidence that the additions have not been shown to have been made with any dishonest or fraudulent purpose. The accused seems to have been in possession of the lands to be sold by prosecution second witness. Prosecution second witness seems also to have been in possession of some jewels and vessels belonging to the accused's family. Accused honestly thought that the signatures of his father and his brothers could not be obtained without mention being made in the document of these matters and he might have further honestly believed that he could persuade his father-in-law, though he had already signed the document, to agree to these subsequent alterations. Even if this further assumption is untenable, dishonest or fraudulent intent does not follow. The making of a false receipt in order to support a true state of facts was held not to be forgery in *Ram Prosad Maity v. The Emperor*(1). In *Surendra Nath Ghose v. King-Emperor*(2), the addition of a name to the list of attesting witnesses of a *kabulayat* was held not to be a forgery if there is no fraudulent or dishonest intention. In *Manicka Asari v. Emperor*(3) decided by Sir WILLIAM AYLING, J., the conclusion is thus stated in the head-note :

“Where the accused altered a document without the authority of the executants after its execution and it was proved that the alteration was made to prevent other people from setting up a claim to

(1) (1908) 8 C.L.I., 317.

(2) (1910) 12 C.L.J., 277.

(3) (1915) M.W.N., 278.

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property which was admittedly in the possession of the accused, the object cannot be said to be dishonest and the man is not guilty of forgery under section 464 of the Indian Penal Code. An intent to defraud implies something more than mere deceit. The advantage intended to be secured must be something to which the party perpetrating the deceit is not entitled either legally or equitably. There can be no intention to defraud where no wrongful result was intended or could have arisen from the act of the accused. A man cannot be convicted of forgery where his intention has been merely to secure something to which he was legally entitled.”

(I would add, “or to which he thought *bona fide* he was legally entitled.”) In *Queen v. Kishan Pershad*(1), it was held that the prosecution, in order to establish that a title has been asserted with a fraudulent or dishonest intent, must show that the accused had no reasonable ground for asserting the title. The conviction for forgery of the accused was set aside in that case on the ground that the prosecution had not proved such intent. In *Weir*, volume I, page 542, it was held that the making of a document untrue in certain particulars is not forgery if it is not shown that it was made fraudulently or dishonestly and that mere intention to deceive is not sufficient. A similar view was held in *Queen-Empress v. Sheo Dayal*(2) with reference to receipts manufactured to support actual payments.

I shall now deal with the third contention. It is clear that no legal right or liability can at all be based upon Exhibit B, (a) either in its unaltered state before the additions in dispute were made or (b) in its altered state after the additions in dispute. In *Regina v. Turpin*(3), Baron Platt says :

“I think that this prosecution must fail. Until the signatures of a majority of the Parish officers were attached to this cheque, it was an incomplete instrument and the altering it”

(as regards the amount)

“when incomplete, is therefore no forgery. The prisoner must be acquitted.”

Sivasami Chetti v. Sevugan Chetti(4), *Amirtham Pillai v. Nanjah Gownden*(5) and *Nethiri Menon v. Gopalan Nair*(6), and the evidence on the side of the prosecution itself which I have already set out show that neither in its altered state nor in its

(1) (1870) 2 N.W.P.H.C.R., 202.

(2) (1885) I.L.R., 7 All., 459.

(3) (1849) 2 C. & K., 820.

(4) (1902) I.L.R., 25 Mad., 389.

(5) (1914) 28 M.L.J., 257.

(6) (1916) I.L.R., 39 Mad., 597.

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unaltered state could any legal right or liability be created or be purported to be created under this document because it is not signed by three of the five intended executants, nor does it purport to be signed by them. And as Halsbury, volume 9, paragraph 1417, puts it

“if an instrument, had it been genuine, would have been effectual in the ordinary course of business between the parties, *no defect being on the face of it* such instrument may be the subject matter of a forgery, although the instrument itself, if genuine, would have been void in law for want of compliance with some statutory direction. An instrument *which after making or alteration still remains incomplete* cannot be an order. An ineffectual addition to a document which already constitutes a complete order is not forgery, but where the document is so far incomplete that a signature is required as a condition of payment, *the false making of such signature is forgery.*”

An incomplete document cannot be a valuable security or a document which is or purports to be a document by which any legal right is created or affected. See illustration to section 30 of the Indian Penal Code. A document incomplete on its face neither is, nor purports to be, a document creating or affecting rights. If the accused had obtained or forged the additional signatures required to convert the document into a complete agreement *on its face*, he might be convicted of forgery if my view on the second point is erroneous. Even if he intended to obtain the signatures of his father and brothers to the altered document without obtaining prosecution second witness's authorization or ratification of the alterations, the matter would not have passed beyond the stage of preparation for committing an offence.

In the result, I would, agreeing with the two assessors in the lower Court, find the accused “not guilty,” reverse the conviction and order him to be set at liberty. [As regards the question of sentence mentioned by the appellant's vakil at the end of his arguments, I think that even if the accused's conviction is sustainable, having regard to the whole circumstances of this case arising out of a family dispute and to the fact that this criminal case has been hanging over the head of the accused from February 1913 (see Exhibit E printed separately), that is, for nearly four years, I should think that a sentence of four years

is excessive and that one year's rigorous imprisonment would be an adequate punishment.]

PHILLIPS, J.—On the evidence I agree with the learned Sessions Judge that the additions and interpolations in Exhibit B were made by accused after the document had been signed by him and prosecution second witness.

[His Lordship then referred to the evidence and proceeded:—]

* * * *

It is next contended that the alteration of the document does not amount to making a false document within the meaning of section 464: (1) because it was not made dishonestly or fraudulently and (2) because the document Exhibit B being incomplete for want of the signature of accused's father and brothers, it cannot be said to be a false document. In support of the second proposition we have been referred to *Regina v. Turpin* (1), but I can see no advantage to be gained from consulting this old English case (which is very briefly reported) when we have to interpret an Indian Statute of a much later date. Similarly the many civil cases cited to show that Exhibit B is not a valid document, are quite useless in determining whether it is forged. The contention, that the word “make” in section 464 is used in the first sentence in its ordinary sense, but must subsequently be read in the technical meaning denoted in “making” a promissory note, must be rejected. It has nothing to support it and even in the expression “maker of a promissory note” there is no technical meaning; for the technical term for the maker is the “drawer”.

Under the second clause of section 464 of the Indian Penal Code, a person is said to make a false document who without lawful authority dishonestly or fraudulently by cancellation or otherwise alters a document in any material part thereof after it has been made or executed either by himself or by any other person. There is nothing in the section which requires that the document so altered shall be legally effective and valid in order that an alteration should, in the circumstances set out, constitute the offence of making a false document. In the present case, not only had the document been made, but it had

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also been executed by prosecution second witness and accused. So far as the former is concerned the document would be binding upon him when completed, and consequently his execution of it was complete.

As regards the first contention it is argued that the alterations in the document are not dishonest or fraudulent. The alterations relate to two points :

(1) The question of right to possession of the lands agreed to be sold, and

(2) The possession by prosecution second witness of certain jewels and vessels alleged to belong to accused and his father.

Inasmuch as the lands in question were bought with funds belonging to prosecution second witness and as in the prior agreement, Exhibit III, there is no reference to accused's right to possession of the lands I think it is obvious that accused's claim is not *bona fide* for there is other evidence to show that his claim is untrue. Similarly prosecution second witness denies possession of the jewels and vessels, and there is no evidence to prove his possession. The interpolation of a provision for their return by prosecution second witness is clearly dishonest. Even if accused had a *bona fide* claim to the lands and the moveables I think the interpolations in the document would be fraudulent for he intended by unfair means to obtain a document containing an admission in his favour by prosecution second witness and this would come within the definition of "defraud" in section 25 of the Indian Penal Code.

It is then contended that Exhibit B is not a valuable security, because it is invalid until the execution by accused's father and brothers is complete. Under section 467 of the Indian Penal Code the document must purport to be a valuable security and its validity or otherwise in law is not relevant. Exhibit B certainly purports to be a valuable security within the meaning of the section and therefore the offence is complete, and I would confirm the conviction.

As my learned brother is of opinion that the accused should be acquitted it is useless for me to express any opinion as to what the sentence should be, although I may say that four years' rigorous imprisonment seems to me, in the circumstances, to be somewhat severe.

This appeal again came on for hearing under section 429 of the Code of Criminal Procedure before OLDFIELD, J. ; the following JUDGMENT of the Court was delivered by

OLDFIELD, J.—The accused has been convicted of an offence punishable under sections 467 and 474 of the Indian Penal Code in the alternative, the forgery being alleged as consisting in certain alterations in Exhibit B made after its execution by second prosecution witness and accused, the result being the making of a false document, purporting to be a valuable security. Both learned Judges, before whom the appeal originally came, held that the alterations were so made by accused ; and nothing now advanced leads me to dissent from this conclusion. The questions, to which the argument has been mainly directed before me, are : (1) whether the alterations were made dishonestly or fraudulently, (2) whether they could amount to forgery either of a document or a valuable security, if, as is alleged, they were made before the completion of the document and (3) whether the sentence is excessive.

One contention on the first of these questions, that accused made the alterations, intending to get second prosecution witness's consent to them before obtaining the other signatures, which, it is said, would make the document effective, can be dealt with shortly. For it was not put forward at the trial, or so far as I can judge, at the original hearing of the appeal. And the reason is clear. Accused then put forward the case, to which he adhered before me, that the alterations were made before second prosecution witness signed ; and he adduced evidence in support of it, which, if believed, negatives the contention under consideration. So also, so far as it goes, does the evidence for the prosecution. In these circumstances I pass at once to the argument that the alterations were not made fraudulently or dishonestly, because they represented what accused in good faith believed to be the truth and intended to use to support what in good faith he claimed or might claim. That this defence is open to him is entailed by the decisions in *Queen-Empress v. Syed Hussain*(1), *Queen-Empress v. Sheo Dyal*(2), *Queen v. Kishan Pershad*(3) and *Manicka Asari v. Emperor*(4). But,

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(1) (1885) I.L.R., 7 All., 403.
(3) (1870) 2 N.W.P. H.C.B., 302.

(2) (1885) I.L.R., 7 All., 459.
(4) (1915) M.W.N., 273.

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when, as is pointed out in the two last cited cases, the result is to exempt the accused from liability in respect of extremely reprehensible conduct, the facts must be scrutinised closely and the legitimacy of his claim or his good faith in its assertion must be established clearly. The question is one of fact and reference to the evidence is therefore necessary.

[His Lordship then dealt with the evidence and found that the additions to Exhibit B were made fraudulently and dishonestly and continued :—]

* * * *

The next question is whether accused's making of them amounted to forgery under section 463 of the Indian Penal Code notwithstanding that they were made when Exhibit B was not completed and, it is alleged, was not to be legally effectual until all the persons specified in it had signed it. The result already reached is that Exhibit B was altered by accused dishonestly and fraudulently in a material part after its execution by himself and second prosecution witness; and therefore its character as a "document" is the only further matter to be established. Certainly it fulfils the requirements of the definition of a "document" in section 29, since the matter expressed on the paper comprising it might be used, even apart from the additions under discussion, as evidence of the rights in the property, which second prosecution witness claimed or did not claim and which he had or had not agreed to transfer; and it cannot matter, for the present purpose whether it does or does not purport to be more. It will be a question how far completion is necessary, when the character of Exhibit B as a valuable security and the application of section 467 are under discussion. But, if by completion is meant the taking of the steps necessary to make the document legally enforceable, as, it is contended, the signatures of accused's father and brothers would have made Exhibit B, it is clear from illustrations (j) and (k) to section 464 that completion is not essential. In my opinion the evidence establishes all that section 462 read with section 29 requires. Accused therefore is guilty at least of the offence punishable under section 465.

Before entering on discussion of the further question whether he is guilty also of forgery of a valuable security, punishable under section 467, the reason why no reference has so far been

made to the English authorities, which have been relied on may be stated. It is that they relate to charges of forgery, amounting to felony, of various instruments specified in the Statute, 24 & 25 Vict., cap. 98, corresponding with the more serious charge next to be considered, not with that already dealt with. It is no doubt true that the English definition of forgery, as "the false making of any written instrument for the purpose of fraud and deceit", *R. v. Parkes*(1), is the same for both forgery at common law and under the Statute. But English procedure recognizes no principle similar to that provided in section 238 of the Code of Criminal Procedure, vide *The Queen v. Thomas*(2), and therefore it does not follow, and it does not appear, that the absence of completion in the cases otherwise in point, to which reference will be made, would have entailed an acquittal, if the indictment had been for a misdemeanour punishable at common law, an opinion to the contrary being in fact implied in the judgment of STEPHEN, J., in one of them, *Reg. v. Harper*(3) and accordingly it is only in connexion with the question remaining for decision that it is necessary to refer to those cases or to the extract from Halsbury's Laws of England, which SADASIYA ATTAR, J., has adopted as expressing the law and which, it may be added, occurs in the sub-section of that work dealing with forgery by statute.

The question is whether Exhibit B purported to be a valuable security, when the alterations were made and when, it was assumed for the defence, it had not been made effectual by the signatures of all the parties referred to in it; and with regard to the arguments from authority, which have been addressed to me, two observations may be offered. Firstly, my learned brother's application of the extract from the Laws of England above referred to (volume 9, page 721) is open to the objections that some words have (with all due deference) been misconstrued and others, which are material, have been omitted. For it begins with a statement relating to instruments, which, had they been genuine, would have been effectual, but are not so for want of compliance with some statutory direction and not on account of any patent defect; this is clearly beside the present point and the cases cited in connexion with it show that the defect

(1) (1796) 2 Leach, 775 and 785. (2) (1837) 2 Mood. C.C., 141.
(3) (1881) 7 Q.B.D., 78.

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contemplated is not one, which the accused could have made good—vide *R. v. Donnelly*(1) and *R. v. Moffatt*(2). Then follows the portion directly in point “an instrument, which after making or alteration still remains incomplete, cannot be an order” to pay, such as the statute contemplates. But this omits the words in the original, which show the nature of the incompleteness in question. They are after the word “incomplete” the words “and has no resemblance to a genuine instrument” and, as *R. v. Rushworth*(3), the case referred to in the footnote, *R. v. Pateman*(4) and *R. v. Burke*(5) show, they are meant to cover instruments which have not and never could acquire the form of any specified in the statute.

Secondly, as regards *Regina v. Turpin*(6) I fully appreciate the reluctance of PHILLIPS, J., to interpret our Code with reference to the brief report of a single remote English authority; but I deal with it, since it has been made the foundation of a general argument. It was no doubt held in it that in the absence of proof that all the necessary signatures had been attached to a cheque before it was altered fraudulently, it must be treated as incomplete at the time of such alteration and could not be the subject matter of forgery. But reasons for doubting the correctness of this decision are given by the learned editor of Russell on Crimes (7th Edition, volume 2, 1634). And *R. v. Kirkwood*(7) and *R. v. Dade*(8) show that forgery can be committed by a person who makes a part only of a forged instrument, if he intends that others shall complete it. In those cases there was no charge of conspiracy and it therefore does not seem material that the completion was intended to be effected by further forgery, and not, as here, by persons acting honestly. These decisions followed the decision in *R. v. Bingley*(9) in which the trial Judge submitted the case as being that,

“unless in such case all are principals, the law seems to reach only the party, who performs the last operation, and thereby makes the forged instrument complete (viz., in this case the party who added the signature, and in the case of a forged deed, who adds the seal),

(1) (1835) 1 Mood. C.C., 438.

(3) (1816) R. & R., 317.

(5) (1822) R. & R., 406.

(7) (1831) 1 Mood. C.C., 304.

(2) (1787) 1 Leach, 431.

(4) (1821) R. & R., 455.

(6) (1849) 2 C. & K., 820.

(8) (1831) 1 Mood. C.C., 307.

(9) (1821) R. & R., 449.

who may be one of the least active and the least guilty of those concerned;”

and this appears to have been accepted by the Court. Again in *R. v. Lee*(1) a case resembling *R. v. Turpin*(2) except that forged signatures, not alterations, were in question, the fact that the instrument, a cheque, was not effective, until the genuine signature of a clerk had been attached, was held immaterial; and, although the argument for the Crown was according to the report that this signature was necessary, not to complete the instrument, but as a guarantee for the genuineness of the other signatures, the defence contention disallowed in the short ruling of the judge was in accordance with the statement of facts that the clerk's signature was under the rules of the complainant society, by which its relations with its Bank were governed, essential, to the validity and therefore the completeness of its cheques. It is not necessary to refer in detail to other more recent cases, in which the completion of a document by signatures essential to its validity has been considered with reference to its liability to stamp duty and other matters unconnected with criminal responsibility. It is sufficient that no analogy with English law constrains me to hold generally that the stage, at which a document purports to be a valuable security, is that, at which all signatures, which it is intended to obtain or which are necessary, have been affixed. In the present case it is not necessary to insist on the broad view, which was taken in the cases of Bingley, Kirkwood and Dade and it is sufficient to adopt what may, it would appear, have been the principle underlying *R. v. Lee*(1) and *Reg. v. Harper*(3) that the documents in question therein, negotiable instruments, were complete, when they bore any signature in virtue of which they would appear to the persons, to whom they might be offered, to be valuable securities, that is when they purported to do so, without reference to the knowledge of the ostensible parties to them that they were not so in fact.

To apply these observations to the present case, Exhibit B, as it stood after signature by prosecution second witness and delivery by him, purported to be an agreement by him in an

(1) (1848) 3 Cox., 80.

(2) (1849) 2 C. & K., 820.

(3) (1881) 7 Q.B.D., 78.

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ordinary form to sell in case the price stipulated for was paid within the date fixed and an agreement for the benefit of accused's minor son was executed simultaneously by the vendees; and there are also provisions regarding the subsequent management of the property for the minor's benefit, which also are to be included in that agreement. The result is that prosecution second witness promised to convey on receiving the payment and on the vendees executing the agreement. Exhibit B therefore imposed an obligation on prosecution second witness, but none at all on accused or his family by way of adherence to the arrangement or otherwise. For them accordingly it created only an option (that is, in the words of section 30 a legal right) without reference to any condition or any obligation, to which their consent was necessary. Accused, however, contends that it did not create such a right, because there was a condition precedent, not appearing explicitly on its face, that his family should sign it. Such a condition is not in my opinion expressed or implied in its terms; and, the obligation imposed being only on prosecution second witness no reason for implying any such condition would suggest itself to any person, to whom it might be shown, to the possible purchasers for instance referred to by prosecution second witness in evidence or any Court, in which a suit might be instituted to compel registration or for specific performance; in fact to any one, except accused and his family. And that is sufficient to justify a finding that Exhibit B purported to be a valuable security.

In fact however it is not, as I understand the case, necessary to have recourse to this ground of decision, because I hold that Exhibit B not only purported to have, but had that character. It has been pointed out that its terms did not expressly or by necessary implication require the signatures of accused's family to make it operative against prosecution second witness; and I do not find any separate agreement proved to that effect. It is said that one was necessary in his interest, as immunity from any possible attacks on his title by accused's father and brothers was the consideration for his promise to sell. But nothing to that effect was expressed or put to him in cross-examination. There is no evidence that these persons ever made or contemplated such an attack. The evidence of defence fourth witness that prosecution second witness "appeared to be a trustee"

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O. XXXIII—Company—Official liquidator, right of, to apply for leave to sue in forma pauperis—“Person,” definition of—General Clauses Act (X of 1897), whether applicable to Order XXXIII—Explanation to rule 1 and rule 3 of Order XXXIII, construction of.] An official liquidator of a company is competent to apply for leave to sue in forma pauperis on behalf of the company under Order XXXIII of the Civil Procedure Code, if the company is a pauper within rule 1 thereof. The reference to “necessary wearing apparel” in the explanation to rule 1 and the provisions of rule 3 requiring presentation of petition by “applicant in person” in Order XXXIII do not necessarily exclude the application of the Order to a company, and the definition of “person” as including a company under the General Clauses Act (X of 1897) applies to Order XXXIII of the Code as there is nothing in the definition which is repugnant to the subject or context of the Order. The fact that the liquidator in his personal capacity is not a pauper does not affect the question; nor does the fact that the liquidator receives a commission on collections realized, make him a person interested in the subject-matter of the suit within clause (e), rule 5 of Order XXXIII. <i>Corles v. Kent Water-works Company</i> (1827) 7 B. & C., 314, and <i>Venkatanarasayya v. Achamma</i> (1881) I.L.R. 3 Mad., 3, followed.	

<i>In the matter of the will of Demubai</i> (1894) I.L.R., 18 Bom., 237, and <i>Manaji Rajinji (Rao Sahib) v. Kandoo Baloo</i> (1912) I.L.R., 36 Bom., 279, distinguished.	
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CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII, R. 5—Application for leave to sue in forma pauperis—Question to be decided by Court before granting leave—Limitation—Doubtful question—Difference of judicial opinion—Duty of Court.] Upon an application for leave to sue in forma pauperis, the Court is not justified in determining, at the stage contemplated by Order XXXIII, rule 5 of the Civil Procedure Code, a question of limitation as to which there has been considerable difference of judicial opinion. Order XXXIII, rule 5 (d) applies only to cases where the allegations of the petitioner do not show a cause of action, and this should appear clearly upon the face of the petition. <i>Govindasami Pillay v. Municipal Council, Kumbakonam</i> ... (1918) I.L.R., 41 Mad.,	620
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EASEMENTS ACT (V OF 1882), SEC. 15—Easements—Prescription against Government—Right of way, and to surface water over land belonging to Government—Enjoyment for thirty or forty years against Government—Assignment, by Government to private person—Suit against latter within two years of assignment—Right of easement against assignee, whether acquired by prescription—“Belongs to Government” in section 15 of the Easements Act, meaning of.] Where an easement had been exercised by the plaintiff over land belonging to Government for thirty or forty years before the land was assigned by the Government to the defendant, and the plaintiff sued within two years of the	

assignment to enforce the right of easement against the defendant. *Held*, that the plaintiff had not acquired a right to the easement by prescription against the defendant. The words "belongs to Government" in the last paragraph of section 15 of the Indian Easements Act (V of 1882), must refer not to the time of suit but to the time during which the easement is enjoyed.

Srinivasa Upadya v. Ranganna Bhatia ... (1918) I.L.R., 41 Mad., 622

EJECTMENT SUIT IN—Decree directing payment of compensation—Decree allowed to be barred by limitation—Subsequent suit on title to recover the property, maintainability of.] The plaintiff's father sued the defendant on a lease deed and obtained a decree in ejectment directing payment of compensation under the Malabar Compensation for Tenants' Improvements Act. He allowed the decree to become barred. Plaintiff then sued on his jenm title: *Held*, that the plaintiff was not entitled to maintain another suit to recover the property. *Kutti Ali v. Chindan* (1903) I.L.R., 23 Mad., 629, dissented from and *Vedapurati v. Vallabha Vallia Raja* (1902) I.L.R., 23 Mad., 360, approved.

Mayan Kutti v. Kunhammad ... (1918) I.L.R., 41 Mad., 641

EXECUTION, see CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, RS. 73 AND 83.

FRAUDULENT ALIENATION to defeat or delay creditors, whether binding until set aside by suit—Transfer of Property Act (IV of 1882), sec. 53, nature of suit under—Attachment of alienated property—Claim by alienee—Suit by unsuccessful claimant—Plea of attaching decree holder of fraudulent nature of alienation validity of.] An alienation which is not a sham transaction but is only a fraudulent one intended to defeat or delay creditors of the alienor is only voidable and continues in force until set aside in proceedings properly instituted for the purpose; and in a suit by the alienee to set aside an adverse order passed against him in claim proceedings, it is not open to an attaching decree-holder against the alienor to plead in defence the fraudulent character of the alienation. *Palaniandi Chetti v. Appavu Chettiar* (1916) 30 M.L.J., 565, approved and *Abdul Kadir v. Ali Mia* (1912) 14 s.c., 715, s.c. (1912) 15 O.L.J., 649, not followed. *Quære*: Whether a suit by a creditor to avoid an alienation as infringing section 53 of the Transfer of Property Act must be brought in a representative capacity on behalf of all the creditors?

Subrahmanya Ayyar v. Muthiah Chettiar ... (1918) I.L.R., 41 Mad., (F.B.), 612

GENERAL CLAUSES ACT (X OF 1897), application of:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII.

HINDU LAW—Adoption by widow—Consent of Sapindas—Revocation of consent, effect of—Arbitrary revocation, whether competent—Delay in adoption or death of Sapinda, effect of—Divesting of estate.] A Sapinda, who has given his consent to a widow to make an adoption to her husband, cannot arbitrarily withdraw his consent before it is acted upon by the widow. The party giving his consent can deliberately revoke it for justifiable reason, but where no reasons are given by him, Courts will not find out a justification for the revocation. Mere lapse of time without more, or the death of the

consenting Sapinda will not put an end to a consent freely and bona fide granted. The assent of the Sapinda is presumptive evidence of the goodness of the act of adoption by the widow. Analogy of the rule as to consent of the nearest reversioner to an alienation by a widow applied. *Sri Virada Pratapa Raghunada Deo v. Sri Brosa Kishore Patta Deo* (1876) I.L.R., 1 Mad., 89 (P.C.); *Bhimappa v. Basawa* (1905) I.L.R., 29 Bom., 400; *Narasimha v. Parthasarathy* (1914) I.L.R., 37 Mad., 199 (P.C.) referred to; *Mami v. Subarayar* (1913) I.L.R., 36 Mad., 145, and *Subrahmanyam v. Venkamma* (1903) I.L.R., 26 Mad., 635, explained. Where a widow, having succeeded as heir to her adopted son who died unmarried, adopted, with the consent of the nearest Sapinda, another son to her late husband, the latter would divest the estate vested in the adoptive mother, whether the estate was the ancestral or the self-acquired property of the first adopted son. *Vallanki Vendata Krishna Rao v. Venkata Rama Lakshmi* (1876) I.L.R., 1 Mad., 174 and *Mussumat Bhoobum Moyee Debia v. Ram Kishore Achary Chowdry* (1865) 10 M.I.A., 209, referred to.

Suryanarayana v. Ramadoss ... (1918) I.L.R., 41 Mad., 604

HINDU LAW—Co-parceners—Junior member of a joint Hindu family—Bond in the name of manager—Payment to a junior member during lifetime of manager—Liability of promisor—Discharge—Rule as to co-heirs and co-promisees—English Law.] Payment made to a junior member of a joint Hindu family during the lifetime of its manager in whose favour a bond has been executed, will not discharge the promisor from his liability under the bond. Rule as to co-heirs applied, and the rulings as to co-promisees considered, and cases reviewed.

Ankalamma v. Chenchayya ... (1918) I.L.R., 41 Mad., 637

JUDICIAL OPINION, difference of—Duty of Court:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII, R. 5.

LANDLORD AND TENANT—Denial of landlord's title when entails forfeiture—Power of Court to relieve forfeiture.] In order that a denial of landlord's title should work a forfeiture of the tenancy, three things are necessary: (a) the tenant must set up title either in himself or in a third party, inconsistent with their mutual relationship, (b) the denial must be direct and unequivocal and not casual and (c) it must be made to the knowledge of the landlord. A casual statement, uncommunicated to the landlord, made by a tenant in a sale-deed executed by him in favour of a third party in respect of other properties, to the effect that the executant is the owner of the properties leased, does not amount to a disclaimer of the landlord's title. *Per SESHAGIRI AYYAR, J. Obiter*—A disclaimer of the landlord's title effects a forfeiture even if the tenure be for a specific term, and Courts have no power to relieve against it unless the disclaimer was occasioned by the fraud, mistake or accident of the landlord and the tenant was neither careless nor negligent.

Kemalooti v. Mohamed (1918) I.L.R., 41 Mad. ... 629

LIMITATION:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII, R. 5.

LIMITATION, decree allowed to be barred by:—See EJECTMENTS suit in.

MADRAS TOWNS' NUISANCES ACT (MADRAS ACT III OF 1889), ss. 6 AND 7.

LIMITATION ACT (IX OF 1908), ART. 125—<i>Alienation by a Hindu widow—Failure of existing reversioners to sue to set it aside within twelve years, effect of, on future reversioners—Representative character of the suit.</i> A suit by a reversioner to set aside an alienation by a Hindu widow is a representative suit on behalf of all her reversioners, then existing or thereafter to be born, and all of them have but a single cause of action, which arises on the date of the alienation. Hence, if by failing to sue within twelve years, allowed by article 125 of the Limitation Act (IX of 1908), the existing reversioners become barred by limitation, reversioners thereafter born are equally barred. <i>Venkatanarayana Pillai v. Subbammal</i> (1915) I.L.R., 38 Mad., 406 (P.C.), <i>Janaki Ammal v. Narayanaswami Aiyar</i> (1918) I.L.R., 39 Mad., 734 (P.C.), followed. <i>Govinda Pillai v. Thayammal</i> (1905) I.L.R., 28 Mad., 57 <i>Veerayya v. Gangamma</i> (1913) I.L.R., 36 Mad., 570, <i>Narayana v. Rama</i> (1915) I.L.R., 38 Mad., 396 and <i>Venkata Row v. Tuljaram Row</i> (1917) M.W.N., 30, overruled. <i>Semble</i>.—A decision one way or other, in a suit by one of them binds all of them. <i>Per SESHAGIRI AYYAR, J.</i>—<i>Semble</i> that article 125 does not apply to persons not born at the date of the alienation, but that the right to declaratory relief of this nature is only conferred on persons alive at the date of the alienation. <i>Varamma v. Gopaladasayya</i> (1918) I.L.R., 41 Mad., (F.B.) 659 —ARTS. 126, 144, AND 148—<i>Sale of equity of redemption by one of two mortgagors—Redemption by vendee—Possession of property by vendee for more than twelve years—Sale by the other co-mortgagor to another—Suit by latter to redeem his half-share—Suit, more than twelve years after first vendee took possession on redemption, whether barred.</i> The first defendant and his father G, mortgaged with possession the suit lands to the second defendant in 1892; in 1897 G sold the equity of redemption to the third defendant, who redeemed the lands and obtained possession in 1898. The first defendant sold his interest in the lands in 1910 to the plaintiff, who instituted a suit in 1912 to redeem his half-share in the property on payment of half the mortgage-debt. The third defendant pleaded that the suit was barred by limitation: <i>Held</i>, that article 148 of the Limitation Act was not applicable to the case and the suit was barred by limitation, as the case fell within article 126. <i>Semble</i>.—The suit was also barred under article 144. <i>Jai Kishen Joshi v. Budhanand Joshi</i> (1916) I.L.R., 38 All., 138, <i>Bhaiji Shamrao v. Hajimiya Mahomed</i> (1890) 14 Bom., L.R., 314, followed; and <i>Ramaswami Ayyar v. Vamamamalai Ayyar</i> (1899) I.L.R., 23 Bom., 137; <i>s.c.</i>, (1915) 26 I.C., 873; <i>Vasudeva Mudaly v. Srinivasa Pillai</i> (1907) I.L.R., 30 Mad., 426 (P.C.), explained. <i>Munna Govindan v. Ramaswami Chetty</i> (1918) I.L.R., 41 Mad. 660 MORTGAGE—<i>Sale of equity of redemption by one of two co-mortgagors—Redemption by vendee. Possession of property by vendee for more than twelve years—Sale by the other co-mortgagor to another—Suit by latter to redeem his half-share—Limitation:—See LIMITATION ACT (IX OF 1908), ARTS. 126, 144 AND 148.</i> REVERSIONERS—<i>See LIMITATION ACT (IX OF 1908), ART. 125.</i> TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 53:—<i>See ALIENATION, fraudulent.</i>	
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is supported by nothing definite and is not consistent with the conclusion of my learned brothers and myself as to the origin of his title. There was in view of the relationship between prosecution second witness and accused nothing improbable in Exhibit B being voluntary; and the fact that the former not only signed, but also delivered it without previous negotiation with the latter's family indicates that it was so. The direct evidence relied on is the statements of prosecution witnesses Nos. 1 and 3 that the document would not be complete until it had the signature of all five persons mentioned in it. But those statements did not necessarily mean that without them it would not be legally enforceable against prosecution second witness or more than that it was in fact accused's intention to obtain them. In fact prosecution second witness deposed "I heard no talk that Exhibit B should have effect only after all the parties signed;" and prosecution witnesses Nos. 1 and 3, who were present at the execution by prosecution second witness, the latter being his son, do not refer to any insistence by him on the necessity for further signatures, or to any conversation regarding it. In these circumstances I cannot find that the condition precedent relied on by accused was either expressed or implied in Exhibit B or established by independent evidence; and I therefore hold that Exhibit B was a valuable security when accused altered it.

The result is that accused's conviction of the offence punishable under section 467 or section 474 of the Indian Penal Code in the alternative is confirmed. As regards sentence both learned Judges considered that the period of four years imposed by the lower Court was excessive and I agree with them. Having regard to the circumstances and in particular to the fact that the forgery was discovered before the accused could profit by it, he will suffer one year's rigorous imprisonment, the sentence being reduced and the appeal allowed to that extent.

RAMASWAMI
 AYYAR
 v.
 THE KING-
 EMPEROR.
 —
 OLDFIELD, J.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1917,
August,
20, 21 and 29.

SURYANARAYANA alias LAKSHMI NARAYANA
(MINOR BY HIS MOTHER AND GUARDIAN S. BHIMALA) AND
ANOTHER (PLAINTIFFS), APPELLANTS,

v.

RAMADOSS AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Adoption by widow—Consent of Sapindas—Revocation of consent, effect of—Arbitrary revocation, whether competent—Delay in adoption or death of Sapinda, effect of—Divesting of estate.

A Sapinda, who has given his consent to a widow to make an adoption to her husband, cannot arbitrarily withdraw his consent before it is acted upon by the widow.

The party giving his consent can deliberately revoke it for justifiable reason, but where no reasons are given by him, Courts will not find out a justification for the revocation.

Mere lapse of time without more, or the death of the consenting Sapinda will not put an end to a consent freely and bona fide granted.

The assent of the Sapinda is presumptive evidence of the goodness of the act of adoption by the widow.

Analogy of the rule as to consent of the nearest reversioner to an alienation by a widow, applied.

Sri Virada Pratapa Raghunada Deo v. Sri Brosa Kishore Patta Deo (1876) I.L.R., 1 Mad., 69 (P.C.); *Bhimappa v. Basawa* (1905) I.L.R., 29 Bom., 400, and *Narasimha v. Parthasarathy* (1914) I.L.R., 37 Mad., 199 (P.C.) referred to; *Mami v. Subarayar* (1913) I.L.R., 36 Mad., 145, and *Subramanyam v. Venkamma* (1903) I.L.R., 26 Mad., 635, explained.

Where a widow, having succeeded as heir to her adopted son who died unmarried, adopted, with the consent of the nearest Sapinda, another son to her late husband, the latter would divest the estate vested in the adoptive mother, whether the estate was the ancestral or the self-acquired property of the first adopted son.

Vallanki Venkata Krishna Rao v. Venkata Rama Lakshmi (1876) I.L.R., 1 Mad., 174; and *Mussumat Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdry* (1865) 10 M.I.A., 209, referred to.

APPEAL against the decree of B. C. SMITH, the District Judge of Ganjam, in Original Suit No. 2 of 1916.

The material facts are stated in the judgment.

V. Ramesam for the appellants.

* Appeal No. 327 of 1916.

Hon. Mr. B. N. Sarma for the respondents.

SESHAGIRI AYYAR, J.—One Gurumurthi Subudhi belonging to the Vaisya caste had four sons, three of whom were married and the other was unmarried. All the four sons died during his lifetime, the three married sons leaving behind them their widows. In this state of circumstances Gurumurthi adopted a boy, the first defendant in this suit, and made a will on the 28th June 1909 by which he authorized his three daughters-in-law to adopt a son each. The second plaintiff in this case adopted a son under the authority given to her by Gurumurthi. That boy died. Thereupon she attempted to adopt the first plaintiff in this case in November 1911 but was temporarily prevented by injunction from doing so. She subsequently adopted him in 1913. The present suit is brought by the adopted son as first plaintiff and by the adoptive mother as second plaintiff to recover the share of the property bequeathed under the will. Their allegations are that the first defendant gave his consent for adopting the first plaintiff, that the boy was selected by the first defendant, that the secular ceremony of giving and taking was completed in the presence of the first defendant in July 1909 and that the first defendant dishonestly prevented the second plaintiff from performing the dattahomam ceremony.

The prayer of the plaintiffs is for a declaration that the adoption of the first plaintiff is valid and in the alternative that in case the plaintiff's adoption is found to be invalid that the second plaintiff is entitled to the share mentioned in the testament of Gurumurthi as the mother and heir of her first adopted son.

The defence of the first defendant is that he never gave his consent to the adoption and consequently the adoption is invalid. He raises also the plea that notwithstanding the will of Gurumurthi the family remained undivided and that consequently the second plaintiff is not entitled to the share devised to her by his adoptive father.

The District Judge found that the first defendant did as a matter of fact consent to the adoption of the first plaintiff, that the allegation that the ceremony of giving and taking was completed in July 1909 is not made out, that it was competent to the first defendant before the actual adoption took place to withdraw his consent, that the conduct of the first defendant

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amounted to an implied withdrawal of the previous consent given by him, that consequently the adoption of the first plaintiff was not valid, but that as the parties became divided in status by the provisions of the will of Gurumurthi the second plaintiff was entitled to the share allotted to her under the will.

The plaintiffs have preferred the appeal for a declaration that the adoption of the first plaintiff is valid. The first defendant has filed a memorandum of objections questioning the findings against him by the District Judge.

I shall first deal with two questions of fact before dealing with the important question of law which was argued at some length before us. The first question is whether the first defendant consented to the adoption of the first plaintiff. There can be no manner of doubt upon a perusal of the documentary and oral evidence in this case, that the conclusion of the District Judge upon this point is fully supported. I do not propose to deal with the correspondence at any length as they have been set out fully by the District Judge. I shall only refer to some of the important documents.

His Lordship then dealt with the evidence and proceeded as follows :—

I therefore agree with the District Judge that the first defendant gave his consent for a second adoption by the second plaintiff and that he selected the first plaintiff for that purpose. Excepting the bare denial of the first defendant there is no evidence worth the name as against the oral and documentary evidence adduced on behalf of the plaintiffs.

The second question of fact which was argued by Mr. Ramesam for the appellants relates to the giving and taking of the boy in July 1909. I felt considerable doubts during the course of the argument whether the finding of the District Judge that there was no giving and taking is correct. On fuller consideration I have come to the conclusion that we must uphold his finding. The District Judge himself says that but for the fact that in the previous litigation this theory of giving and taking was not set up, he would have come to a different conclusion. The oral evidence is strong on the point and it is not seriously shaken in cross-examination. There is, however, one document which is entirely inconsistent with this theory of giving and taking in

July 1909. Exhibit XV is a letter written to the first defendant by the second plaintiff's brother. The writer says :

"As we are all satisfied as to Chiranjeevi Lakshminarayana you would consider well whether you would send word to his father's house."

If the giving and taking had been completed in July 1909 such a letter would be meaningless. Apparently the boy was taken on trial and was kept in the house of the first defendant as has been done in the case of other boys who were rejected. This document coupled with the omission to state this point in Exhibit II, the written statement filed by the second plaintiff in the suit of 1911, throws doubt upon the oral testimony given in the case. On the whole though not without hesitation, I have come to the conclusion that there was no giving and taking in 1909.

The conclusion on facts is that the second plaintiff had the consent of the first defendant to take the first plaintiff in adoption, the first plaintiff was taken to the family house of the parties with a view to the religious ceremony of dattahomam being performed, that the first defendant subsequently prevented the adoption taking place, and that the second plaintiff took the boy in adoption in spite of this opposition in 1913.

The question of the sufficiency of the consent was not seriously argued by Mr. Sarma. Even granting for the sake of argument that the family was undivided, the first defendant as the managing member would be the only person whose assent need be sought for. Further the other members of the family were all minors in 1909. If the family was divided the first defendant as the nearest reversioner to the estate of the second plaintiff's husband was alone competent to authorize the adoption.

On the question whether a consent once given can be arbitrarily withdrawn before it was acted upon there is no direct authority. There is nothing in the Hindu Law texts on the subject. Therefore before considering the few cases which were quoted as containing pronouncements which logically conclude the question against the plaintiff, I shall endeavour to examine the reason of the rule.

As a widow in a Mitakshara family is incompetent to act *sui juris* she can make an adoption only if she is authorized to do so by her husband. To this an exception has been engrafted to the effect that the absence of this authority can be made good

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by the assent of the sapindas. This power has been given to the sapindas as they are interested in the property and are expected to see that the spiritual welfare of the deceased kinsman is not jeopardized. Their consent is equivalent to an expression of opinion that the adoption is necessary for the spiritual benefit of the deceased and for securing the secular management of his properties. In *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishore Patta Deo*(1) the Judicial Committee speak of these sapindas as "councillors and protectors" of the widow. An analogy for this may be found in the consent of the nearest reversioner being regarded as evidence that the alienation was for justifiable purposes. In the one case the assent is evidence that the widow is not acting capriciously to serve her own ends and in the other that she is not illegally disposing of property solely to benefit herself. In both the cases, the assent is presumptive evidence of the goodness of the act. It is open in either case to rebut the presumption. It can be shown that the assent to the adoption was obtained by fraud, misrepresentation, etc., or that it was given from interested or corrupt motives, *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishore Patta Deo*(1), as it can be shown that the consent of the reversioner to an alienation was not given bona fide. This train of thought precludes me from acceding to the proposition that mere lapse of time without more or the death of the consenting sapinda would put an end to the authorization freely and bona fide granted. It is settled that the fact that a consent to an alienation was given by a reversioner who is dead would not by itself be sufficient to enable the reversioner entitled to succeed to the property to impeach that consent. In my opinion, the same reasoning should govern the assent to an adoption.

I can understand the party granting the permission deliberately revoking it for justifiable reason. Sir JAMES COLVILLE says in the case already referred to :

"To authorize an act implies the exercise of some discretion whether the act ought or ought not to be done."

Sir LAWRENCE JENKINS in *Bhimappa v. Basawa*(2) says :

"that the consent required is a matter not of form but of substance"

(1) (1876) I.L.R., 1 Mad., 69 (P.C.). (2) (1905) I.L.R., 29 Bom., 400.

"and that it implies an intelligent concurrence on due consideration."

Some learned Judges go the length of holding that the assenting sapinda stands in a fiduciary position to the widow. *Ramachandra v. Mulji Nanabhai*(1) is apparently based on this view. In *Narasimha v. Parthasarathy*(2) Lord Moulton speaks of the authority given to the widow by the husband as being equivalent to a power of appointment. It will not be an undue stretch of this analogy to characterize the authority vested in the sapindas as a power to consent to the exercise of the power of adoption. In any view, the consent should be given not capriciously or from corrupt motives but on a fair consideration of the circumstances which would justify the exercise of the prerogative. In *Ganesa Ratnamaiyar v. Gopala Ratnamaiyar*(3) their Lordships of the Judicial Committee point out that an assent of a sapinda procured by misrepresentation was not sufficient to validate an adoption. This principle would apply *mutatis mutandis* to the power of revocation which a sapinda may exercise. I am willing to concede that it is open to a party to revoke a consent before it is acted upon. Further if a court can pronounce on the validity of the consent I fail to see why the party himself should not be allowed to reconsider his decision. He can review his opinion just in the same way as tribunals can their decisions. It may be as argued by Mr. Sarma that the sufficiency of the reason should not be canvassed by courts. If he acts honestly and puts forward grounds which would satisfy a person of ordinary prudence, that he was acting to the best of his knowledge and belief it is open to argument that courts should not scrutinize his reasons. At the same time, I am unable to assent to the contention of the learned vakil for the respondents that where the party professing to revoke the consent assigns no reasons, his legal advisers can draw attention to materials on which his conclusions might have been based. What the courts are concerned with is not what might have operated on the mind of the revoking party but what did influence him. The judgment of his legal advisers should not be substituted for the party's.

(1) (1891) I.L.R., 22 Bom., 558. (2) (1914) I.L.R., 37 Mad., 199 (P.C.).
(3) (1880) I.L.R., 2 Mad., 270 (P.C.).

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For the above reasons, I am of opinion that a sapinda cannot arbitrarily withdraw his consent and that the question is not whether the courts should find out a justification for the revocation but whether a justification was offered. In the present case, the first defendant strenuously denied that he gave his consent and he has not set forward any grounds in the written statement or in his evidence to justify the withdrawal of the consent.

It would therefore be wrong to permit any speculation regarding what might have led the first defendant to act in the way he did. I must hold that he acted arbitrarily in refusing his assent to the adoption, and that this conduct on his part is not enough to nullify the consent which was voluntarily and bona fide given by him.

I shall now proceed to deal with the few cases that were cited in the argument. *Mami v. Subbarayar*(1) was strongly relied on for the respondent. In that case the learned Judges inclined to the view that consent lapses with the death of the consensor. The reasoning which I have pursued is not quite in accordance with this proposition. I am not saying that it is not open to the sapindas who are alive at the time of the adoption to prove that the assent of the dead man was not obtained honestly. If that was so obtained, I would hesitate to hold that the death of the consensor put an end to the consent. I do not want to pursue the matter further. Reliance was placed upon the sentence

"It must, we think, be conceded that if a sapinda who has given his consent withdraws it afterwards the widow would not be entitled to act upon such consent and it seems to us to be unreasonable to hold that a consent once given should become irrevocable by the death of the sapinda giving the consent so as to override the opinion of the sapindas who subsequently became entitled to be heard."

I do not think the learned Judges intended to lay down that the withdrawal can be arbitrary. They had not that aspect of the question before them. The observations in *Subramanyam v. Venkamma*(2) on which the learned Judges in *Mami v. Subbarayar*(1) rely were purely obiter. No question of revocation was considered in the earlier case. Attention may

(1) (1913) I.L.R., 36 Mad., 145.

(2) (1903) I.L.R., 26 Mad., 635.

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also be drawn to *Nagarampalli Kamesam v. Nagarampalli Bat-chamma*(1) where attempts seem to have been made to explain away the pronouncement in *Mami v. Subbarayar*(2): see also *Krishnayya v. Lakshmipaty*(3). There is no pronouncement of the Judicial Committee or of the other High Courts on this question.

In my opinion, it would be opposed to all notions of fair play and justice that a party who is clothed with authority to consent to an act should, after giving his deliberate vote in its favour, be permitted arbitrarily and capriciously to resile from it. I therefore hold that the second plaintiff was justified in taking the first plaintiff in adoption, notwithstanding the demur of the first defendant. In this view it is unnecessary to consider whether the will of Subudhi brought about a severance of the coparcenary interests among the members of his family. On a minor point argued by Mr. Sarma in the memorandum of objections, namely, ground No. 11, I agree with the conclusion of the District Judge.

After we reserved judgment, Mr. Sarma asked permission to argue a new point of law. Although this was not raised in the court below we heard him as the question did not involve the consideration of any fresh evidence. The contention was that as according to the plaintiff the share taken by the second plaintiff's first adopted son was self-acquired property and as on the death of that adopted son the property was inherited by the second plaintiff as mother the second adoption was incapable of divesting her of that inheritance. Mr. Ramesam repudiated the suggested interpretation of the plaintiff's case. It is needless to go into this question. Granting for argument's sake that the share taken by the first adopted son was his self acquisition, there is no warrant for the contention that the inheriting mother could not be divested of that property by the adoption which she made subsequently. The Guntur case *Vallanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(4) is authority for the proposition that a mother succeeding as heir to her son would be divested by her adopted son of the inherited property. There can be no distinction in principle between property owned as ancestral or

(1) (1914) M.W.N., 620.

(3) (1915) 30 M.L.J., 265.

(2) (1913) I.L.R., 36 Mad., 145.

(4) (1976) I.L.R., 1 Mad., 174.

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which is taken as a self-acquisition. *Mussumat Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdhry*(1) related to property which vested in the widow of the adopted son. In this present case, the first adopted son died unmarried. We must therefore overrule this contention.

For the above reasons the decision of the District Judge in so far as it dismissed the suit of the first plaintiff must be reversed and his decree should be modified by declaring that the first plaintiff as adopted son is entitled to the share decreed to the second plaintiff. The memorandum of objections must be dismissed with costs. The appellants are entitled to their costs in this and in the Court below and the costs will be taxed on the value of the property decreed to the first plaintiff.

AYLING, J. AYLING, J.—I agree.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ayling, Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

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September,
18.

SUBRAMANIA AYYAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

A. L. V. R. R. M. MUTHIA CHETTIAR (DECEASED) AND OTHERS
(DEFENDANTS AND LEGAL REPRESENTATIVES OF THE FIRST DEFENDANT),
RESPONDENTS.*

Fraudulent alienation to defeat or delay creditors, whether binding, until set aside by suit—Transfer of Property Act (IV of 1882), sec. 53, nature of suit under—Attachment of alienated property—Claim by alienee—Suit by unsuccessful claimant—Plea of attaching decree-holder of fraudulent nature of alienation validity of.

An alienation which is not a sham transaction but is only a fraudulent one intended to defeat or delay creditors of the alienor, is only voidable and continues in force until set aside in proceedings properly instituted for the purpose; and in a suit by the alienee to set aside an adverse order passed against him in claim proceedings, it is not open to an attaching decree-holder against the alienor to plead in defence the fraudulent character of the alienation.

(1) (1865) 10 M.I.A., 209.

* Second Appeal No. 691 of 1916 (F.B.).

Palaniandi Chettiv. Appavu Chettiar (1916) 30 M.L.J., 565, approved.
Abdul Kadir v. Ali Mia (1912) 14 I.C., 715; s.c. 15 C.L.J., 649, not followed.

Quaere: Whether a suit by a creditor to avoid an alienation as infringing section 53 of the Transfer of Property Act must be brought in a representative capacity on behalf of all the creditors?

SECOND APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU, the Subordinate Judge of Coimbatore, in Appeal No. 14 of 1916, preferred against the decree of S. P. SUBRAHMANYA AYYAR, the Additional District Munsif of Erode, in Original Suit No. 203 of 1915.

The facts are given in the first two paragraphs of the judgment of AYLING, J.

This second appeal having been originally posted for admission before SADASIVA AYYAR and NAPIER, JJ., the following ORDER was delivered by

SADASIVA AYYAR, J.:—Post. before a Full Bench as we think that the correctness of the judgments in *Palaniandi Chetti v. Appavu Chettiar* (1) ought to be considered by a Full Bench on the questions whether a suit ought to be brought by creditors to set aside a deed voidable as against creditors before it could be declared void and whether such a suit could be brought by a single creditor in his own interest or ought to be brought on behalf of all the creditors.

The case accordingly came on for hearing before AYLING, SESHAGIRI AYYAR and BAKEWELL, JJ.

A. Krishnaswami Ayyar for L. S. Viraraghava Ayyar for the appellants. A transfer though fraudulent within section 53 of the Transfer of Property Act is good until avoided; and the way in which this could be done is by having it avoided by an action whether on behalf of all the creditors or otherwise: see form 18 of forms of decrees in Civil Procedure Code, Appendix B: *Palaniandi Chetti v. Appavu Chettiar*(1), *Hakim Lal v. Mooshahar Sahu*(2), *Iswar Timappa v. Devar Venkappa*(3), *Chatterput Singh v. Maharaj Bahadur*(4), Order of BAKEWELL, J., in Civil Suit No. 113 of 1911. *Subramania Pillay v. Dakshinamoorthy Mudaliyar*(5), which is the other way, is the decision of a single Judge (SUNDARA AYYAR, J.): see *Phul Kumari v. Ghanshyam Misra*(6).

(1) (1916) 30 M.L.J., 565. (2) (1907) I.L.R., 34 Cal., 999 at p. 1007.

(3) (1903) I.L.R., 27 Bom., 146.

(4) (1905) I.L.R., 32 Cal., 198 (P.C.) at p. 217. (5) (1912) M.W.N., 863.

(6) (1908) I.L.R., 35 Cal., 202 (P.C.).

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V. C. Seshachariar for the respondents. The matter is governed by section 53 of the Transfer of Property Act. No action need be brought to set aside the alienation; for any result that could be achieved by bringing a suit could also be achieved by a plea in defence impeaching the alienation: *Abdul Kadir v. Ali Mia*(1), a case exactly on all fours. *Subramania Pillay v. Dakshinamoorthy Mudaliar*(2) shows that the settled practice of this Presidency is to attach without bringing any such suit. Reference was made to *Hem Chandra Sarkar v. Lalit Mohan Kar*(3), *Sinaya Pillai v. Munisami Aiyar*(4), *Babaji v. Krishna*(5), and *Ramu Aiyar v. Palaniappa Chetty*(6).

AYLING, J.—In this case the appellants (plaintiffs) are purchasers of the suit property from second defendant by a sale-deed, Exhibit A, dated 20th June 1904. The first defendant, subsequent to this sale, obtained a decree against second defendant in Small Cause Suit No. 1960 of 1905, and in 1913 attached the suit properties in execution. Plaintiffs preferred a claim; on the dismissal of which they filed the present suit for declaration of their title, and for cancellation of the summary order on their claim.

The suit failed in both the lower Courts, the Subordinate Judge holding in first appeal that the sale was a fraudulent transaction intended to defeat or delay second defendant's creditors, though not a mere sham transaction.

It is now argued in second appeal that it is not open to the first defendant to set up such a defence in the present suit; and that the sale must be held good against him unless and until he obtained a decree setting it aside in proceedings suitably instituted for that purpose. Mr. A. Krishnaswami Ayyar relies on a recent ruling of this Court, *Palaniandi Chetti v. Apparu Chetti*(7), and the second appeal appears to have been specially ordered to be heard by us with a view to the correctness of this ruling being considered by a Bench of three Judges.

Speaking for myself I have carefully considered the judgment in the case referred to and the arguments of Mr. Seshachariyar who has endeavoured to show us that the decision is wrong. The facts are absolutely analogous to those in the present case. It

(1) (1912) 14 I.C., 715; s.c., 15 C.L.J., 649. (2) (1912) M.W.N., 303.
 (3) (1912) 16 C.W.N., 715, 717. (4) (1899) I.L.R., 22 Mad., 289.
 (5) (1894) I.L.R., 18 Bom., 372. (6) (1912) I.L.R., 35 Mad., 35.
 (7) (1916) 30 M.L.J., 565.

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is unnecessary for us in the present case to consider whether a suit by a creditor to avoid an alienation as infringing against section 53 of the Transfer of Property Act must be brought in a representative capacity on behalf of the body of creditors, but apart from this I have no hesitation in concurring in the views expressed by COUTTS TROTTER and SESHAGIRI AYYAR, J.J., in that case. The only case quoted by Mr. Seshachariyar which has not been dealt with in their judgment and which appears to have any bearing on the question is a Calcutta case not reported in the regular series, *Abdul Kadir v. Ali Mia*(1). With all respect I cannot agree with the decision. I do not find in it sufficient authority for the proposition advanced by Mr. Seshachariyar that anything which can be made the basis of a suit can be pleaded as a bar in action: and I agree with my learned brother SESHAGIRI AYYAR, J., in *Palaniandi Chetti v. Apparu Chetti*(2) that a sale such as the one we are considering must be held to continue in force until it is set aside in proceedings properly instituted for the purpose.

It follows that the decree of the lower Courts in the present suit should be set aside and plaintiffs be given a decree as sued for with costs throughout.

SESHAGIRI AYYAR, J.—I agree. The further arguments addressed to us by Mr. Seshachariyar have not convinced me that my view in *Palaniandi Chetti v. Apparu Chetti*(2) is wrong and that an attaching creditor as defendant can obtain a declaration that the sale by his judgment-debtor which he has not sued to set aside is in fraud of his and other claims against the common judgment-debtor and that on that ground the suit should be dismissed.

BAKEWELL, J.—I agree.

N.R.

BAKEWELL, J.

(1) (1912) 14 I.C., 715; s.c., 15 C.L.J., 649. (2) (1916) 30 M.L.J., 565.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1917,
November
19.

THIRAVIYAM PILLAI AND ANOTHER (DEFENDANTS
NOS. 2 AND 3), APPELLANTS,

v.

LAKSHMANA PILLAI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXI, rr. 73 and 83—Several decree-holders—Execution—Attachment in each decree—Applications for sale—Permission to judgment-debtor to raise money by private alienation to pay off one of the decrees—Money paid into Court, by alienee—Rateable distribution—“Assets held by a Court”, meaning of.

Where several decree-holders in different suits had attached the same property of their judgment-debtor and applied for sale in execution of their respective decrees, but the judgment-debtor obtained permission of the Court under Order XXI, rule 83, to raise money by private alienation of the property to pay the decree amount due in one of the decrees, and the amount was paid into Court by the alienee.

Held, that the money, having been paid into Court under a pending execution application, was assets held by the Court under Order XXI, rule 73 of the Code, and was liable to rateable distribution among the several decree-holders who had applied for execution.

Sorabji Coovarji v. Kala Raghunath (1912) I.L.R., 36 Bom., 156, dissented from.

Kathum Sahiba v. Hajee Badsha Sahib (1915) I.L.R., 38 Mad., 221 at p. 224, referred to.

Golstrum v. Woomes Chandra Bonnerjee (1917) I.L.R., 44 Cal., 789, distinguished.

SECOND APPEAL against the decree of V. DANDAPANI PILLAI, the Subordinate Judge of Madura, in Appeal No. 40 of 1915, preferred against the decree of K. W. RAMA RAO, the Additional District Munsif of Madura, in Original Suit No. 153 of 1913.

The material facts appear from the judgment.

C. V. Anantakrishna Ayyar for the appellants.

T. R. Venkatarama Sastriyar and P. S. Narayanaswami Ayyar for the respondent.

The judgment of the Court was delivered by

* Second Appeal No. 1269 of 1916.

SESHAGIRI AYYAR, J.—Plaintiff and first defendant obtained decrees against one Thoppiah Pillai. Plaintiff applied for execution and an order was made for the attachment of the judgment-debtor's property. The first defendant also applied for execution and the same property was again attached at his instance. When the property was about to be sold, the judgment-debtor applied under Order XXI, rule 83 of the Code of Civil Procedure, for permission to raise money by private alienation. The District Munsif gave him permission. Why he granted it when there was an attachment at the instance of the first defendant, and why he accepted the payment by the judgment-debtor of monies which could only have covered the amount due to the plaintiff have not been explained. It seems to us that the permission should not have been accorded, but as the judgment-debtor is not before us, we shall not deal with that question any further. In accordance with the permission, the judgment-debtor executed a mortgage on the property and the mortgagee paid into Court money just enough to cover the plaintiff's decree. The District Munsif divided this amount rateably between the plaintiff and the first defendant. Thereupon this suit was instituted to contest that order. The Courts below have held that the money should entirely be given to the plaintiff apparently on the ground that it was deposited in Court by virtue of the permission obtained in the proceedings taken by the plaintiff. We are unable to agree with them.

Mr. Venkatarama Sastriyar vakil for the respondent, in his able argument took us through the various provisions contained in Order XXI and argued that the money paid by the judgment-debtor must be taken to have been ear-marked for the benefit of the plaintiff. A significant change has been made in the language of section 73 of the present Civil Procedure Code. In the old Code, the words were “whenever assets are realized by sale or otherwise in execution of a decree”. In the present Code, the words are “where assets are held by a Court”. The change was apparently intended to set at rest the question whether the word realization should not be restricted to what is paid in by virtue of process taken in execution; but apparently the legislature has not succeeded in the object. There can be no question that the language of the present Code is wide enough to cover cases where monies are in the hands of

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the Court by whatever process the same has been realized. It is true that the learned Judges of the Bombay High Court hold that even under the new Code, the money to be held by the Court must have reached its hands in execution: see *Sorabji Coovarji v. Kala Raghunath*(1). An observation of Mr. Justice BAKEWELL in *Kathum Sahiba v. Hajee Badsha Sahib*(2) lends support to this proposition. It is not necessary to express any opinion on this question, as we are of opinion that when permission is granted under Order XXI, rule 83, to raise money by private alienation the money is paid under a pending execution application. The further point which Mr. Venkatarama Sastriyar pressed before us was that the money should be taken to have been paid solely to the credit of his client's decree. The learned vakil asked us to apply the analogy of Order XXI, rule 55. In that rule, three classes of payments are indicated. We are prepared to concede that if money is paid outside the Court and the decree-holder certifies the payment, it cannot be said that it is an asset held by the Court. It may be that in such a case, as the attachment would cease to subsist, rival decree-holders can have no remedy; but if money is paid into Court by the other modes mentioned in rule 55, we are not satisfied that this money cannot be regarded as an asset held by the Court. If *Sorabji Coovarji v. Kala Raghunath*(1) lays down this proposition we are not prepared to follow it. It must be remembered that an attaching creditor acquires no lien upon the proceeds of the sale because he procured the attachment and we fail to see why the fact that the attachment is raised in consequence of the payment made into Court should take the money out of the expression "assets held by the Court". As regards *Golstrum v. Woomes Chandra Bonnerjee*(3) that was a decision under Order XXI, rule 89. That order distinctly provides for payment to the decree-holder or to the purchaser, consequently the payment must be taken to have been ear-marked.

The learned vakil for the respondent conceded that where monies are realized by process of Court solely at the instance of one of the attaching decree-holders he does not obtain, apart from getting his expenses paid, any higher right than the other

(1) (1912) I.L.R., 36 Bom., 158. (2) (1915) I.L.R., 38 Mad., 221 at p. 224.
(3) (1917) I.L.R., 44 Cal., 789.

decree-holders who have before payment applied for execution. This being so, we fail to see on what principle the fact that the money was paid into Court by virtue of the permission granted to raise money privately should give a larger right to the person in execution of whose decree permission was so granted. The policy of the legislature seems to be to bring all monies realized at least in process of execution to the hotchpot to be shared by all the decree-holders. It is analogous to distribution on an insolvency. The language of Order XXI, rule 72, shows that even when monies are not actually paid into Court, as in cases where the decree-holder is given permission to purchase property and the sale-proceeds are applied to the satisfaction of his decree, the legislature specifically provided for the money being regarded as assets held by the Court. The intention of the legislature is to afford every creditor equal opportunities of obtaining a rateable advantage in the available assets of the judgment-debtor. Therefore unless there is something clear in the language of the provisions of the Code to exempt a payment from being applied to the benefit of all the creditors, Courts should incline to the view that monies in the hands of the Court should be shared by all decree-holders rateably.

In this view, we must reverse the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout. The memorandum of objections is dismissed. There will be no order as to costs.

K.R.

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APPELLATE CIVIL.

Before Mr. Justice Bakewell and Mr. Justice
Kumaraswami Sastriyar.

GOVINDASAMI PILLAY (PETITIONER), APPELLANT,

v.

THE MUNICIPAL COUNCIL, KUMBAKONAM
(RESPONDENT), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 5—Application for leave to sue in forma pauperis—Question to be decided by Court before granting leave—Limitation—Doubtful question—Difference of judicial opinion—Duty of Court.

Upon an application for leave to sue *in forma pauperis*, the Court is not justified in determining, at the stage contemplated by Order XXXIII, rule 5 of the Civil Procedure Code, a question of limitation as to which there has been considerable difference of judicial opinion.

Order XXXIII, rule 5 (d) applies only to cases where the allegations of the petitioner do not show a cause of action, and this should appear *clearly upon the face* of the petition.

APPEAL under clause 15 of the Letters Patent against the judgment of SPENCE, J., in *Govindasami Pillay v. The Municipal Council of Kumbakonam* (1).

The appellant filed an application in the District Munsif's Court of Kumbakonam for leave to sue *in forma pauperis* against the Municipality of Kumbakonam, claiming to recover a sum of money as the balance of a deposit made by him in respect of a contract of lease of the right to collect rents and dues of a vegetable market, which was purchased by him in auction, and also damages for alleged breach of contract by the municipality in respect of the lease. The District Munsif rejected the petition holding, after an elaborate investigation of the authorities, that the claim was barred by limitation. The petitioner preferred a civil revision petition to the High Court, which was heard by SPENCE, J., who dismissed the petition holding, after examining the authorities cited before him, that the suit

* Letters Patent Appeal No. 74 of 1917.

(1) Civil Revision Petition No. 887 of 1916 praying the High Court to revise the order of S. NARAYANASWAMI AYYAR, the Principal District Munsif of Kumbakonam, in Original Petition No. 1251 of 1915,

was barred by limitation. The petitioner preferred an appeal under the Letters Patent and contended (1) that the suit was not really barred, and that (2) in any event the Court was not justified in determining such a highly doubtful question of law as to limitation at that stage under Order XXXIII, rule 5 of the Code.

K. Ramachandra Ayyar for the appellant.

N. Rajagopala Achariyar for the respondent.

The judgment of the Court was delivered by

KUMARASWAMI SASTRIYAR, J.—We are of opinion that the District Munsif was not justified in determining a question of limitation as to which there has been considerable difference of judicial opinion upon an application to sue *in forma pauperis*. Order XXXIII, rule 5 (d), applies only to cases where the allegations of the petitioner do not show a cause of action and we think that this should appear clearly upon the face of the petition.

We have been referred to cases where it was held that the Court can go into the question of limitation to see if the petitioner has a subsisting cause of action. The cases do not decide that an elaborate enquiry into doubtful and complicated questions of law should be raised at the stage contemplated by Order XXXIII, rule 5. The pauper has no right of appeal if the decision on the question of law is wrong. We do not think it necessary to decide the question of limitation at this stage. This should form the subject matter of an issue.

In the present case, moreover the question of limitation may depend upon the construction of the contract between the parties and it is possible that other evidence may be admissible as to the rights of the parties to the deposit made by the applicant, and we think such matters should not be considered by the Court at this stage.

The appeal is allowed, the order of the District Munsif is set aside and the petition is remanded for disposal according to law. The costs in the Civil Revision Petition No. 887 of 1916 and this Letters Patent Appeal will abide the result of the suit.

K.R.

KUMARASWAMI
SASTRIYAR,
J.

APPELLATE CIVIL.

1917,
November 29,

Before Mr. Justice Ayling and Mr. Justice Phillips.

SRINIVASA UPADYA (PLAINTIFF), APPELLANT,

v.

RANGANNA BHATTA (DIED) AND THREE OTHERS DEFENDANTS AND
HIS LEGAL REPRESENTATIVE RESPONDENTS.*

Easements Act (V of 1882), sec. 15—Easements—Prescription against Government—Right of way, and to surface water over land belonging to Government—Enjoyment for thirty or forty years against Government—Assignment, by Government to private person—Suit against latter within two years of assignment—Right of easement against assignee, whether acquired by prescription—“Belongs to Government” in section 15 of the Easements Act, meaning of.

Where an easement had been exercised by the plaintiff over land belonging to Government for thirty or forty years before the land was assigned by the Government to the defendant, and the plaintiff sued within two years of the assignment to enforce the right of easement against the defendant,

Held, that the plaintiff had not acquired a right to the easement by prescription against the defendant.

The words “belongs to Government” in the last paragraph of section 15 of the Indian Easements Act (V of 1882), must refer not to the time of suit but to the time during which the easement is enjoyed.

SECOND APPEAL against the decree of A. J. CURGENVEN, the District Judge of South Kanara, in Appeal No. 286 of 1915 preferred against the decree of C. N. KUPPUSWAMI AYYAR, the District Munsif of Udipi, in Original Suit No. 126 of 1914.

The plaintiff sued for a declaration that he was entitled by prescription to a right of way and to a right to surface water over land which had originally belonged to the Government but was assigned by the latter to the defendant two years before the present suit, and also prayed for a perpetual injunction to restrain the defendant. The plaintiff had enjoyed the right for thirty or forty years against the Government before the assignment of the servient tenement to the defendant. Both the lower Courts dismissed the suit on the ground that the plaintiff had not acquired by prescription a right to the easements in question. The plaintiff preferred a Second Appeal.

* Second Appeal No. 1098 of 1916.

K. Yagnanarayana Adiga for B. Sitharama Rao for the appellant.

K. Sundara Rao for the respondents.

The judgment of the Court was delivered by

AYLING, J.—The subject of dispute is an easement claimed as prescription. The servient tenement belonged to Government till two years before suit and was then assigned by Government to the defendant. At the time of assignment the easement had been exercised only for thirty or forty years and had therefore not become absolute as against Government. Appellant contends that the transfer of ownership had the effect of rendering it absolute inasmuch as the servient tenement became the property of a private individual against whom the previous thirty or forty years enjoyment would be sufficient under section 15 of the Easements Act.

The point is a novel one and is not covered by authority. But we think appellant's contentions cannot be admitted. We think the words “belongs to Government” in the last paragraph of section 15 must refer, not to the time of suit but to the time during which the easement is enjoyed. An easement can only be acquired by twenty years enjoyment against a private person or by sixty years enjoyment against Government. Here neither condition is satisfied. It may be that where the sixty years' period has nearly expired, during Government ownership of the land, and the land is then transferred by Government to a private party, the acquisition of the easement might be held to be completed when the deficiency was made up by subsequent enjoyment against the transferee but subject to this the person claiming the easement must make good his title by twenty years' enjoyment against the transferee after the transfer.

If we adopted the view contended for by appellant, we should have to hold that the transfer of the servient tenement by a private owner to Government would have the effect of destroying any easement right, which had been legitimately acquired by twenty years enjoyment but which had not been enjoyed for the period of sixty years required as against Government. The appeal is dismissed with costs.

K.R.

SRINIVASA
UPADYA

RANGANNA
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APPELLATE CIVIL.

Before Mr. Justice Bakewell and Mr. Justice
Kumaraswami Sastriyar.

PERUMAL GOUNDAN AND THREE OTHERS (RESPONDENTS),
PETITIONERS,

v.

THE THIRUMALARAYAPURAM JANANUKOOLA
DHANASEKHARA SANGHA NIDHI (LIMITED), THROUGH
ITS OFFICIAL LIQUIDATOR A. VENKATASWAMI NAIDU
(PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXXIII—Company—Official liquidator, right of, to apply for leave to sue in forma pauperis—'Person,' definition of—General Clauses Act (X of 1897), whether applicable to Order XXXIII—Explanation to rule 1 and rule 3 of Order XXXIII, construction of.

An official liquidator of a company is competent to apply for leave to sue *in forma pauperis* on behalf of the company under Order XXXIII of the Civil Procedure Code, if the company is a pauper within rule 1 thereof.

The reference to 'necessary wearing apparel' in the explanation to rule 1 and the provisions of rule 3 requiring presentation of petition by 'applicant in person' in Order XXXIII, do not necessarily exclude the application of the Order to a company, and the definition of 'person' as including a company under the General Clauses Act (X of 1897) applies to Order XXXIII of the Code as there is nothing in the definition which is repugnant to the subject or context of the Order.

The fact that the liquidator in his personal capacity is not a pauper does not affect the question; nor does the fact that the liquidator receives a commission on collections realised, make him a person interested in the subject matter of the suit within clause (e), rule 5 of Order XXXIII.

Cortes v. Kent Water-works Company (1827) 7 B. & C. 314, and *Venkatanarasayya v. Achemma* (1881) I.L.R., 3 Mad., 3, followed.

In the matter of the will of Demubai (1894) I.L.R., 18 Bom., 237 and *Manaji Rajinji (Rao Sahib v. Khandoo Baloo)* (1912) I.L.R., 36 Bom., 279, distinguished.

PETITION under section 115 of the Code of Civil Procedure Code (Act V of 1908), and section 107 of the Government of India Act, praying the High Court to revise the order of V. DANDAPANI PILLAI, the Subordinate Judge of Madura, in Original Petition No. 303 of 1916.

The material facts appear from the judgment.

* Civil Revision Petition No. 367 of 1917.

S. Parthasarathi Ayyangar for the petitioners.

C. Padmanabha Ayyangar and A. Ramaswami Ayyar for the respondent.

The judgment of the Court was delivered by

KUMARASWAMI SASTRIYAR, J.—The Thirumalarayapuram Jananukoola Dhanasekhara Sangha Nidhi (Limited), which was a company registered under the Indian Companies Act went into liquidation and an official liquidator was appointed. He as liquidator applied under Order XXXIII of the Civil Procedure Code to file a suit on behalf of the Nidhi *in forma pauperis* against the petitioners before us who are alleged to owe the Nidhi about Rs. 8,524 under a promissory note. The allegations in the petition show that the Nidhi was bankrupt and that the only properties it had (except the subject of the suit) were worth Rs. 12. The Subordinate Judge allowed the Nidhi to sue *in forma pauperis* and the respondents have filed this petition against the order.

The chief contention raised before us is that Order XXXIII of the Civil Procedure Code does not apply to companies, corporations or other associations. It is argued that as the explanation to Order XXXIII, rule 1, refers to necessary wearing apparel and rule 3 requires presentation of the petition by the "applicant in person" the order necessarily excludes petitioners who are not human beings.

We are unable to accept this contention. The word 'person' is not defined in the Code of Civil Procedure and consequently the definition of the word person as including any company or association or body of individuals whether incorporated or not in the General Clauses Act (X of 1897) would apply unless there is something repugnant to the subject or context. Order XXXIII of the Civil Procedure Code refers to suits by paupers and rule (1) enacts that any suit may, subject to the provisions of the order, be instituted by a pauper and does not exclude official persons. Now a registered company or any other association may be unable to pay the court-fee payable like any other ordinary person and there is no reason to suppose that the legislature did not intend Order XXXIII to apply to such cases especially when it is remembered that the effect would be to allow debtors to escape payment and defeat or defraud the creditors and shareholders of the company. The explanation to rule (1) no doubt

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states that where no court-fee is prescribed the petitioner should not be entitled to property more than Rs. 100 "other than his necessary wearing apparel". The explanation simply allows deduction of the value of wearing apparel and can only mean that if the applicant has necessary wearing apparel he can deduct its value. We do not think it can be construed to mean that only persons who in law can possess wearing apparel, can sue as paupers. In *Cortes v. The Kent Water-works Company* (1), the argument that an enactment (47, Geo. III, C. 111) did not apply to corporations as it allowed a person to appeal on entering into a recognizance which a corporation was not competent to do was negatived by BAYLEY, J., who observed as follows:—

"But assuming that they cannot enter into a recognizance yet if they are persons capable of being aggrieved by and appealing against a rate, I should say that that part of the clause which gives the appeal applies to all persons capable of appealing and that the other part of the clause which requires a recognizance to be entered into applies only to those persons who are capable of entering into a recognizance but is inapplicable to those who are not."

The word used in the explanation is 'person' and there is nothing repugnant in applying the definition given in the General Clauses Act. Where the applicant is a company which, ex-hypothesi, can have no wearing apparel, then it will not be entitled to deduct anything on account of wearing apparel and will not be a pauper if it has property worth Rs. 100 and the suit is one for which no fee is prescribed.

As regards rule 3 which requires personal presentation of the application to sue *in forma pauperis*, it seems to us that where the law in consequence of personal appearance in Courts being impossible either by reason of the party being a company or an infant or lunatic, allows appearance by somebody else appearance by such person would be sufficient. For example, Order XXXII of the Civil Procedure Code which relates to minors and persons of unsound mind authorizes appearance by the next friend and guardian *ad litem* and it cannot be said that where the minor or lunatic is a pauper, the presentation of a petition to sue *in forma pauperis* by the next friend would be invalid or contravening the provision of Order XXXIII, rule 3. So far as companies are

(1) (1827) 7 B. & C., 814.

concerned, the Companies Act provides for the mode in which the company is to be represented. Under section 179 of the Indian Companies Act the liquidator may institute any suit or other legal proceedings in the name and on behalf of the company and under Order XXIX of the Civil Procedure Code the principal officer of the company may act in legal proceedings on behalf of the company and may be required to appear when personal appearance is necessary. The liquidator can therefore fulfil all the obligations required of a pauper petitioner under Order XXXIII. Rule 3 of Order XXXIII of the Civil Procedure Code, in our opinion, only prohibits a pauper who is competent in law to appear in person from taking advantage of Order III of the Civil Procedure Code and appearing by a pleader or recognized agent instead of being present personally. It does not cover cases where from the nature of the case physical presence is impossible or where the law, owing to any disability, directs that all acts required by the Code should be performed by a next friend. We are of opinion that there is nothing in rule 3 to prevent an official liquidator from appearing and presenting the petition. A company or other association being a person within the meaning of the definition of the General Clauses Act which applies to the Civil Procedure Code of 1908, could *prima facie* apply for leave to sue *in forma pauperis* and as we see nothing in Order XXXIII, rules 1 and 3 which will be repugnant to the application of the definition, we think a company can take advantage of the provision of Order XXXIII if it is a pauper.

It is next argued that, as the liquidator is not a pauper though the company may be so, Order XXXIII would not apply. The suit is really by the company and as the liquidator only acts for the company, being so to say its agent, his financial standing is immaterial. We think the case is covered by *Venkatanarasayya v. Achemma* (1), where it was held that a next friend who is not a pauper can sue *in forma pauperis* if the minor is proved to be a pauper. Reference was made to *In the matter of the will of Demubai* (2) and *Manaji Rajinji (Rao Sahib) v. Khundoo Baloo* (3). They were cases of executors suing and without expressing any opinion as to the correctness of the decisions it

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(1) (1881) I.L.R., 3 Mad., 3. (2) (1894) I.L.R., 18 Bom., 237.
(3) (1912) I.L.R., 36 Bom., 279.

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is sufficient, for the purpose of this case, to say that in the case of executors the estate vests in them and they are the real plaintiffs though they sue not for their own benefit but for the benefit of the beneficiaries. For the purpose of Order XXXIII the real question is who is the actual plaintiff and is he a pauper within the meaning of the explanation to Order XXXIII, rule 1, of the Civil Procedure Code.

The last contention is that as the liquidator received by his order of appointment a commission he is interested in the subject-matter of the suit within the meaning of Order XXXIII, rule 5, of the Code of Civil Procedure. The provision only applies to agreement between the pauper and a third person with reference to the subject-matter of the suit. Where a Court or a company appoints a liquidator he is an officer who is appointed under statutory authority and the fact that he is paid a percentage of the collections does not bring him within clause (e) of Order XXXIII, rule 5. No particular debt is ear-marked with the payment and even if it were so an agreement in pursuance of the Companies Act to remunerate the liquidator for winding up the company would be on the same footing as an agreement by the pauper with his vakil to pay him the legal fees for conducting the suit.

We see no reason to interfere and dismiss the petition with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

KIZHAKKEKATH KEMALOOTI AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

PULIKKALAKATH MUHAMED AND THREE OTHERS
(DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

Landlord and tenant—Denial of landlord's title, when entails forfeiture—Power of Court to relieve forfeiture.

In order that a denial of landlord's title should work a forfeiture of the tenancy, three things are necessary: (a) the tenant must set up title either in himself or in a third party, inconsistent with their mutual relationship, (b) the denial must be direct and unequivocal and not casual and (c) it must be made to the knowledge of the landlord. A casual statement, uncommunicated to the landlord, made by a tenant in a sale-deed executed by him in favour of a third party in respect of other properties, to the effect that the executant is the owner of the properties leased, does not amount to a disclaimer of the landlord's title.

Per SESHAGIRI AYYAR, J.—*Obiter*: A disclaimer of the landlord's title effects a forfeiture even if the tenure be for a specific term, and Courts have no power to relieve against it unless the disclaimer was occasioned by the fraud, mistake or accident of the landlord and the tenant was neither careless nor negligent.

SECOND APPEAL against the decree of M. R. NARAYANASWAMI AYYAR, the Subordinate Judge of South Malabar at Calicut, in Appeal No. 130 of 1916 preferred against the decree of M. NARASINGA RAO, the District Munsif of Parappanangadi, in Original Suit No. 8 of 1915.

The facts are given in the judgment of SESHAGIRI AYYAR, J.
K. Kuttikrishna Menon for appellants.

K. P. Govinda Menon for respondents.

SESHAGIRI AYYAR, J.—This is a suit for ejectment by a landlord on the ground that the tenant has forfeited his right by his denying the title of the plaintiff. The District Munsif held that the act complained of did amount to a disclaimer of the landlord's title and decreed possession. On appeal the Subordinate Judge agreed with the District Munsif that there was a disclaimer but

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held that as the lease was granted for the life-time of the lessee, the disclaimer had not the effect of putting an end to the tenancy and that the suit was premature. He dismissed the suit upon that ground.

There are two questions for consideration in this second appeal. The first is, was there a disclaimer of title, secondly whether the tenant has not forfeited the tenancy as the lease was for the life-time of the tenant although he did deny the landlord's title. I shall dispose of the second point first.

The cases quoted by the Subordinate Judge have not much bearing upon this second question. I fail to see why the denial of title during the continuance of the period of tenancy should not work a forfeiture of the right. The Transfer of Property Act, no doubt, has no application to the terms of this tenancy which is an agricultural one. But, the principle of section 111, clause (g), is applicable to this case. Under the second sub-section of that clause it is enacted that the lessee renounces his character as such by setting up the title of a third person or by claiming title in himself. Mr. Justice SADASIVA AYYAR in *Abbakka v Seshamma*(1) points out that under the common Law of India a favourable construction should be placed upon the conduct of the tenant before he is adjudged to have forfeited his tenancy. I am prepared to accept this view in dealing with agricultural leases, but I can see no justification for the view taken by the Subordinate Judge that leases for a term will enure for the full length of it notwithstanding the denial of title by the tenant. Therefore if I came to the conclusion that there has been a disclaimer of title by the tenant I would have taken a different view of the case. I suggested, in the course of the arguments, that even if there was a disclaimer, Courts may have power to relieve tenants from forfeiture. Many authorities were not cited on the question at the bar, but on considering the matter fully I am not satisfied that if there is a denial of title there is power in the Courts to relieve against forfeiture. Under the English Law there are, at present, two classes of cases which can be relieved against: (a) for non-payment of rent; the common Law Procedure Acts of 1851 and 1860 and section 4 of the Conveyancing Act of 1892 provide for relief;

(1) (1914) M.W.N., 915.

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(b) in cases of breaches of other conditions and covenants; the Conveyancing Acts of 1891 and 1892 declare the principles on which relief can be granted. No doubt it is pointed out in *Barrow v. Isaacs and Son*(1) that these various enactments have not exhausted the equitable jurisdiction of the High Court to relieve a defaulting tenant from forfeiture. Lord ESHER in that case says that in cases which are not provided for by the legislature, equity will come to the aid of the party only where there has been fraud, accident or mistake. Then he proceeds to say that even if any of these elements are found, there will be no relief if the tenant had acted with great carelessness or negligently. The learned Master of the Rolls does not refer to the case of denial of title as one of the relievable cases, and I have not been able to find any authority in which relief was granted by Courts where the tenant had denied the landlord's title. Mr. Justice SADASIVA AYYAR, in the case to which I already referred, seems inclined to the view that all cases of forfeiture can be relieved against. Even accepting this broad proposition as being especially applicable to Indian conditions, I would require that where there has been a denial of title the tenant must prove in the language of Lord ESHER that that denial was occasioned by the fraud, mistake or accident of the landlord and that the tenant himself was neither careless nor negligent. In the present case no attempt has been made to prove that the tenant has been misled. Therefore if I am driven to the conclusion that there has been a disclaimer of title, I would have decreed possession.

But I am not satisfied that the Courts below are right in holding that there is a disclaimer of title. The disclaimer is said to be contained in Exhibit J. That is an assignment of *jemn* right by the defendant to a third party in respect of properties which undoubtedly belong in *jemn* to the defendant. In the course of describing the properties assigned and in excluding certain properties from the deed of assignment the defendant says that the excluded property belongs to him in *jemn*. It is true there is, in this case, an assertion of *jemn* right in respect of property now sought to be recovered, but the assertion is not addressed to the landlord nor is that assertion followed up by transferring the particular property to a third

(1) (1891) 1 Q.B., 417.

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party. There is no surrender of possession to a person claiming adversely to the *jenn*. It is only an incidental statement in a document which was intended to convey some other property. The question now is whether this incidental reference can amount to a denial of title. In the Transfer of Property Act the language is

"in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself."

In this case he did not set up the title of a third person nor did he renounce his character as tenant. In ordinary parlance the expression 'renounce' would connote that some act is done to the knowledge of the landlord which was calculated to convey to him the impression that the tenant repudiated his title. The English authorities, to which I shall presently refer, seem to bear out the view that a casual reference like the present one will not have the effect of renunciation of title. As was pointed out in *Prag Nurain v. Kadir Bakhsh*(1), the denial must be unequivocal and some act tending to the giving up of the relationship of tenant must have been committed. The authorities in England are to the same effect. In *Doe dem Graves v. Wells*(2), LORD DENMAN, C.J., seems to suggest that there must be a betrayal of the landlord's interest and that the landlord should be placed in a worse condition before he can insist upon putting an end to the tenant's lease. In *Doe dem Di Man v. Parker*(3) it was held that a payment to a third person was not sufficient to put an end to the tenant's lease. *Doe D. Gray v. Stanion*(4), *Doe D. Pittman v. Sutton*(5) and *Doe Dem Williams and Jeffrey v. Cooper*(6) may be quoted in support of the same view. In Mr. William's book on Ejectment (second edition), page 56, the law is thus stated:—

"In order to constitute a disclaimer something must be done by the tenant which amounts to a direct repudiation of the relationship of landlord and tenant, and is necessarily inconsistent with that relationship."

In Woodfall on Landlord and Tenant, page 431, the statement is

(1) (1913) I.L.R., 35 All., 145.

(3) (1820) Gow., 180.

(5) (1841) 9 Car. & P., 706.

(2) (1839) 10 Ad. & E., 427.

(4) (1836) 1 M. & W., 895.

(6) (1840) 1 Man. & Gr., 1135.

"In order to make either a verbal or written disclaimer sufficient it must amount to a direct repudiation of the relationship of landlord and tenant, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it."

The same proposition is stated in Cole on Ejectment also, page 41. In my opinion the collateral reference in a document intended to convey some other property is not enough to constitute a disclaimer of title. The principle is well settled that a tenant cannot acquire title by prescription against his landlord so long as he does not to the knowledge of the landlord repudiate the tenancy under which he holds possession. Consequently the statement in a document executed to a third party cannot ordinarily have the effect of starting adverse possession in favour of the tenant. The landlord, therefore, is not put in a worse position than he was when he let the property to the defendant. I therefore hold that there has been no denial of title. I would dismiss the second appeal. But, having regard to the conduct of the defendant, I do not think he is entitled to any costs in this Court.

NAPIER, J.—Two questions have been raised in this second appeal, the first, whether the alleged denial of title by the defendant operates to terminate his interest in the land and the second, whether, if there is a forfeiture, the Courts have power to relieve against it. The first question only has been considered by the lower Appellate Court, and the view taken by the learned Judge on his reading of some decisions of this Court is that no denial of title by a person in the position of the defendant could have that operation. I agree with the appellant that the learned Judge has misappreciated the effect of those decisions. But that does not dispose of the question.

It must be premised that there is no statutory law under which a denial of title by an agricultural lessee acts as a forfeiture. It is argued, and the argument is founded on several decisions of this Court, that the analogy of the Transfer of Property Act should be applied although such leases are specifically exempted. I have, speaking for myself, pointed out in another case the danger of this method and, where statutory provision is absent, have preferred to seek another basis, namely,

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the English Law of Property. In doing so, we should, in my opinion, always bear in mind the difference in the origin of tenures and also the conditions peculiar to land tenures in this country.

I entirely agree with my learned brother that the only denial which we have to consider in this case is that contained in Exhibit J, and this denial is certainly not made in any transaction dealing with the property, the subject of this suit, and is not addressed to the landlord. That is the state of facts as to the denial. The tenancy in question arises in a rather peculiar manner. Claims were made to this property, and other properties by the plaintiff and the defendant and a suit ensued. Their respective rights were settled by a razinama decree, under which this property was

"to be held by the second and third defendants until the death of both of them on verumpattam right under the plaintiff without being surrendered. The defendants should pay a rental of Rs. 2 per year, and on the death of the defendants, the paramba should be taken possession of by the plaintiff or her representatives."

The result of this decree was to create the relationship of landlord and tenant between the plaintiff and the defendants, the tenancy being one for the joint lives of the defendants. The defendants have certainly, in Exhibit J, declared that they held the property in *jenn* right, but they have not granted any lease inconsistent with their life tenure, nor have they repudiated that tenure directly to the landlord.

It appears from an examination of the English cases that forfeiture for denial of title is based on two different principles when applied to the different classes of tenancies. The first is with regard to tenancies from year to year. In *Doe dem Graves v. Wells*(1), DENMAN, Lord, C.J., points out that with regard to tenures from year to year the words 'forfeiture' and 'disclaimer' are wrongly applied and that where a landlord brings an action to recover possession from such a tenant the evidence of a disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy, from the particular nature, was limited; and

viewed in this light, he held that a verbal assertion that the fee was in the tenant even though made to the landlord's agent, was not a sufficient indication of the desire of the tenant to put an end to the tenancy in that mere words could not operate to affect an interest in law.

The origin of the doctrine as applying to tenancies not terminable at will is to be found in 3 Bacon's Abridgement, page 196, 'Estate for Life and Occupancy'.

"Another way of forfeiture in a Court of Record is, by claiming a greater estate than he had by the feudal donation, or by affirming the reversion to be in any other person than his lord. This seems to be grounded on a rule in the old feudal law, that if a vassal denied that he held the feud of his lord, and it was proved against him, such denial was a forfeiture."

And then come the words explaining the limitation of this doctrine.

"But, as by the feudal law the vassal was to be convicted of this denial so in our law these acts which plainly amount to a denial must be done in a Court of Record, to make them a forfeiture; for such act of denial appearing on record is equivalent and equally conclusive as a conviction upon solemn trial; and all other denials, that might be used by great lords for trespassing their tenants, and for a pretence to seize their estates, by our law were rejected, for such convictions might be made by such great lords where there was no just cause; but the denial of the tenure upon record could never be counterfeited; or be abused to any injustice; and therefore this notorious and solemn act of the tenant was retained as a just cause of forfeiture by our law."

That is the origin of the doctrine of forfeiture by denial, and it is hardly necessary to point out how unequivocal and direct a denial must be to come within the mischief of this doctrine.

The modern application of this doctrine is to be found stated in Woodfall's Law of Landlord and Tenant, nineteenth edition, page 431:

"In order to make either a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it."

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This statement of the law is taken word for word from the judgment of the Court of Exchequer in *Doe D Gray v. Stanion*(1) and was quoted as the basis of his judgment by a very eminent Judge, FRY, J., in *Vivian v. Moat*(2). It is clear therefore that a mere allegation of title which does not amount to repudiation cannot work forfeiture, and it is to be noted that in the Transfer of Property Act, this distinction has evidently been borne in mind, for the only disclaimers which operate under section 111, clause (g), are in cases where "the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself." It seems to me that both the words 'repudiation' and 'renunciation' require something a great deal stronger than a mere assertion not communicated the landlord. It is impossible to lay down a hard and fast rule; but to my mind a very good test to apply would be, whether the assertion would operate as a starting point for adverse possession against the landlord (vide *Doe v. Williams*(3) where Lord MANSFIELD applies this test) and viewed in this light, the assertion will not come within its mischief.

I am, therefore, of opinion that there was no denial of the title within the mischief of the doctrine. That being my conclusion on the first question, I do not think it necessary to enter into a consideration of the other point, whether a forfeiture for denial of title can be relieved against. I agree with the result of my learned brother's judgment.

N.R.

(1) (1836) 1 M. & W., 695, at p. 703.

(2) (1881) 16 Ch. D., 730.

(3) (1777) 2 Cowp., 622.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

ANKALAMMA (SECOND PLAINTIFF), APPELLANT,

v.

B. CHENCHAYYA AND TEN OTHERS (DEFENDANTS
Nos. 1 TO 11), RESPONDENTS.*

1917,
December,
14.

Hindu Law—Coparceners—Junior member of a joint Hindu family—Bond in the name of manager—Payment to a junior member during lifetime of manager—Liability of promisor—Discharge—Rule as to co-heirs and co-promisees—English Law.

Payment, made to a junior member of a joint Hindu family during the lifetime of its manager in whose favour a bond has been executed, will not discharge the promisor from his liability under the bond.

Rule as to co-heirs applied, and the rulings as to co-promisees considered, and cases reviewed.

SECOND APPEAL against the decree of G. GANGADHARA SOMAYAJULU, the Temporary Subordinate Judge of Cuddapah, in Appeal No. 87 of 1916, preferred against the decree of S. NILAKANTAM PANTULU, the District Munsif of Proddatur, in Original Suit No. 647 of 1910.

The material facts appear from the judgment.

M. O. Parthasarathy Ayyangar and M. O. Thirumala Achariyar for the appellant.

A. Narasimha Achariyar for V. V. Srinivasa Ayyangar and Messrs. Venkata Subba Rao and Radhakrishnayya for the respondents.

The judgment of the Court was delivered by

SESHAGIRI AYYAR, J.—The bond sued on was executed to the father of the first plaintiff. The first plaintiff's case was that it was assigned to him by the father. After filing the suit he died and the second plaintiff is his legal representative. The first defendant is the son of the mortgagor. Defendants Nos. 2 to 11 are alienees of some of the properties mortgaged. The twelfth defendant is the eldest son of the mortgagee. The defendants pleaded that the mortgage bond was discharged by the payment made to one Chinna Narayana Reddi. This Chinna Narayana

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* Second Appeal No. 1949 of 1916.

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Reddi was another son of Byreddi Venkata Reddi, the original mortgagee. In the written statement, the case for the defence was that in a partition between the father and the sons this bond fell to the share of Chinna Narayana Reddi and that after it came to him, there was a complete discharge of the obligation under the bond.

The District Munsif gave a decree to the plaintiff. In appeal after remand in which the District Judge asked for certain findings upon some subsidiary issues, the Subordinate Judge who heard the appeal finally has come to the conclusion that the payment to Chinna Narayana Reddi discharged the first defendant from liability and that the plaintiff is not entitled to claim anything under the bond.

The facts found are (a) that Venkata Reddi was alive at the time that the alleged payment was made to Chinna Narayana Reddi. Venkata Reddi and his son, the twelfth defendant, were sentenced to transportation for life somewhere near 1880 and the discharge is alleged to have been in the year 1883. At that time the father is alleged to have given a power of attorney to a person called Narayana Reddi. (b) It is further found that there was no partition as alleged by the defendants. The District Munsif has stated that there was no allegation that Chinna Narayana Reddi was the manager of the family and that it was not sought to establish it before him. In this Court, an attempt was made both by Messrs. Narasimha Achariyar and Radhakrishnayya to show that Chinna Narayana Reddi was actually managing the family affairs. But the circumstances mentioned by the Subordinate Judge negative any such presumption. After the father and the eldest son were convicted and sentenced to transportation for life apparently every member of the family was endeavouring to get as much family property as was possible into his own hands. In these circumstances, it is unlikely that any one of the members was looked up to as manager of an undivided family.

On these facts, the question of law for decision is whether the payment to Chinna Narayana Reddi could discharge the first defendant from liability. Chinna Narayana Reddi was undoubtedly not a promisee. The learned vakils for the respondents argued, that as the money was advanced by the father while the family was still undivided every member of the family must be taken to be a co-promisee with the father. In

the first place, there is no evidence as to the source of the money which was lent. For all we know, it might have been the self-acquisition of the father. Even granting that it was from family funds that the father advanced the money it does not follow that the other members of the family were co-promisees with him. The definition of 'promisor' and 'promisee' contained in the Contract Act negatives any such presumption; prima facie, the word 'promisee' means a person in whose name the document has been executed. No authority has been cited before us for the broad proposition that where money had been advanced by the manager of a joint Hindu family, the other members of the family would become co-promisees with him. The fact that the other members of the family have an interest in the debt is not enough to constitute them promisees; that is a technical expression carrying with it certain rights; we are not prepared to hold that every person who has an interest in bonds or securities standing in the name of another is a co-promisee, even though that other may be the manager of the Hindu family of which he is a member. Therefore we must proceed on the footing that Chinna Narayana Reddi was not a promisee under the bond. He was one of the heirs of Venkata Reddi to whom the bond was executed. There were also other heirs including the plaintiff who were entitled to the money under this bond. The question therefore is whether payment to one of the co-heirs would discharge the obligor from liability. The principle regarding co-heirs would be equally applicable to co-parceners. In *Ahinsa Bibi v. Abdul Kader Sahab* (1) BHASHYAM AYYANGAR, J., accepts the proposition laid down by MAHMOOD, J., in *Surju Prasad Singh v. Khawhash Ali* (2) and says that the co-heir of a single promisee is not entitled to give a discharge, in respect of a bond executed to his ancestor. The Subordinate Judge has relied for his conclusion that payment to one of the co-heirs would discharge the obligor, upon *Sheik Ibrahim Tharagan v. Rama Ayyar* (3). That case only decided that where payment is made in fraud of the other co-heirs to one of the co-heirs, the obligor is not discharged. Further there are some observations in the judgment which are against the view taken by the Subordinate Judge. There is nothing in that judgment to support his

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(1) (1902) I.L.R. 25 Mad., 27 at p. 39.

(2) (1882) I.L.R., 4 All., 512.

(3) (1912) I.L.R., 35 Mad., 685.

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position. Mr. Parthasarathi Ayyangar has drawn our attention to the Full Bench decision in *Annapurnamma v. Akkayya*(1) where two learned Judges of this Court held that payment to one of the co-promisees would be a good discharge. The Chief Justice was against that view. Even the two learned Judges who held that payment to one of the co-promisees would amount to a discharge, guard themselves by saying that the case of a co-heir would stand upon a different footing. SANKARAN NAYAR, J., at page 549 says that the proposition which he enunciated would not cover the case of co-heirs. SADASIVA AYYAR, J., uses similar language in his judgment. In a later case *Muniandi Servai v. Ramasami*(2), SADASIVA AYYAR, J., sitting with HANNAY, J., held that payment to one of the co-heirs of the promisee would not amount to a discharge of the liability incurred under the bond. COURTS TROTTER, J., in *Ponnusami Pillai v. Thayagaraja Pillai*(3) seems to doubt the correctness of the Full Bench decision in *Annapurnamma v. Akkayya*(1). If the question for decision were whether the payment made to one of the co-promisees would amount to a discharge of the bond, it might become necessary to refer the matter to a Full Bench, having regard to the fact that two cases in Calcutta, in which the question was fully argued and elaborately considered, took a different view; and to the fact that COURTS TROTTER, J., is of opinion that the decision is opposed to the current of authorities in England. We refer to *Hussainara Begam v. Rahimannesa Begam*(4) and *Umes Chandra Banerjee v. Dinabhandhu Mahanti*(5). But that question need not be considered in this case. The principle seems to be clear that payment to one of the co-heirs of the promisee would not discharge the promisor from his liability to pay under the bond. The same considerations govern payments made to a junior member of a Hindu family during the lifetime of its manager in whose favour the bond was executed. In the view we have taken, the decision of the Subordinate Judge must be reversed and that of the District Munsif restored with costs here and in the lower Appellate Court. Time for payment is extended to 9th April 1918.

K.R.

(1) (1913) I.L.R., 36 Mad., 544 (F.B.).

(2) (1915) 29 I.C., 586.

(3) (1916) 3 L.W., 22.

(4) (1911) I.L.R., 38 Cal., 342.

(5) (1915) 29 I.C., 956.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Sadasiva Ayyar.

MAYANKUTTI (PLAINTIFF), APPELLANT,

v.

KUNHAMMAD AND FOURTEEN OTHERS (DEFENDANTS NOS. 1 TO 6
AND 9 TO 17), RESPONDENTS.*

1917,
December,
21.

Ejectment suit in—Decree directing payment of compensation—Decree allowed to be barred by limitation—Subsequent suit on title to recover the property, maintainability of.

The plaintiff's father sued the defendant on a lease deed and obtained a decree in ejectment directing payment of compensation under the Malabar Compensation for Tenants Improvements Act. He allowed the decree to become barred. Plaintiff then sued on his jenm title:

Held, that the plaintiff was not entitled to maintain another suit to recover the property.

Kutti Ali v. Chindan (1900) I.L.R., 23 Mad., 629, dissented from.

Vedapuratti v. Vallabha Vallia Raja (1902) I.L.R., 25 Mad., 300, approved.

SECOND Appeal against the decree of G. A. B. JACKSON, the District Judge of South Malabar, in Appeal No. 143 of 1916, preferred against the decree of S. ANANTA PATTAR, the District Munsif of Ponnani, in Original Suit No. 400 of 1914.

Plaintiff sued to recover possession of his property with arrears of rent on the strength of his jenm title; plaintiff's father having already sued the same parties on a lease executed by their predecessor in title and obtained a decree which he never executed but allowed to become barred by limitation. The Court of first instance dismissed the suit as being barred under section 9 of the Limitation Act IX of 1908. The lower Appellate Court confirmed the above decree. Plaintiff preferred this second appeal.

C. Madhavan Nair for the appellant.

M. N. Krishna Ayyar for the respondent.

WALLIS, C.J.—This case raises a question of considerable importance and interest, namely, what is the effect of a plaintiff, who obtains a decree in ejectment in Malabar directing payment of compensation, allowing that decree to become barred. The

* Second Appeal No. 152 of 1917.

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question is whether he is entitled to maintain another suit, as it is contended, upon his title, a proposition which is supported by reference to the decision of *Kutti Ali v. Chindan*(1). Now the ordinary principle is that, when a man has a cause of action and brings a suit upon it, that cause of action is merged in the decree, *transit in rem judicatum*; and then his remedy is in execution and if he does not enforce his remedy and allows it to become barred, his rights are gone. When a lessor sues to eject a lessee he has to prove that there was in existence a lease and a determination of that lease. That is his cause of action, and if he gets a decree and allows that decree to become barred, it seems to me that, on general principles his remedy is gone. I do not, with great respect, quite understand what is meant in *Kutti Ali v. Chindan*(1) by saying that he will still be allowed to sue on title. The suit on title, I take it, is a suit to eject the defendant on the ground that he was a trespasser. Even if it could be said that the effect of a decree in ejectment was to determine the tenancy and convert the tenant into a trespasser, that would not apply to the present case where the tenant has a statutory right to continue in possession after decree until he is paid for his improvements. Further, the decision in *Kutti Ali v. Chindan*(1) seems difficult to reconcile with the subsequent decision of a Full Bench of five Judges in *Vedapuratti v. Vallabha Valiya Raja*(2) in which it was held, overruling some earlier cases that, where a mortgagor brings a suit for redemption and allows the decree for redemption to become barred, his rights are gone and he cannot bring a subsequent suit for redemption. I do not see any reason why the same doctrine is not applicable to the case of lessor and lessee. Lastly, as regards the Malabar tenancies, I think that the provisions of sections 5 and 6 of the Malabar Compensation for Tenants Improvements Act, strongly support the view I have taken and show that it was the intention of the legislature that these matters should be dealt with in execution. Section 5 provides that, notwithstanding the determination of the tenancy, the tenant is entitled to remain in possession until ejectment in execution of a decree or order of Court. Section 6 deals with the form of the decree in

(1) (1900) I.L.R., 28 Mad., 629.

(2) (1902) I.L.R., 25 Mad., 800.

ejectment and the determination of compensation, and the decree is to direct that

"On payment by the plaintiff into Court of the amount so found due and also the mortgage money (if any), the defendant shall put the plaintiff into possession of the land with the improvements thereon",

which is very like a decree for redemption. Sub-section (3) deals with compensation for subsequent improvements and revaluation, if necessary, of the improvements at the time of ejectment. Sub-section (4) provides that

"Every matter arising under section 3 shall be deemed to be a question relating to the execution of a decree within the meaning of clause (C) of section 214 of the Code of Civil Procedure".

It seems to me *a fortiori* that the payment of the compensation which is assessed in the suit by the decree is still more a matter, or at least as much a matter, relating to execution and is intended to be dealt with as such. As I understand the scheme of the Act, it is that it leaves the decree passed under the Act for ejectment on payment of compensation to be governed by the law of limitation with regard to the execution of decrees, and that it was not intended to interfere with the general principle, that a man who sues on his cause of action and obtains a decree and allows that decree to become barred has no further remedy. With great respect, I am not prepared to follow the decision in *Kutti Ali v. Chindan*(1) in this case. The second appeal is dismissed with costs.

SADASIVA AYYAR, J.—When a plaintiff has obtained in one suit based on some legal title, a decree for the reliefs which he was entitled to as against a defendant and has allowed that decree to become barred, he cannot, in my opinion, be allowed to bring another suit for obtaining *the very same relief* against the very same defendant, though on a different basis, if the latter ground of claim is founded on a right or title which existed and could have been relied on as a basis of relief when the first suit was brought. If he had failed in the first suit on the basis on which he had brought it, he might be entitled to claim the same relief in a second suit on another basis, if this latter basis could be treated as affording a different cause of action.

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(1) (1900) I.L.R., 28 Mad., 629.

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In *Chowakkuran Keloth v. Karuvalote Parkum*(1) the provisions of section 6 of the Malabar Compensation for Tenants Improvements Act and the decision in *Vedapuratti v. Vallabha Valiya Raja*(2) do not seem to have been considered and brought to the attention of the Court. I do not therefore, with great respect feel bound to follow the decision in *Chowakkuran Keloth v. Karuvalote Parkum*(1).

S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Phillips.

1917,
December,
14 and
1918,
January, 8.

*Re APPAJI AYYAR AND TWO OTHERS (ACCUSED NOS. 1 TO 3),
PETITIONERS.**

Criminal Procedure Code (Act V of 1898), sec. 517—Power under, to confiscate property produced before Court—Conviction for gambling under ss. 6 and 7 of Madras Towns' Nuisances Act (III of 1889), ss. 6 and 7—Confiscation of money not actually used for gambling but found on gambler's person, validity of.

On a conviction for gambling under sections 6 and 7 of the Madras Towns' Nuisances Act (III of 1889), an order to confiscate money found with the gamblers can only be passed under section 517 of the Criminal Procedure Code, and only in respect of such money as has been actually employed in gambling and not in respect of other money found on the person of the gambler.

Per AYLING, J.—Although section 517 is in its terms wide, confiscation of property "produced" before a Criminal Court is not justifiable unless it has been used for an offence, or an offence has been committed regarding it.

Per PHILLIPS, J.—The powers under section 517 are very large and the Magistrate's discretion is wide and the section empowers him to make such order as he thinks fit for the disposal of property "produced" before him; but the discretion must be exercised judicially and not arbitrarily.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of P. N. MUHAMMAD MIRAN, the Sub-Divisional First-class Magistrate of Gopichettipalayam, in Appeal No. 26 of 1917, preferred against the judgment of D. SANTHA PILLAI, the Third-class Magistrate of Satyamangalam, in Calendar Case No. 884 of 1917.

(1) (1915) 29 I.C., 559.

(2) (1902) I.L.R., 25 Mad., 800.

* Criminal Revision Case No. 558 of 1917.

Certain police officers entering a gaming house found seven or eight sovereigns on a mat on which the accused were gambling. These sovereigns suddenly disappeared somehow and a search of the second and third accused resulted in finding eight sovereigns in the mouth and three in the waist cloth of the third accused and one in the pocket of the second. The lower Courts not only convicted the accused for gambling under sections 6 and 7 of the Madras Towns' Nuisances Act (III of 1889) but also ordered the confiscation of the twelve sovereigns.

The accused preferred this Revision Petition to the High Court.

J. C. Adam for the petitioners.

C. Narasimhachariyar for the Public Prosecutor for the Crown.

AYLING, J.—I can see no reason for interfering with the conviction in this case or with the order directing the destruction of the cards. The real difficulty is in determining whether the Magistrate had jurisdiction to pass the order confiscating the money (twelve sovereigns) found on the persons of accused Nos. 2 and 3.

The order admittedly cannot be brought under the last paragraph of section 3 of Act III of 1889, inasmuch as the conviction was not under clause (10) of the same section: and it can only be upheld if it is covered by section 517, Criminal Procedure Code, clause 1 of which runs as follows:—

"Where an inquiry or a trial in any Criminal Court is concluded the Court may make such order as it thinks fit for the disposal of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence."

Mr. C. Narasimhachariyar, who appeared for the Public Prosecutor, has endeavoured to support it on two grounds:—

(1) That the money was property "which has been used for the commission of an offence" i.e., gaming in a common gaming house (section 7 of Act III of 1889);

(2) that, even if it were not, the Court had jurisdiction to dispose of it by confiscation under the earlier part of the clause as "property produced before it."

I have no doubt that the section authorizes the confiscation of property

"which has been used for the commission of an offence,"

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vide *Ramasami Aiyar v. Venkateswara Aiyar*(1). But are the sovereigns such property? The Sub-Magistrate who passed the order merely speaks of them as property "concerned in the case". The Subdivisional Magistrate in upholding it called them "sovereigns used for gaming"; but he does not refer to, much less discuss, the evidence to show that they were used for gaming, or consider the difference between the sovereigns found in third accused's mouth and the sovereigns found in second accused's pocket. I take it the coins can only be said to have been used for gaming if they had been actually staked.

Now as regards the eight sovereigns found in third accused's mouth, I think this can be legitimately inferred from the evidence. The place of concealment tends to indicate a guilty knowledge, and prosecution witness No. 1 deposes that, when the police party entered, seven or eight sovereigns were lying on the mat with the cards. These disappeared somehow; and it may be fairly inferred that third accused, who was one of the gamblers, snatched them up and put them in his mouth. I think the order of confiscation of the eight sovereigns found in third accused's mouth can be upheld on this ground.

The other four were found, three tied in third accused's waist cloth and one in second accused's pocket. There is nothing to indicate that these coins had been staked; and it cannot be inferred from the fact they were found in the pocket or cloth of a person engaged in gambling. *Emperor v. Walli Mussaji*(2) and *Emperor v. Tota*(3) are cases in which orders for confiscation of money in similar circumstances were set aside, because they were not covered by the terms of the Gambling Acts in force; there was apparently no suggestion in either case that any portion of section 517, Criminal Procedure Code, could be invoked in aid of the order.

Mr. Narasimha Achariyar, however, seeks to fall back on the first portion of the section, and argues that the coins were produced before the Court, and that the Court is authorized to dispose of them "as it thinks fit"—which words would, he says, include even confiscation. The section was altered in 1898 and its present wording is, no doubt, startlingly wide; but I cannot

believe that it was intended thereby to confer on a Court the absolute power of disposition of property regarding which no offence has been committed and which has not been used for the commission of an offence. A reference to the draft bill which ended in the Code of 1898 shows that the original intention was to empower a Court to pass such order as it thought fit for the disposal of any property produced before it "the title to which is doubtful or in dispute"—which seems to indicate a provisional disposal of such property, leaving any party claiming an interest therein to seek his remedy through the usual channels against the holder. In the Select Committee the words "the title to which is doubtful or in dispute" disappeared—an omission which is not explained in the Committee's report. If the intention had been to confer such wide punitive powers as are now claimed (for confiscation implies nothing less) it is difficult to believe that no explanation would have been offered. We have not been referred to any case in which the section has been construed in such a wide sense. The judgment in *Russul Bibee v. Ahmed Moosajee*(1) implies no more than the limited and provisional power above indicated. The two cases already quoted—*Emperor v. Walli Mussaji*(2) and *Emperor v. Tota*(3)—are both indirectly against such a view; for in each case the order set aside could apparently have been supported in view of the law contended for on behalf of the Crown. With these may be read the order in *Ponuswami Pillai, In re*(4), which is indeed an authority to the contrary, though no doubt of an *obiter* nature and unsupported by reasons. I may also refer to the view taken by the learned Judges in *Abinash Chandra Bhattacharjee v. Emperor*(5), regarding the proper interpretation of the earlier portion of the section, although I am unable to follow them as regards the limitation of forfeiture of property connected with an offence.

I would set aside the order of confiscation of these four sovereigns as not warranted by section 517, Criminal Procedure Code, and direct their return to the persons from whom they were seized.

PHILLIPS, J.—The first point taken is that the finding that the house is a gaming house is based on the uncorroborated testimony of an accomplice. In the first place prosecution witness

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(1) (1912) 24 M.L.J., 1.

(2) (1902) I.L.R., 26 Bom., 641.

(3) (1904) I.L.R., 26 All., 270.

(1) (1907) I.L.R., 34 Calc., 347.

(2) (1902) I.L.R., 26 Bom., 641.

(3) (1904) I.L.R., 26 All., 270.

(4) (1909) 19 M.L.J., 254.

(5) (1907) I.L.R., 34 Calc., 986.

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No. 2 is hardly an accomplice in the offence charged, although he may have frequented the house for gambling on previous occasions, and secondly the evidence of prosecution witness No. 1 is corroborative in that it shows that some nine persons of different castes were gambling together. Our interference in the concurrent finding of two Courts is not called for on this ground.

The second point is that the order to confiscate the cards and sovereigns is not legal. The Sub-Magistrate does not state under what provision of law he passed the order, but inasmuch as the confiscations were under sections 6 and 7 of Act III of 1889 the order cannot have been passed under section 3 of that Act, and the presumption being that the Sub-Magistrate acted according to law the order must have been passed under section 517, Criminal Procedure Code, the section relied on by the Sub-divisional Magistrate. The question then is whether the order is a legal order; and the cases quoted for petitioners, i.e., *Emperor v. Walli Mussaji*(1) and *Emperor v. Tota*(2) are not very much to the point as they relate to the provisions of special acts, and not to section 517, Criminal Procedure Code.

The powers under the section are very large, and the Magistrate's discretion under it is wide, for he can make such order "as he thinks fit" for the disposal of any property produced before him; vide *Russul Bibee v. Ahmed Moosajee*(3). Such discretion must, I take it, be exercised judicially, and if it has been so exercised, I do not think that we should interfere in revision, especially when the order has been confirmed by an Appellate Court. In the present case prosecution witness No. 1 says, that he saw sovereigns being used for gambling, and when accused Nos. 1 to 3 were arrested eight sovereigns were found in third accused's mouth, three in a towel or handkerchief tucked into his waist, and one in second accused's pocket. Under section 3 of Act III of 1889 money employed or displayed for the purpose of gaming is liable to forfeiture, and consequently an order under section 517, Criminal Procedure Code, for the confiscation of money employed or displayed for the purpose of gaming would be a legal order, for it would be an order passed on the lines of a statutory provision for similar cases, and could not be deemed to be an arbitrary

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exercise of discretion. In this case, however, there is no definite proof that these particular sovereigns were employed or displayed for the purpose of gambling, but in view of the fact that sovereigns had been used for gaming and had been seen on the mat used by the gamblers, it is not an unreasonable presumption that the sovereigns found on accused Nos. 2 and 3 were some of those sovereigns. The eight sovereigns in the third accused's mouth can hardly be said to have been carried by him in this way in the ordinary course of business; and a very natural inference would be that he had snatched up the coins from the mat and concealed them in his mouth, and the inference is all the stronger from the fact that he had three other sovereigns tied up in a cloth at his waist. The inference as to these latter and the one sovereign found with second accused that they were being employed for gaming is much weaker, but there is the circumstance that accused Nos. 2 and 3 have not explained their possession on any other hypothesis. The evidence of defence witness No. 1 is incredible and if, believed, would merely show that first accused was going to give him 12 sovereigns the following day to convert into jewellery. In a case under the Madras City Police Act III of 1888, *Queen-Empress v. Bhashyam Chetti*(1), it was held that the Magistrate was not required to hold an enquiry as to whether the money ordered to be forfeited had been used for gaming, that it was sufficient that the money, etc., had been seized by the Commissioner of Police under circumstances of reasonable suspicion entertained by him. If money were found in a gambler's purse and there were no circumstances to suggest that it had been employed for gaming, it would certainly be unreasonable to order its confiscation, but in this case there are circumstances from which the inference can be drawn that the sovereigns had been employed for gaming. As regards eight of them the inference is very strong, but the inference as regards the other four is much weaker, and while I am doubtful whether it can be said that the Magistrates have exercised their discretion in an arbitrary manner as regards these four sovereigns, and that, I take it, would be the only ground for interference by this Court in a case of revision, I am not prepared to differ from my learned brother's opinion and agree in the order proposed.

N.R.

(1) (1896) I.L.R., 19 Mad., 209.

(1) (1902) I.L.R., 26 Bom., 641. (2) (1904) I.L.R., 26 All., 270.
(3) (1907) I.L.R., 34 Cal., 847.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

MUNIA GOUNDAN (THIRD DEFENDANT), APPELLANT,

v.

RAMASAMI CHETTY AND NINE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1, 2 AND 4 TO 10) RESPONDENTS.*

Limitation Act (IX of 1908), arts. 126, 144 and 148—Sale of equity of redemption by one of two mortgagors—Redemption by vendee—Possession of property by vendee for more than 12 years—Sale by the other co-mortgagor to another—Suit by latter to redeem his half-share—Suit, more than 12 years after first vendee took possession on redemption, whether barred.

The first defendant and his father G, mortgaged with possession the suit lands to the second defendant in 1892; in 1897 G sold the equity of redemption to the third defendant, who redeemed the lands and obtained possession in 1898. The first defendant sold his interest in the lands in 1910 to the plaintiff, who instituted a suit in 1912 to redeem his half-share in the property on payment of half the mortgage-debt. The third defendant pleaded that the suit was barred by limitation:

Held, that article 143 of the Limitation Act was not applicable to the case and the suit was barred by limitation, as the case fell within article 126.

Seemle.—The suit was also barred under article 144.

Jai Kishan Joshi v. Budhanand Joshi (1916) I.L.R., 38 All., 138, *Bhaiji Sham Rao v. Hajimiya Mahomed* (1890) 14 Bom., L.R., 314, followed; and *Ramaswamy Ayyar v. Vanamamalai Ayyar* (1899) I.L.R., 23 Bom., 137 (F.B.); s.c. (1915) 26 I.O., 873, *Vasudeva Mudaly v. Srinivasa Pillay* (1907) I.L.R., 30 Mad., 426 (P.C.), explained.

SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, the Temporary Subordinate Judge of Salem in Appeal No. 99 of 1915, preferred against the decree of G. R. SUBBARAYA AYYAR, the District Munsif of Dharmapuri, in Original Suit No. 702 of 1912.

The material facts appear from the judgment.

G. S. Ramachandra Ayyar and E. Ramaswami Ayyar for the appellant.

T. R. Ramachandara Ayyar and T. R. Krishnaswami Ayyar for the first respondent.

OLDFIELD, J. OLDFIELD, J.—The facts admitted or found are that first defendant and his father Gopal Rao, mortgaged their property to

second defendant with possession under Exhibit 1. Gopal Rao afterwards sold the equity of redemption, as though the property were his self-acquisition, to third defendant by Exhibit II. The lower appellate Court has found, and we accept its findings, that the property belonged to the family and the sale does not bind first defendant. After Gopal Rao's death, first defendant sold to plaintiff by Exhibit A and plaintiff now sues for possession of first defendant's share on payment of the appropriate proportion of the mortgage amount, which third defendant has paid. The question is whether the suit, filed on 26th August 1912, is in time. It will be if the article of Schedule I, Limitation Act, applicable is No. 148. It may be, if the article is No. 144 and third defendant's possession, which, it is not disputed, began in 1898, was not adverse to first defendant and plaintiff. It will not be if the article is No. 126.

It is simplest to disregard for the present the distinction between articles Nos. 144 and 126. The substantial question is then whether the suit is for redemption or for possession, subject no doubt to the satisfaction of third defendant's lien. It is brought in effect by one co-owner, represented by plaintiff, for recovery of mortgaged property redeemed by another co-owner and now in possession of his transferee, third defendant; and argument has turned on whether article No. 148 or No. 134 would apply to the case thus simplified. The question has not been dealt with by this Court. But the conclusion reached in Allahabad and Bombay is in favour of the latter. It was no doubt held in *Ashfaq Ahmed v. Wazir Ali*(1) that, when one co-heir of a mortgagor had redeemed the whole mortgage the suit against his representative was subject to article No. 148. But recently, when that decision was considered in *Jai Kishan Joshi v. Budhanand Joshi*(2) the question being whether article 134 should be applied against a transferee from a redeeming co-owner on the assumption that the latter had the equivalent of a mortgage right, one learned Judge held, with reference to the principle stated in section 95, Transfer of Property Act, that he was only a charge-holder and applied article No. 144 whilst the other concurred, observing with reference to the earlier decision that the possession of the charge-holder need not be regarded

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* Second Appeal No. 1 of 1917.

(1) (1892) I.L.R., 14 All., 1.

(2) (1916) I.L.R., 38 All., 148.

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as in all respects equivalent to that of a mortgagee. The view taken in *Ashfaq Ahmad v. Wazir Ali*(1) was not adopted in *Vasudev v. Balaji*(2) or in other cases decided by the Bombay High Court and referred to therein or in *Bhaiji Shamrao v. Hajimiya Mahomed*(3). The objections made to the reasoning in these authorities are that the Transfer of Property Act was not applicable to the facts, the mortgage in the later Allahabad case having been executed before it and the Act not being applicable to the Bombay Presidency at the time, and that the distinction between the positions of a mortgagee and a charge-holder or as he is called in the Bombay cases, a lienor, has been abrogated since the decision of the Privy Council in *Vasudeva Mudaly v. Srinivasa Pillay*(4). The first is unsubstantial, the principle involved not depending on the Act for its validity. The second was no doubt not noticed in the judgments in question. But it cannot affect the conclusion. For the Privy Council held only that a simple mortgage was to be treated as equivalent to a charge for the purpose of article No. 132, not that every charge was a mortgage for the purpose of article No. 134. And the argument is unsustainable, because third defendant's right, being equivalent only to that of Gopal Rao, is, as the cases referred to show, not based on the principle of subrogation recognized in section 101, Transfer of Property Act. For neither Gopal Rao nor third defendant became or could have become absolutely entitled to the property so far as first defendant's share was concerned. As *Dunappa v. Yamnappa*(5) and other cases referred to in *Raushan Ali Khan Chowdhury v. Kali Mohan Moitra*(6) show the right is to contribution and is secured only by a lien. These considerations applied to the present case, decision must be that plaintiff's suit is not for redemption and is not subject to article No. 148.

The question is then between articles Nos. 126 and 144, the contention in connexion with the latter being that enquiry must be held to ascertain the date, at which third defendant's possession became adverse to first defendant and plaintiff. It is urged that the lower appellate Court has already dealt completely with the

(1) (1892) I.L.R., 14 All., 1.

(3) (1890) 14 Bom. L.R., 314

(5) (1902) I.L.R., 26 Bom., 379.

(2) (1902) I.L.R., 26 Bom., 500.

(4) (1907) I.L.R., 30 Mad., 426 (P.C.).

(6) (1906) 4 C. L.J., 79.

matter in its reference to first defendant's alleged acquiescence; but that is only one aspect of it. The decision in *Bhuvrao v. Rakhim*(1) has been referred to as negating third defendant's right to an enquiry; but it is not clear that it can be applied to the facts in the case before us. To these facts article No. 126 is exactly applicable; and it was applied to similar facts in *Rama-swamy Ayyar v. Vanamamalai Ayyar*(2), the superfluity of any enquiry as to the character of defendant's possession being pointed out. The suit being subject to article No. 126 and having been filed over thirteen years after the possession of third defendant began, is out of time and must be dismissed with costs throughout, the District Munsil's decree being restored and the appeal being allowed.

SADASIVA AYYAR, J.—The third defendant is the appellant. The suit was for redemption of one-fourth share in a certain property half of which was mortgaged for Rs. 700 in 1892 to the second defendant by the first defendant and his father who owned the said half share in equal moities of one-fourth and one-fourth. The plaintiff is the purchaser of the first defendant's one-fourth share. The other half share in the property belonged to one Narasayya but we are not concerned with that half share in this suit.

The first defendant's father and Narasayya sold the entire property to the third defendant and to another person (who transferred his rights afterwards to the third defendant) for Rs. 2,000. As regards Narasayya's half-share which was sold for Rs. 1,000, there is no dispute in this suit. As regards the other half share which the first defendant's father sold for the remaining Rs. 1,000, the first defendant's father is found to have had no right to sell the first defendant's one-fourth share out of that half-share. Thus the third defendant, so far as title is concerned, has the same only to the extent of three-fourths share. As there was a mortgage for Rs. 700 in 1892 on both the quarter shares which belonged to the first defendant, and to his father in favour of the second defendant and as half of that Rs. 700 or Rs. 350 is binding on the first defendant's one-fourth share now vested in the plaintiff, the plaintiff offers in the plaint to pay

(1) (1899) I.L.R., 23 Bom., 137 (F.B.); s.c. (1915) 26 I.C., 873.

(2) (1915) 26 I.C., 873.

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Rs. 350 and seeks to redeem the said one-fourth share on payment of the said Rs. 350.

As I said already, the first defendant's father sold away both the one-fourth shares in 1897. Though the second defendant was the original mortgagee under the mortgage of 1892, as the third defendant after his purchase in 1897 paid up in April 1898 the Rs. 700, mortgaging to the second defendant out of the sum of Rs. 1,000 (the price he paid to the first defendant's father for the half share) and is in possession of the half share from April 1898, this suit for redemption of one-fourth share is really directed against the third defendant.

Several defences to the suit were raised by the third defendant (the appellant before us), but I think it is necessary to consider only the defence of limitation. The plea of bar by limitation is based on the fact that from April 1898 the third defendant has been in adverse possession (claiming as full owner) till the date of suit (August 1912), that is, for more than fourteen years. Articles 126 and 144 of the Limitation Act are relied upon.

The District Munsif upheld the plea of limitation without mentioning in his judgment the article of the Limitation Act on which he relied. The Subordinate Judge on appeal held that the suit was not barred by limitation because the mortgage of 1892 for Rs. 700 was payable only in June 1902 which was within twelve years of the date of the plaint (August 1912). His judgment also does not refer to any of the articles of the Limitation Act. He gave a decree for redemption in favour of the plaintiff on payment of Rs. 350 and of half of the value of the improvements. (The claim for improvements even if the plaintiff was entitled to redeem was put forward by the third defendant on the ground that the plaintiff's vendors knew of the sale of 1897, that the third defendant redeemed and got into possession in April 1898 and that third defendant made improvements of large value to plaintiff's knowledge without objection on plaintiff's part.) The Subordinate Judge quotes from the District Munsif's judgment without dissent as follows:—

"He" (the plaintiff) "stood by when these," that is the improvements, "were made. He knew of the sale and of the third defendant's possession." Then the learned Subordinate Judge says: "there is no dispute to the claim for compensation." But the claim

(that is, the amount due for the value of the improvements) "should be proved by the best evidence."

The Subordinate Judge therefore refused to accept the amount of Rs. 4,000 claimed by the third defendant as the value of the improvements and directed the issue of a commission by the lower Court to exactly ascertain such value before passing the final decree for the redemption of the one-fourth share.

As I said, it is necessary for the disposal of this appeal to consider only the question of limitation. I am clear in my opinion that article 126 of the Limitation Act applies to this case. That article provides a limitation period of twelve years for a suit by a Hindu governed by the Mitakshara law "to set aside his father's alienation of ancestral property," the period being calculated from "when the alienee takes possession of the property." It has been held under the analogous article 44 relating to a suit by a minor whose property was alienated by his guardian that the expression "suit to set aside a transfer of property" includes a suit in which there is a prayer for consequential relief of possession: see *Annamalay Chettiar v. Pitchu Ayyar*(1). I am also clear that the article 126 which speaks of a suit "to set aside" the father's alienation of ancestral property denotes also a suit in which possession is claimed and does not only contemplate a mere declaratory suit: see *Rustomjee's Limitation Act*, page 326, quoting *Dev Raj v. Shiv Ram*(2). The present suit is by a person claiming from a Hindu (the first defendant) governed by the law of the Mitakshara to set aside the said Hindu's (first defendant's) father's alienation of ancestral property to the extent of the first defendant's share and for consequential relief of possession by redemption. The alienee (the third defendant) took possession of the property in April 1898 and, as more than twelve years had elapsed from that date before the date of suit, the suit is barred under this article. Mr. T. R. Ramachandra Ayyar for the respondent contended that the article 126 (first column) when it uses the words

"to set aside his father's alienation of ancestral property" means "to set aside his father's alienation of ancestral property provided the alienation was made by the father alleging that it was ancestral property or at least without alleging that it was not ancestral property."

(1) (1905) I.L.R., 28 Mad., 122.

(2) (1914) P.R. No. 70.

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I see no reason whatever to add any such words as those italicized by me to the first column of the article. Mr. Ramachandra Ayyar relied upon the decision of their Lordships of the Privy Council in *Balwant Singh v. R. Clancy* (1), to the effect that when an elder brother mortgages a property as if he was the sole owner and not as the manager of the family consisting of himself and his younger brother, the creditor is not entitled to prove that the younger brother's share was also bound by the mortgage as executed by the *de-facto* manager for necessary family purposes. In the first place, it is not easy to see what the above observation has to do with the interpretation of the article 126. Further, their Lordships clearly make a distinction between an alienation by an elder brother and an alienation by a father. They state at page 303:

"It need not hardly be said that Sheroj Singh" (the alienor's elder brother) "was not an ancestor or a predecessor of Maharaj Singh" (the younger brother).

The Legislature and the Hindu law do make a distinction between an alienation by a father of ancestral property and that by any other person who was a mere manager.

The doctrine of right by birth in the son is wholly antiquated and inconvenient for modern times. The Privy Council have taken advantage of the texts relating to the father's power of alienation for antecedent debts to mitigate the inconvenience of that doctrine and the legislature has provided by a special article 126 for the perfection of the title of an alienee from the father when a Hindu son who wants to take advantage of the antiquated Mitakshara law seeks to set aside such an alienation. It is significant that the alienation under article 126 need *not* be for consideration. It is also significant that article 126 applies alike to an alienee with and to an alienee without notice: see *Bharrao v. Rakhim* (2). The legislature has clearly fixed an overt and patent fact, namely, the taking of possession of the property by the alienee as the event from which the period has to be calculated so as to avoid as far as possible difficult questions as to notice.

Mr. Ramachandra Ayyar further argued that the words in the third column of article 126,

"when the alienee takes possession of the property" means "when the alienee takes possession of the property *by the sole and unaided virtue and effect of father's alienation*"

and that where the alienee gets possession by redeeming a previous usufructuary mortgage the date of such possession given by mortgagee will not form the starting point under the third column and so apply article 126. Here again I see no reason whatever to add to the plain language of the article. Supposing for instance the alienation by the father is made one year after a trespasser had deprived the father of his possession of the property and the alienee after his alienation sues the trespasser and gets into possession, can it be argued that the son can come in more than twelve years afterwards treating the alienee's possession as that of a mere co-sharer and treating article 126 as not applicable because the alienee had to sue the trespasser in order to get possession?

Assuming, however, that article 126 is not applicable, I think that the suit is barred also under article 144. In *Vasudev v. Balaji* (1) the facts were as follows:—

V and G, co-owners of a land, mortgaged it in 1872. V alone redeemed it in 1882 and obtained possession and he and his heirs asserted adverse and exclusive title to the whole and continued in possession till 1898. Then G's heirs brought a suit in 1898 for redemption of their half share. JENKINS, C.J., and CROWE, J., held that the co-owner who redeemed the whole of the mortgage was not a mortgagee and did not stand in the shoes of the mortgagee, that he was a mere charge holder, that a charge holder can assert and claim adverse possession and that after twelve years the charge could not be redeemed by the other co-sharer as the title by adverse possession became perfected. The learned Judges held that article 148 applied only to a suit against a mortgagee and not to a suit against a person who obtained a charge by paying up the mortgagee. In this connexion, it might be remarked that, under section 95 of Transfer of Property Act, one of several co-mortgagors who redeems the mortgaged property and obtains possession thereof does not himself become the mortgagee but is given only a charge on the share of the other co-sharers for the proportion of the expenses

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(1) (1912) I.L.R., 34 All. 296, et seq.

(2) (1839) I.L.R., 23 Bom., 137, at p. 142 (F.B.); s.c. (1915) 26 I.C., 873.

(1) (1902) I.L.R., 26 Bom., 500.

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of redemption and of obtaining possession. In this case, it is clear on the proved documents and the facts found by the lower appellate Court that the third defendant when he purchased in 1897 had the animus to claim title as the sole owner of the equity of redemption and not merely to claim title to the first defendant's father's one-fourth share, and that he took possession in April 1898 with the animus to hold the whole half share against all the world and not as a mere co-sharer with the first defendant in that half share. That possession of immoveable property is notice to the whole world of the title under which possession is held, and that possession is prima facie adverse and exclusive are well known principles of law: see *Magu Brahma v. Bholi Dass* (1). Of course, a mortgagee or a co-sharer or a tenant who first obtains possession *as such* cannot without notice to the mortgagor or to the other co-sharers or to the landlord (as the case may be) claim to hold adversely, that is, by mere unilateral declaration of intention he could not convert his original possession into the adverse possession, but in this case the possession was obtained from the very beginning under an assertion of exclusive title.

The date fixed for the redemption in the mortgage of 1892 has no relevancy on the question of adverse possession as it is not a mortgagee who sets up adverse possession but a purchaser from one of the co-mortgagors: see *Freeman on Co-tenancy*, section 224, at pages 296 and 297.

In the result, I hold that the suit is clearly barred by limitation under article 126, and even if article 126 does not apply, under the general article 144 and I would therefore set aside the decree of the lower appellate Court and restore that of the District Munsif with costs payable by the plaintiff to the third defendant throughout.

K.R.

(1) (1913) 20 I.C., 195.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ayling, Mr. Justice Olcfield, Mr. Justice Sadasiva Ayyar, Mr. Justice Coutts Trotter and Mr. Justice Seshugiri Ayyar.

C. VARAMMA AND SEVEN OTHERS (DEFENDANTS NOS. 2 TO 9),
APPELLANTS,

v.

M. GOPALADASAYYA AND ANOTHER (PLAINTIFF AND FIRST
DEFENDANT), RESPONDENTS.*

Limitation Act (IX of 1908), art. 125—Alienation by a Hindu widow—Failure of existing reversioners to sue to set it aside within twelve years, effect of, on future reversioners—Representative character of the suit.

A suit by a reversioner to set aside an alienation by a Hindu widow is a representative suit on behalf of all her reversioners, then existing or thereafter to be born, and all of them have but a single cause of action, which arises on the date of the alienation. Hence, if by failing to sue within twelve years, allowed by article 125 of the Limitation Act (IX of 1908), the existing reversioners become barred by limitation, reversioners thereafter born are equally barred.

Venkatanarayana Pillai v. Subbammal (1915) I.L.R., 33 Mad., 406 (P.C.), *Janaki Ammal v. Narayanasami Aiyer* (1916) I.L.R., 33 Mad., 631 (P.C.), followed.

Gorinda Pillai v. Thayammal (1905) I.L.R., 28 Mad., 57, *Veerayya v. Gangamma* (1913) I.L.R., 38 Mad., 570, *Narayana v. Rama* (1915) I.L.R., 38 Mad., 396 and *Venkata Row v. Tulja Ram Row* (1917) M.W.N., 30, overruled.

Semble.—A decision one way or other, in a suit by one of them binds all of them.

Per SESHUGIRI AYYAR, J.—*Semble* that article 125 does not apply to persons not born at the date of the alienation, but that the right to declaratory relief of this nature is only conferred on persons alive at the date of the alienation.

APPEAL against the decree of A. SAMRAMURTI AYYAR, the Temporary Subordinate Judge of Guntur, in Original Suit No. 100 of 1915.

The facts appear from the first paragraph of the judgment of SADASIVA AYYAR, J., and the first paragraph of the ORDER OF REFERENCE of WALLIS, C.J.

V. Ramadoss for the appellants.

P. Narayanamurti for the respondents.

*Appeal No. 317 of 1916.

1917.
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26 and 28,
October, 11
and 1918,
February, 11
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WALLIS, C.J.

This appeal came on for hearing in the first instance before WALLIS, C.J., and KUMARASWAMI SASTRIYAR, J., who made the following ORDERS OF REFERENCE TO A FULL BENCH:—

WALLIS, C.J.—This is an appeal from the decision of the Subordinate Judge of Guntūr giving the plaintiff a declaration that the sale-deed executed by the second defendant, the widow of the last male owner, in favour of the third defendant, was void beyond the lifetime of the second defendant and did not affect the reversionary rights of the plaintiff and the first defendant. The plaintiff who is now one of the next reversioners was not born until more than twelve years after the date of the alienation, and in these circumstances the Subordinate Judge has held that he was within time under article 120 read with section 7 of the Limitation Act, as his right to sue accrued at the date of birth. The cases referred to by the Subordinate Judge—*Govinda Pillai v. Thayammal*(1), *Veerayya v. Gammamma*(2), and *Narayana v. Rama*(3)—are authorities for this view and have been followed quite recently in *Venkata Row v. Tuljarom Row*(4). On the other hand *Muliapudi Ratnam v. Mullapudi Ramayya*(5) is to the contrary effect, as is also the opinion expressed by the Full Bench in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(6), which has been followed in the subsequent cases in *Krishniah v. Lakshmiammal*(7), in *Ramanna v. Annamma*(8) and in *Subbamma v. Madi Reddi*(9).

The recent decisions of the Privy Council in *Venkatanarayana Pillai v. Subbammal*(10) and in *Janaki Ammal v. Narayanasami Aiyer*(11), that the reversioner's suit in these cases is a representative suit in which he represents not only himself but the whole body of possible reversioners of whom the one who happens to be the nearest surviving on the death of the widow will succeed to the estate appears to necessitate a reconsideration of this question which has occasioned so much disagreement in this Court with a view of finally settling it if possible in the light of their Lordships' recent decision.

(1) (1905) I.L.R., 28 Mad., 57.

(3) (1915) I.L.R., 38 Mad., 396.

(5) (1902) I.L.R., 25 Mad., 731.

(7) (1908) 18 M.L.J., 275.

(9) (1915) 2 L.W., 337.

(2) (1913) I.L.R., 36 Mad., 570.

(4) (1917) M.W.N., 30.

(6) (1906) I.L.R., 29 Mad., 390 (F.B.).

(8) (1913) 24 M.L.J., 183.

(10) (1915) I.L.R., 38 Mad., 406 (P.C.).

(11) (1916) I.L.R., 39 Mad., 634 (P.C.).

As pointed out by the Full Bench in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(1), the view that the reversioner's suit might be regarded as a representative one and the decision as binding on the other reversioners was put forward, but without deciding it, by Sir BARNES PEACOCK in *Brojo Kishoree Dassee v. Sreenath Bose*(2), and again by the same high authority in the Full Bench case decided about the same time in *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty*(3), in which he deals with the representative character of the widow in possession and holds that the next reversioners were not only bound by decrees obtained against her without fraud or collusion, but that in the Limitation Act of 1859 the words 'cause of action' referred not to a new cause of action accruing to the reversionary heirs personally and individually but to the cause of action which accrued to the heir as representative for the time being of the deceased. JACKSON, J., expressed the opinion that, after the decision in the *Sivaganga case*(4) that the decrees against the widow were binding on the reversioners, it was impossible to escape the position that an adverse possession which barred the widow would also bar the heirs. PHEAR, J., also expressed the opinion that, under the Limitation Act of 1859, the cause of action of the reversionary heirs was the same as that of the widow, and MACPHERSON, J., concurred merely pointing out that, where the widow had precluded herself from suing for possession by her own act, the reversioner's cause of action for possession did not arise until her death, a view which is embodied in article 142 of the Limitation Act of 1871.

Applying these principles, and without further discussing them, JACKSON, J., sitting with GLOVER, J., held in *Pershad Singh v. Chedee Lall*(5) that the reversioner's cause of action for a declaration that the widow's alienation was not binding on the estate accrued at the date of the alienation and was not revived in favour of the plaintiffs in the suit who had since been born and attained majority. The same view was held by the Bombay High Court in *Bhikaji Apaji v. Jaganath Vitthal*(6) where it

(1) (1906) I.L.R., 29 Mad., 390 (F.B.).

(2) (1838) 9 W.R., 463 at p. 465.

(3) (1368) 9 W.R., 505.

(5) (1871) 15 W.R., 1.

(4) (1863) 9 M.I.A., 539.

(6) (1873) 10 Bom. H.J.R., 351.

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was held that the suit must be brought within six years from the date of the conveyance under section 1, clause 16, of the Act of 1859. This decision was referred to with approval by the Privy Council in *Rani Anand Kunwar v. The Court of Wards*(1), and the Bombay Court has adhered consistently to this view.

It is next necessary to refer to certain subsequent *dicta* of the Privy Council which have sometimes been relied on in this Court as rulings that decisions in suits by reversioners are not binding on other reversioners. With reference to a suit governed by the Act of 1859, though instituted after the coming into force of the Act of 1871 Sir JAMES COLVILLE delivering their Lordships' judgment in *Jumona Dassya v. Bamasoondarai Dassya*(2) reserved the question whether a decree in a suit by a next reversioner questioning an adoption would bind any reversioner except the plaintiff or bind the adopted son as between himself and anybody but the plaintiff. It was unnecessary to decide the point, and the representative character of the reversioner's suit was not considered. In *Doorga Persal Singh v. Doorga Konwari*(3), Sir BARNES PEACOCK delivering their Lordships' judgment found that the plaintiff was not the next reversioner, and as one of the reasons for not giving him a declaratory decree observed that if the suit should be decided in favour of Joy Munghul, the alienee from the widow, it might not be final in his favour because the plaintiff might die in the lifetime of the widow and the estate might never come to him.

This observation may have been made with reference to the *dictum* of Sir JAMES COLVILLE, and, having regard to the view already referred to which Sir BARNES PEACOCK had expressed in India, I do not think he intended to intimate any opinion of his own that the decree would not be binding. This is confirmed by the fact that he went on to point out that there were in existence persons who might be able to prove a preferential title to the widow herself as well as the plaintiff and who would not be bound by any decision in the suit to which they were no parties. A reversioner may be allowed to represent all possible reversioners who come after him, but there is not the same reason

(1) (1881) I.L.R., 6 Cal., 764 at p. 772 (P.C.).
(2) (1876) I.L.R., 1 Cal., 239 (P.C.). (3) (1879) I.L.R., 4 Cal., 190 (P.C.).

for allowing him to represent persons who claim in priority to the widow as well as to himself.

Lastly in *Isri Dut Koer v. Mussumat Hansburti Koerain*(1), a suit by the reversioner questioning an alienation by the widow, their Lordships referred to the reason given by the lower Court for refusing a declaratory decree, that the decision might after all not be binding on the actual reversioners and observed

"the question of law is of such a nature that its decision, though not binding as *res judicata* between the widows and a new reversioner, would be so strong an authority in point of law as probably to deter either party from disputing it."

I do not think these *dicta* amount to more than cautious reservations by their Lordships on a point which was not before them for decision. In any case they were *obiter* and were made without reference to the representative character of the reversioners' suit as now established, an aspect of the question which was not referred to. The ruling of their Lordships in *Mussumat Chend Kour v. Pertab Singh*(2) that when the nearest reversioners sued and allowed the suit to be dismissed for default the decree would not bar other reversioners from suing does not appear to me to involve the present question. Unfortunately the question never came directly before their Lordships for decision, and I think the difficulties in this Court have been largely occasioned by treating these *dicta* as authority for the proposition that the decision in a reversioner's suit questioning an alienation by the widow is not binding on subsequent reversioners. Now that the representative character of the reversioner's suit is established, I do not think these *dicta* preclude us from holding that the decision in a representative suit must be binding as between the persons who are represented and the opposite parties in the suit.

All the cases in this Court on which the Subordinate Judge has relied, *Govinda Pillai v. Thayammal*(3), *Veerayya v. Gargamma*(4), *Narayana v. Rama*(5) and *Venkata Row v. Tuljaram Row*(6), to which may be added *Abinash Chandra Muzumdar v. Harinath Shaha*(7) which follows *Govinda Pillai v. Thayammal*(3)

(1) (1884) I.L.R., 10 Cal., 324 at p. 333 (P.C.).
(2) (1893) I.L.R., 16 Cal., 98 (P.C.). (3) (1905) I.L.R., 23 Mad., 57.
(4) (1913) I.L.R., 38 Mad., 570. (5) (1915) I.L.R., 33 Mad., 393.
(6) (1917) M.W.N., 30. (7) (1905) I.L.R., 32 Cal., 62.

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WALLIS, C.J. will be found to proceed upon the authority of the decision of the Full Bench of the Allahabad High Court in *Bhagwanta v. Sukhi*(1). In that case, STRACHEY, C.J., rested his opinion on the ground that the reversioners in such a suit do not represent the whole body of reversioners;

"If," he observed, "the nearest reversioner could be held, as the Hindu widow has been held, to represent fully the whole estate, it would no doubt follow that the limitation which would bar that reversioner would bar other reversioners, just as a decree passed against the nearest reversioner would in that case operate as *res judicata* against the more remote. But, so far as I know, that has never been held to be the relation in which one reversioner stands to another."

That is the relation in which the nearest reversioner stands to the others under the recent decision, and therefore the decision of the Full Bench in *Bagwanta v. Sukhi*(1) and the cases which followed it can no longer be considered as of authority on this question.

As I have already said, BASHYAM AYYANGAR and MOORE, JJ., in *Mullapudi Ratnam v. Mullapudi Ramayya*(2) held that a declaratory suit questioning an alienation by the widow was finally barred unless brought within twelve years from the date of the alienation (article 125). In *Ayyadorai Pillai v. Solai Ammal*(3) SUBRAHMANYA AYYAR and DAVIES, JJ., took the same view with regard to a reversioner's suit during the widow's lifetime to question an adoption holding it finally barred unless brought within six years from the date of the adoption. In *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(4), SUBRAHMANYA AYYAR and BODDAM, JJ., in deference to the Privy Council *dicta* to which I have referred and also relying on *Bagwanta v. Sukhi*(1), felt bound to overrule the contention that in a suit by a presumptive reversioner questioning an alienation he represents the whole body of possible reversioners, and that consequently on the death of the plaintiff-reversioner the right of continuing the suit survives to the next presumptive reversioner. This is

(1) (1900) I.L.R., 22 All., 33 (F.B.).

(2) (1902) I.L.R., 25 Mad., 731.

(3) (1901) I.L.R., 24 Mad., 405.

(4) (1904) I.L.R., 27 Mad., 588.

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one of the decisions expressly overruled by the Privy Council in *Venkatanarayana Pillai v. Subbammal*(1).

In Bombay the representative character of the reversioner's suit has all along been recognized. In this Court the first attempt to assert it was made by SUBRAHMANYA AYYAR and SANKARAN NAYAR, JJ., in their order of reference in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(2). The question was whether a decision in a suit by a reversioner questioning an adoption was binding on another reversioner. A Full Bench of five Judges answered it in the affirmative after examining the question with regard to limitation as well as to *res judicata*. They felt a difficulty, in the face of the Privy Council *dicta* to which I have already referred, in holding that the decision in a reversioner's suit to question an alienation was binding on subsequent reversioners, but they laid down that in such a suit the next reversioner represents the other reversioners (page 401). On this basis they proceeded to refer at pages 407—410 to the question of limitation as regards a reversioner's suit to question an alienation during the lifetime of the widow, and expressed the opinion that it was barred if not brought within twelve years from the date of the alienation. Having regard to the fact that the opinion of the Full Bench as to the representative character of the reversioner's suit has since been confirmed by the Privy Council, I think the opinion of the Full Bench on the question now before us, though it may be said to have been *obiter*, is entitled to great weight.

In *Chinna Veerayya v. Lakshmi Narasamma*(3), and in *Arunachalam v. Vellaya*(4), the Full Bench decision was not held to overrule the decision in *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(5) that reversioner's suit to question an alienation abates on the death of the plaintiff and cannot be continued by the other reversioners, although that decision proceeded on the express ground that the suit was not a representative one. It was also held not to affect the present question in *Veerayya v. Gangamma*(6) and in *Nurayana v. Rama*(7).

(1) (1915) I.L.R., 38 Mad., 406 (P.C.) (2) (1906) I.L.R., 23 Mad., 390 (F.B.)

(3) (1914) I.L.R., 37 Mad., 406.

(4) (1912) 23 M.L.J., 719.

(5) (1914) I.L.R., 27 Mad., 588.

(6) (1913) I.L.R., 36 Mad., 570.

(7) (1915) I.L.R., 38 Mad., 396.

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In this state of things a reversioner died while his suit questioning an adoption was pending in appeal before the Privy Council, and this Court reported that according to its decisions the surviving reversioner could not be allowed to continue it. It thus became necessary for their Lordships to decide whether the reversioner's suit was a representative suit or not. The Full Bench decision of this Court in *Chiruvolu Funnamma v. Chiruvolu Perrozu*(1) was cited on the one side and *Sakyahani Ingle Rao Sahib v. Bharani Bozi Sahib*(2), *Govinda Pillai v. Thayammal*(3), *Chinna Veerayya v. Lakshmi Narasamma*(4) and *Arunachalam v. Vellaya*(5) were referred to on the other. Their Lordships decided that in suits to question adoptions and alienations the reversioner sues in a representative capacity on behalf of himself and other reversioners.

Their Lordships observed that the respondents relied on certain decisions of the Madras High Court which, they contended, established that adjudications in suits brought by next reversioners questioning transactions by the widow during her lifetime were not res judicata as against contingent reversioners, and that consequently

"on the death of the presumptive reversioner the others have each, in order of succession, a separate right of suit, and cannot claim to prosecute an action brought by the deceased reversioner as they do not derive their right through him."

This contention was rejected by their Lordships. They considered the representative character of the reversioner's suit, whether to question an alienation or an adoption, so clear that the test of res judicata applied in some of the decisions of this Court could be treated as irrelevant, and they therefore abstained from any pronouncement on these decisions. If, however, the suit be a representative suit, the idea that the decision may not be binding as between the parties represented in the suit and their opponents appears to me almost to involve a contradiction in terms. I have sought to show that the decisions referred to proceed on inferences drawn from certain observations in Privy Council cases which were rather in the nature of reservations on points not before Court than of *obiter dicta*, and that even

(1) (1906) I.L.R., 29 Mad., 340 (F.B.). (2) (1904) I.L.R., 27 Mad., 588.

(3) (1905) I.L.R., 28 Mad., 57. (4) (1914) I.L.R., 27 Mad., 406.

(5) (1912) 23 M.L.J., 719.

considered as *dicta* they do not express the considered opinions of their Lordships with reference to the representative character of these suits. Now that the representative character of the suit is established, we must, I think, hold the decision binding on those who are represented in it whether born or unborn.

It, also, follows I think that, as pointed out by the Full Bench, the cause of action of all the reversioners is the same and arises on the date of the alienation, and that the question dealt with in *Rani Anand Kunwar v. The Court of Wards*(1), as to when a remote reversioner is to be allowed to sue is merely a question as to which reversioners should have the conduct of the suit which is instituted on a cause of action common to all.

In the opinion of the Full Bench, though the point did not arise for decision, having regard to the fact that the presumptive reversioner sues not on his own behalf alone but on behalf of all other possible reversioners as well, the language in which the suit is described in column (1) of article 125 is large enough to include a suit in which, owing to exceptional circumstances, a reversioner other than the nearest reversioner is allowed to be the plaintiff and have the conduct of the suit, and in this view the article applies to all suits by reversioners to question alienations during the widow's lifetime.

If this be not so, they were of opinion that article 120 must be applied, and that, as one cause of action arises to the whole body of reversioners on the date of alienation, and they have no separate causes of action, their right to sue must be deemed to accrue within the meaning of article 120 on the date of the alienation. This would appear to be in accordance with the policy of the legislature, which might on the one hand have allowed the nearest reversioners to sue for declaratory relief at any time during the lifetime of the widow, or on the other hand have prescribed that the adoption or alienation must be questioned if at all within a fixed period from the date of its taking place, but has taken a middle course and, whilst allowing the reversioners to wait if they choose, until the widow's death, has permitted them to sue during her lifetime for declaratory relief within a prescribed period only. The object no doubt was to afford an inducement to bring these declaratory suits, which are

(1) (1881) I.L.B., 6 Cal., 764 (P.C.).

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In this view, the present suit is barred, but as there are decisions the other way, at least one of which is subsequent to the decisions of the Privy Council in *Venkatanarayana Pillai v. Subbammal*(1), and in *Janaki Ammal v. Narayanasami Aiyer*(2). I would refer to Full Bench the question whether the present suit is barred by limitation.

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SASTRIYAR, J. referred to the Full Bench.

ON THIS REFERENCE:—

V. Ramadas for the appellants.—The suit is barred by limitation. There is only one cause of action for all the reversioners born and to be born, to question the alienation and if for any reason the existing reversioners neglect to sue in time, after-born reversioners also are barred by limitation. A reversioner's suit to set aside an alienation is only a representative suit on behalf of all. I rely on the arguments urged in favour of this view in the Order of Reference. See *Venkatanarayana Pillai v. Subbammal*(1), *Janaki Ammal v. Narayanasami Aiyer*(2), *Chiruvolu Punnamma v. Chiruvolu Perrajau*(3), *Rangamma v. Narasimhachariyulu*(4), *Raja of Palghat v. Raman Unni*(5), *Aiya Ramalinga Mudali v. Arumuga Mudali*(6), *Chand Kour v. Partab Singh*(7), *Venkata Row v. Tuljaram Row*(8), *Bapanna Venkatasubbarayudu v. Bapanna Ratnamma*(9) and *Muthusami Mudaliar v. Masilamani Mudaliar*(10).

P. Narayanamurthy for the respondents:—The suit is not barred. Each reversioner has an independent right; *Venkatanarayana Pillai v. Subbammal* at page 414(1) and *Rani Anand Kunwar v. The Court of Wards*(11). These show when a

- (1) (1915) I.L.R., 38 Mad., 406 (P.C.).
 (2) (1916) I.L.R., 39 Mad., 634 at p. 638 (P.C.).
 (3) (1906) I.L.R., 29 Mad., 390 at pp. 409 and 411 (F.B.).
 (4) (1916) 31 M.L.J., 26. (5) (1918) I.L.R., 41 Mad., 4 at p. 17.
 (6) (1917) 33 M.L.J., 471.
 (7) (1889) I.L.R., 16 Cal., 98 at p. 101 (P.C.).
 (8) (1917) M.W.N., 30. (9) (1910) 8 M.L.T., 121.
 (10) (1909) 20 M.L.J., 49 at p. 65.
 (11) (1881) I.L.R., 6 Cal., 764 (P.C.).

remote reversioner gets his right to sue. The cause of action for all reversioners may be one but the right of each to sue may arise at different times; *Govinda Pillai v. Thayammal*(1), *Veerayya v. Gangamma*(2), *Venkata Row v. Tuljaram Row*(3) and *Arula Guruvaya v. Arula Venkatannah*(4).

[Court.—How does this case differ from one where a whole community has a right?]

There each of them has an independent right to sue on the same date Reference was made to *Jhandu v. Tarif*(5) and *Abinash Chandra Mazumdar v. Harinath Shaha*(6). Article 125 does not apply to this case as on the date of alienation my client was not born and could not have sued; the first and the third columns of the article must be read together; see the judgment of ABDUR RAHIM, J., in *Seeti Kutti v. Kunhi Pathumma*(7). Even at the time of this suit the plaintiff was a minor.

V. Ramadas as was not called on to reply.

The Court expressed the following OPINIONS:—

SADASIVA AYYAR, J.—The facts out of which the question of law referred to this Full Bench arises may be shortly stated thus: Butchayya, a Hindu, died in 1890. The second defendant, his mother, inherited his properties with the rights and powers of a female heir. She sold the plaint properties in 1891 to the third defendant. The then presumptive reversioner, plaintiff's witness No. 1, who was entitled at once to sue for a declaration on behalf of the whole body of successive presumptive reversioners (including the third defendant) failed to bring such a suit within the twelve years allowed to him by article 125 of the Limitation Act, that is, within November 1903. The third defendant who was benefited by the second defendant's alienation would, of course, not bring any such suit. Meanwhile, the plaintiff and the first defendant (minors even at the date of this suit) were born to Butchayya's step-sisters and they on their birth became nearer presumptive reversioners than even plaintiff's witness No. 1. The plaintiff having been born in July 1910, brought

- (1) (1905) I.L.R., 28 Mad., 57. (3) (1917) M.W.N., 30.
 (2) (1913) I.L.R., 36 Mad., 570. (5) (1915) I.L.R., 37 All., 45 at p. 48 (P.C.).
 (4) (1913) M.W.N., 383. (6) (1905) I.L.R., 32 Cal., 62.
 (7) (1917) I.L.R., 40 Mad., 1040 at pp. 1053, 1054.

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this suit to avoid the alienation, in October 1915 within six years of his birth. The short question referred to the Full Bench is whether this suit is barred by limitation.

To enable us to solve this question, arguments were addressed to us on the following questions:—

1. (a) When a Hindu widow makes an alienation voidable against the ultimate reversionary heir at her death or remarriage, does a single cause of action for a declaration of its invalidity arise at once to be availed of by the next presumptive reversioner by bringing a suit on behalf of the whole body of successive reversioners till the opening of the reversion, and, in case the next presumptive reversioner by collusion or other act precludes himself from availing himself of that single cause of action, to be availed of by the next reversioner in the order of succession and so on, the suit whenever brought being based on the same single cause of action?
- (b) Is article 125 the only article applicable to the suit based on such single cause of action, if 1 (a) is answered in the affirmative, or
2. do several causes of action arise at different times to several reversioners when each preceding reversioner has lost his right to bring and conduct such a suit through collusion or other similar acts? (I shall use the word 'reversioner' for brevity as including a set of reversioners standing on an equal footing as among themselves).
3. (a) If each successive reversioner gets a new cause of action, does that cause of action spring up not only when the previous reversioner loses his right by collusion, etc., positive act, but also when such right is lost by laches and consequent bar by limitation?
- (b) If (2) and 3 (a) are answered in the affirmative, what is the period of limitation, and what is the article of the Limitation Act governing suit by the succeeding reversioner?
4. Where a new reversioner comes into being for the first time by natural birth or by adoption (a) who gets preference by modern Hindu Law in respect of the

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status of presumptive reversionership over other persons who till then formed the body of reversioners or (b) who becomes entitled to sue by reason of collusion, etc. [see questions 2 and 3 (a)], does a fresh cause of action arise in the new reversioner so coming into being as above entitling him to bring a suit for declaration of the invalidity of the alienation?

5. If (4) is answered in the affirmative, what is the period of limitation for the suit by the new reversioner and what is the governing article of the Limitation Act?

(It will be seen from the facts of this case that it falls under the heading 4 above and that only questions 4 and 5 directly arise in this case.)

My Lord the Chief Justice in his well considered ORDER OF REFERENCE (if I may be permitted to say so with respect) expresses his strong inclination to answer questions 1 (a) and 1 (b) in the affirmative (that is, that there is only one cause of action arising on the date of the alienation to be availed of on behalf of all the body of reversioners in a single representative suit and that that cause of action is governed by article 125) and to answer questions 2 to 4 in the negative. I entirely agree with the said conclusions and the reasons given for such conclusions. I shall shortly consider the decisions of this Court from *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(1), downwards in which observations inconsistent with the above conclusions occur. Those decisions are *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(1), *Govinda Pillai v. Thayammal*(2), *Veerayya v. Gangamma*(3), *Chinna Veerayya v. Lakshmi Narasamma*(4), *Arunachalam v. Vellaya*(5), *Narayana v. Rama*(6) and *Venkata Row v. Tuljaram Row*(7).

As regards *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(1), *Arunachalam v. Vellaya*(5) and *Chinna Veerayya v. Lakshminarasamma*(4), the law laid down in those three cases to the effect that when the next presumptive reversioner who has brought a suit to set aside an alienation dies, the suit abates finally and the next man entitled to stand as presumptive

(1) (1904) I.L.R., 27 Mad., 588. (2) (1905) I.L.R., 28 Mad., 57.
(3) (1913) I.L.R., 36 Mad., 67J. (4) (1914) I.L.R., 37 Mad., 408.
(5) (1912) 23 M.L.J., 719. (6) (1915) I.L.R., 38 Mad., 396.
(7) (1917) M.W.N., 30.

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reversioner cannot carry it on but ought to bring a fresh suit of his own, has been directly overruled by the decision of their Lordships of the Privy Council in *Venkatanarayana Pillai v. Subbammal*(1), the dicta laid down in which have been confirmed by their Lordships in *Janaki Ammal v. Narayanasami Aiyer*(2) and though the above three cases of this Court were quoted before their Lordships by the counsel for the respondents in *Venkatanarayana Pillai v. Subbammal*(1) to support his contentions, he was unsuccessful.

In *Govinda Pillai v. Thayammal*(3), the learned Judges answered the question 3 (a) to the effect that even the loss of the right to sue by the bar of limitation through the laches of previous sets of reversioners would vest a new cause of action in a reversioner of a succeeding class, that if the latter was not in existence at the date of alienation, a new cause of action vested in him at his birth (question 4) that he had six years under article 120 from when his cause of action arose and if that six years expired before he attained majority, he was entitled under section 7 of the Limitation Act to three years from his attaining majority to bring his suit. I am convinced in my mind that the reasons given for the conclusions in *Govinda Pillai v. Thayammal*(3) decided by DAVIES and BENSON, JJ., are inconsistent with the reasons given in the unanimous and fully considered opinion of the Full Bench of five Judges of this Court (including the same learned Judges, DAVIES and BENSON, JJ.) in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(4), Sir S. SUBRAHMANYA AYYAR as the OFFICIATING CHIEF JUSTICE being a member of the Bench which made the reference to the Full Bench consisting of SIR ARNOLD WHITE, C.J., SUBRAHMANYA AYYAR, DAVIES, BENSON and MOORE, JJ. The Full Bench case in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(4), was no doubt a suit by a reversioner to set aside an adoption, while that in *Govinda Pillai v. Thayammal*(3) was one to set aside an alienation by the widow, but as pointed out in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(4) and by their Lordships of the Privy Council in *Venkatanarayana Pillai v. Subbammal*(1) there

(1) (1915) I.L.R., 38 Mad., 406 (P.C.). (2) (1916) I.L.R., 39 Mad., 634 (P.C.).
(3) (1905) I.L.R., 28 Mad., 57.
(4) (1906) I.L.R., 29 Mad., 390 at pp. 400 and 410 (F.B.).

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is no distinction in principle between the two kinds of suits "as regards the position of the plaintiffs." Both *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(1) and *Govinda Pillai v. Thayammal*(2) are referred to in the Full Bench decision in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(3), both in the arguments and in the judgment at pages 399 and 400 and 410 and though it is not expressly said that they are dissented from, the whole reasoning (see pages 400 and 410) indicates in my opinion that they were not approved of.

As regards *Veerayya v. Gangamma*(4), I agreed with SUNDARA AYYAR, J., in the judgment pronounced by him that notwithstanding *Chiruvolu Punnamma v. Chiruvolu Perrazu*(3) the decisions in *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(1) and *Govinda Pillai v. Thayammal*(2) were still good law because there were several dicta of the Privy Council to the effect that one reversioner did not claim through another as regards suits to set aside alienations. We thought that those dicta constrained us to decide cases of suits to set aside alienations differently from the way in which they ought to be decided if the principles enunciated in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(3) were logically applied.

In *Narayana v. Rama*(5) there are certain obiter observations by me approving of *Veerayya v. Gangamma*(4) the decision itself in *Narayana v. Rama*(5) being one dismissing the suit on the ground that the plaintiff—reversioner was estopped from questioning the alienations.

In *Venkata Row v. Tuljaram Row*(6) there is again an obiter dictum (at page 36) that a minor not born on the date of an alienation gets an independent cause of action from the date of his birth notwithstanding that there were nearer reversioners who by collusion with the widow or by having allowed 12 years to elapse from when they were entitled to come in as plaintiffs did not or could not attack the alienation. The suit in that case also was dismissed on a wholly independent ground, namely, that the Courts had a discretion to grant the declaratory relief and that that case was not a proper one to grant such relief.

(1) (1904) I.L.R., 27 Mad., 588. (2) (1905) I.L.R., 28 Mad., 57.
(3) (1906) I.L.R., 29 Mad., 390 at pp. 400 and 410 (F.B.).
(4) (1913) I.L.R., 38 Mad., 570. (5) (1915) I.L.R., 38 Mad., 396.
(6) (1917) M.W.N., 30.

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As regards the dicta of the Privy Council which were relied on in several cases in the other High Courts (I shall not refer to those cases in detail) and in this Court even after the decision in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(1), I entirely agree with my lord in his observations about them in his Order of Reference; and as I am not likely to add to the cogency and the strength of the arguments found in the said observations by putting them in my own language, I shall certainly not attempt to do so. Considering the outstanding fact of

"the identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights" see *Venkatanarayana Pillai v. Subbammal*(2).

I think it is impossible to hold that several suits could legally be maintained founded on such an identical interest and involving the same questions of law and fact so far as the dispute about the validity of an alienation is concerned. The inconveniences of holding otherwise have been cogently pointed out in the Full Bench decision in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(1). The act complained of is "to the common detriment" of the body of reversioners as a whole just as the relief sought is intended for their common benefit: see *Venkatanarayana Pillai v. Subbammal*(2). If several suits are allowed to be brought so that the matter once sued on with the then presumptive reversioner as plaintiff could be litigated over and over again "to the detriment and injury of all parties, the position of affairs would become almost intolerable" as when the adjudications in favour of or against a Karnavan as such were denied before *Vasudevan v. Sankaran*(3), to have a binding character with reference to the other members of the tarwad and led to such a position. The justice and expediency of making adjudications in such cases final as far as possible, is manifest, and if the whole existing body of reversioners both near and remote can be made parties (as has been now settled) and the conduct of the suit can be allowed by the Court to any of them on sufficient grounds [just as it was taken away on appeal from the plaintiff and given to other worshippers in the *Kamudi temple case*(4)], there is no injustice whatever in applying article 125, so far as a suit for the declaration of the

(1) (1906) I.L.R., 29 Mad., 390 at pp. 400 and 410 (F.B.).

(2) (1915) I.L.R., 38 Mad., 406 (P.C.). (3) (1897) I.L.R., 20 Mad., 129.

(4) (1908) I.L.R., 31 Mad., 236 (P.C.).

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invalidity of an alienation by a female heir is concerned and in further holding that there should be only one representative suit brought in the interest of all the reversioners, though the Court in its discretion will, as a rule, not allow a remoter reversioner to institute and have the conduct of such a suit except on sufficient grounds (such as collusion, acts amounting to estoppel, gross laches, risk of the disappearance of necessary evidence, reasonable danger of the right to sue becoming barred by limitation if the remoter reversioner is not allowed to institute the suit and so on).

If such is not the rule, article 125, evidently intended to discourage belated declaratory suits, might as well be removed from the statute of limitations. If the second contingent reversioner can wait for nearly six years after the first presumptive reversioner is barred, the third contingent reversioner again for nearly six years after the second is barred and so on and if newly born reversioners can wait till nearly three years after each attains majority to bring a suit notwithstanding that living reversioners failed during fifty years after the alienation to bring such a suit or even failed in suits brought by them before the new plaintiff was born, the object of article 125 is almost wholly defeated.

The argument based on the supposed injustice of barring a man's right of suit before he is even born does not impress me. If the unborn future members of a whole community (say a Vadagalai community, as in the illustration suggested by my learned brother OLDFIELD, J., in the course of the argument) could be barred from the exercise of a vital mode of worship by limitation owing to the long established adverse acts of a rival community, I do not see why the failure of existing members of a body to bring a representative suit for the benefit of unborn members also should not bar such unborn members: see also *Muhammad Amir v. Sumitra Kuar*(1).

It must be remembered that even the very first presumptive reversioner has only a possibility of succeeding or *spes successionis*: *Bahadur Singh v. Mohar Singh*(2) and *Amrit Narayan Singh v. Gaya Singh*(3). In conceding a right of suit to persons

(1) (1914) I.L.R., 36 All., 424.

(2) (1892) I.L.R., 24 All., 94 (P.C.).

(3) (1912) 34 M.L.J., 298 (F.C.).

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possessing an interest of this defeasible character, the case law provided a very exceptional remedy and (if I may be permitted to say so with respect) an anomalous remedy. It must also be remembered that under the more ancient and liberal Hindu Law, a wife as heir of her husband succeeding as his remaining half and a mother succeeding to her son who was her own flesh and blood had full and absolute rights of ownership; and it is only mediæval pious text-interpolators and reactionary commentators with low views of women's position and morals that took advantage of texts intended for the chivalrous protection of the properties of women by men, a vedic text about women being *nirindryas* (whose meaning was twisted and perverted beyond recognition) and mere moral precepts to widows as to the conduct of noble *Sadhwees* that had made a female heir almost a trustee for the future and unascertained reversioner who might happen to be the heir of her husband or her son at her death instead of making the inheritance pass to her own heirs. I confess that I have no sympathy whatever with these problematical reversioners and unless the law compels me to do so, I am not inclined to unduly favour them. It was argued that because the heir at the death of the widow is allowed under article 141 a period of twelve years from her death to recover possession of the alienated property, there is no harm in allowing numerous declaratory suits also during her lifetime to different persons without any reference to the lapse of time since the date of alienation. Apart from the difference between a declaratory suit and a suit for possession, the alienee has in a suit for possession brought against him by the ultimate heir after several years the advantage of the rulings of the Privy Council that the evidence of the necessity for and of the inquiries made about the necessity for a longstanding alienation should be considered indulgently in favour of the validity of the alienation.

Lastly it seems to me that it is a glaring anomaly that while an alienee from a mortgagee or even a trustee is protected after twelve years from the date of the alienation under article 134, while an alienee even from a minor's guardian is protected after three years from the date of the minor's attaining majority under article 44, when even a son supposed to have equal rights with his father in the ancestral property if he is born after an alienation by his father cannot acquire by birth any right to attack

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that alienation, a reversioner with a *spes successionis* and not born till several years after an alienation by a female heir should have twelve years from the date of the death of the Hindu female heir (who has certainly greater rights of ownership than a guardian or a trustee) to sue for possession of a property alienated by her, say more than sixty years before her death. I am wholly unable to understand why the legislature should have been so very solicitous about such remotely contingent interests. If the legislature decides against a recent proposal made in the Local Legislative Council to allow Courts to grant sanctions to alienations by widows so as to make the title of the alienee thereafter unquestionable, I hope that article 141 would at least be modified by the addition of a clause "or 24 years from the date of the alienation not declared invalid by decree in an appropriate suit; whichever term first expires." The first column of the article might also be made clear by confining its operation to Muhammadans governed by Hindu law through custom. In *Garikipati Paparayudu v. Rattamma*(1). I stated

"the very object of allowing a suit by a contingent reversioner has been unfortunately, if I may be permitted to say so, defeated to a very large extent by the decisions which are binding on us to the effect that a decree passed in favour of or against such a reversioner is not binding on a remoter reversioner. I might be permitted to hope that the legislature would see fit to enact that the decree in a suit *bona fide* brought and litigated by the then nearest reversioner is binding on the remoter reversioners."

I am glad that the recent pronouncement of the Privy Council in *Venkatanarayana Pillai v. Subbammal*(2), has the effect of overruling the decisions which I referred to in the above passage. But so far as suits for possession on the death of the female heir are concerned, the assistance of the legislature is still necessary.

In the result, I would answer the questions (1a) and (1b) formulated by me in the affirmative, and questions (2) and (4) in the negative. Questions (3a), (3b) and (5) do not arise on these negative answers to the other questions. As regards the question directly referred to us, I agree with the answer in the affirmative suggested in the judgment of my Lord.

(1) (1912) M.W.N., 1176 at p. 1179. (2) (1915) I.L.R., 38 Mad., 406 (P.O.).

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COUTTS TROTTER, J.—The history of the case law on this subject in this Presidency has been so exhaustively reviewed by the learned Chief Justice in his ORDER OF REFERENCE that no useful purpose would be served by covering the same ground. The only point we have really to determine is whether the decision of the Privy Council in *Venkatanarayana Pillai v. Subbammal*(1), concludes the question referred to us. That decision was cited in a later decision of the Privy Council *Janaki Ammal v. Narayanasami Aiyer*(2), as expounding the law on the subject and establishing the doctrine that a reversionary heir appealing to the Court for the conservation of the property does so in a representative capacity. In *Venkatanarayana Pillai v. Subbammal*(1) a reversioner brought a suit to set aside an adoption by a widow. Pending an appeal to His Majesty in Council he died. The Privy Council decided that his grandson might be brought on the record as appellant in his place and that the appeal did not abate by reason of the death of the original appellant. The decision was based on the express ground that the suit was a representative one and enured for the benefit of the whole class of reversioners. It seems to me impossible to escape from the logical conclusion that, if it enures for the benefit of all, it must equally enure to the detriment of all. As the learned Chief Justice says in his ORDER OF REFERENCE, to hold otherwise would almost be a contradiction in terms. One sentence in their Lordships' judgment was pressed upon us by Mr. Narayanamurthi as indicating that their Lordships did not mean to question the right of each reversioner as he became nearest in succession to litigate his own claims unhampered and unaffected by anything done or left undone by his predecessors in the line of succession. The sentence appears on page 414 of *Venkatanarayana Pillai v. Subbammal*(1) and is worded as follows:—

"The right to relief on the part of the reversioners exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body."

The right to relief in the sense of the right to obtain possession of the property no doubt exists in order of succession, but

(1) (1915) I.L.R., 38 Mad., 406 (P.C.). (2) (1916) I.L.R., 39 Mad., 634 (P.C.).

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I take their Lordships' judgment to mean that the right to relief of a declaratory nature against the transaction impugned arises simultaneously and jointly for all the reversioners at the moment the act is done. It follows in my judgment that if a reversioner who is competent to do so challenges an alienation or an adoption unsuccessfully or fails to challenge it within the period allowed by the law of limitation, the result is binding on his successors in the reversion. The *argumentum ab-inconvenienti* is pressed upon us, that so to decide would open the door to fraudulent and collusive actions between the widow and the nearest reversioner bartering away the rights of subsequent reversioners. I think the answer to be that proof of such fraud and collusion would at once invalidate the result which was sought to be achieved. It appears to me that the hardship of allowing an alienee or an adopted son to be harassed by an endless series of suits by successive reversioners each raising the same point and each more difficult to meet with the lapse of time is infinitely greater.

The result is that in my opinion, the present suit is barred; and that *Govinda Pillai v. Thayammal*(1), *Veerayya v. Gangamma*(2), *Narayana v. Rama*(3) and *Venkata Row v. Tuljaram Row*(4), are no longer law.

AYLING, J.—I would answer the question in the affirmative, and concur in the judgment of COUTTS TROTTER, J. AYLING, J.

OLDFIELD, J.—I desire to express no opinion except on the question directly referred to us; and I would answer it in the affirmative for the reasons given by COUTTS TROTTER, J. in his judgment. OLDFIELD, J.

SESHAGIRI AYYAR, J.—The case law is fully discussed in the ORDER OF REFERENCE made by the learned Chief Justice. I entirely agree with the conclusion he has come to. I shall only refer to two or three cases and to the Limitation and the Specific Relief Acts to make my position clear. It is not denied that the object of a suit by a reversioner for a declaration either that the adoption is invalid or that the alienation is void beyond the lifetime of the alienor, is to perpetuate testimony. The party

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(1) (1905) I.L.R., 28 Mad., 57.
(3) (1915) I.L.R., 33 Mad., 396.

(2) (1913) I.L.R., 36 Mad., 570.
(4) (1917) M.W.N., 30.

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suing gets no immediate benefit. It very often happens that the ultimate benefit of the declaration is enjoyed by somebody else.

It is clear therefore that the nature of the suit is to obtain a pronouncement not for the personal benefit of the plaintiff nor for obtaining any immediate relief to himself. The right of suit is given by section 42 of the Specific Relief Act which has been framed according to Mr. Collett, once a judge of this Court and who has written a commentary upon the Act, upon the basis of the Scotch Law. According to the English Law a declaration of right was obtainable only as introductory to some other relief which the Chancery Court proceeded to award: see *Robert Fischer v. Secretary of State for India in Council*(1). But apparently under the Scottish action of declarator, declaratory actions were entertained for making a matter clear which was then doubtful although no immediate relief was expected or granted. Very likely it is this principle of the law of Scotland that has been accepted by the framers of the Indian Code. It is clear that the right of suit is given only with a view of dispelling a cloud which may attach to the title when the life-estate ends. The fact that in India widows in possession of their husband's properties have been found to alienate them in favour of strangers to the prejudice of the possible claimants at the end of a long period of suspense might have induced the legislature to give to the reversioners a right of suit, while the evidence was still available and fresh, to contest the action of the widow, leaving it to the actual heir on the death of the widow to avail himself of that relief before taking possession of the property. *Prima facie* therefore it may be taken that the right agitated is not an individual right but a corporate right.

Mr. Narayanamoorthi strongly relied upon the course of decisions beginning with *Rani Anand Kunwar v. The Court of Wards*(2) for the proposition that the right possessed by each reversioner is a several or individual right and not a common right. In my opinion these decisions do not help the learned vakil. What was decided in these cases was that if the immediate or presumptive reversioner does not sue to perpetuate the testimony a remoter reversioner can institute such a suit. It

(1) (1899) I.L.R., 22 Mad., 270 (P.C.). (2) (1881) I.L.R., 6 Cal., 764 (P.C.).

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must be remembered that in such suits the presumptive reversioner is almost invariably impleaded as a defendant. The suit is really one brought on behalf of the person who is unwilling to litigate the matter. We are familiar with cases wherein a trustee of a temple does not take action when he should and his co-trustee or the beneficiary, as the case may be, brings a suit impleading the unwilling trustee as a defendant. In such cases it is not an individual right possessed by the co-trustee or the beneficiary that is being contested in Court; it is the right belonging to the trust itself that is really litigated. In England there are cases where the *cestui que trustent* have been compelled to use the name of the trustee in suits brought by the beneficiaries. Similarly a suit brought by a remoter reversioner which ought to have been instituted by the presumptive reversioner is not an action which is special to himself but is one in which he is interested along with the defaulting reversioner. Therefore I do not think that the cases from *Rani Anand Kunwar v. The Court of Wards*(1) leading up to *Jhandu v. Tarif*(2) are any authority for the proposition that each reversioner has a separate right.

There can be no doubt that the cause of action is one and the same. But, what was strenuously argued was that the right of suit upon the single cause of action is different in the case of each reversioner. Reliance was placed for this proposition upon a sentence in the judgment of the Judicial Committee in *Venkatanarayana Pillai v. Subbammal*(3). At page 414 their Lordships observe:

"The right to relief on the part of the reversioners exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body."

I do not understand this sentence to lay down that the suit for declaration is not in respect of a right common to a body of persons. The reference to rights existing severally may be explained as indicating that the remoter reversioners can themselves be plaintiffs; "the order of succession" only suggests that it is not every remote reversioner that can come to Court

(1) (1881) I.L.R., 6 Cal., 764 (P.C.). (2) (1915) I.L.R., 37 All., 45 (P.C.).
(3) (1915) I.L.R., 38 Mad., 406 at 414 (P.C.).

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without asking persons before him to undertake the task of getting their common right vindicated. I do not think that this sentence can be construed in the way the learned vakil contended for.

The decision of the Committee on the other hand lays down definitely that the reversioners as a body have a common interest and that the right litigated is a joint right.

It is stated in page 412:

"It is the common injury to the reversionary rights which entitles the reversioners to sue."

And again at the top of page 413 it is stated:

"There remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights."

The next point for consideration is, granted it is a joint right and that any conclusion come to in a suit brought by one of the reversioners will be binding upon the others also, does it follow that the failure to institute a suit by the reversioners precludes others from suing for such a relief. Section 11, explanation 6 to the Civil Procedure Code, enunciates the principle of *res judicata* where action has been brought to vindicate a right common to the plaintiff and to others. Notwithstanding the statement in the judgment of the Privy Council in *Venkata-narayana Pillai v. Subbammal*(1) that a consideration of the question of *res judicata* is irrelevant, I hold with the learned Chief Justice that it is impossible to resist the conclusion that if the right litigated is a common right and if that litigation has been honestly conducted the other reversioners are affected by the bar of *res judicata*. This is the logical result of the decision of the Judicial Committee. The next step may be reached by the application of the principle contained in section 7 of the Limitation Act. The principle of that section is that if there are some persons in existence who are adults who could have safeguarded the common rights of themselves and of others similarly situated, the failure of the persons who are to litigate the right will start the cause of action not only against themselves but also against persons in similar circumstances. In

(1) (1915) I.L.R., 38 Mad., 406 (P.C.).

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my opinion the general principle of law implied in this section is applicable to the case of reversioners,

The last argument of Mr. Narayanamurthi related to the construction of article 125 of the Limitation Act. In terms, that article applies only to the presumptive reversioner. I was rather inclined to think that the suggestion contained in the Full Bench decision in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(1) at the top of page 409 that the words:

"Hindu . . . who if the female died,"

etc., in the article would comprehend for the purposes of the article, a remote reversioner allowed by law to sue in his stead, was somewhat far-fetched; but it seems to me on further consideration that if a remote reversioner has only the conduct of the litigation not for himself but on behalf of the body of reversioners and for the benefit of the person who is entitled to recover when the succession opens, there is nothing wrong in holding that the article is applicable not only to the presumptive reversioner but also to the remote reversioners as well. If my suggestion that the remote reversioner is really suing in the name of the presumptive reversioner is right, the article is clearly applicable. The proper way to look at these suits is to regard the plaintiff reversioner as being entrusted with the conduct of litigation on behalf of a body of persons: ordinarily, the nearest reversioner is the person most competent to conduct it: he has the right of preference; but circumstances may show that the position of *dominis litis* should be taken away from his hands and should be entrusted to another. That in my opinion is the true principle underlying suits by remote reversioners. At present I am rather doubtful whether the residuary article 120 is applicable to suits by remote reversioners. There is an observation about it in *Venkata Row v. Tuljaram Row*(2) but as that decision has gone up to the Privy Council, it is not necessary to discuss the question any further.

Mr. Narayanamurthi then argued that even supposing article 125 applied to remote reversioners, it cannot apply to a person who was not in existence on the date of the alienation. I am

(1) (1906) I.L.R., 29 Mad., 390 (F.B.).

(2) (1917) M.W.N. 30.

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inclined to agree with him in this contention. The articles in the Limitation Act must be construed reasonably, and if a cause of action accrues at a time when a person was not born, he must not be affected by it. But I do not think that that conclusion really affects the matter. The law must be taken to have intended to provide only for cases of persons who were in existence on the date of the alienation or adoption.

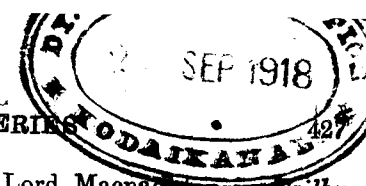
As I stated at the outset, the main object is to perpetuate testimony and that object can be gained ordinarily by persons who were alive at the date of the alienation and who were capable of bringing before the court circumstances showing that the alienation is not binding. The rights of the actual heir are not jeopardised. It looks from the language of article 125 as if the legislature considered it sufficient to give this extraordinary relief of declaration only to persons alive on the date of the alienation. The decision in *Veerayya v. Gangamma*(1) is exactly in point and I think it was rightly decided. The *obiter dicta* contained in the judgments of the Judicial Committee in the various cases referred to by Mr. Narayanamurthi have been explained away by the learned Chief Justice, and I do not wish to add anything to that discussion. I would, for the reasons given, answer the question in the affirmative.

N.R.

(1) (1918) I.L.R., 36 Mad., 570.

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Paul's(1), which is referred to by Lord Macnaghten in *Tailby v. The Official Receiver*(2), where a covenant in a lease to renew for ninety-nine years which was lawful when made was rendered illegal by subsequent statutes, it was held by the House of Lords, that, as the statutes permitted leases for forty years, specific performance by executing a fresh lease for forty years might be decreed, but in that case the original agreement was lawful, and it does not cover the present case where the transaction was illegal at the time it was entered into. As regards the second question my answer is that the transfer was clearly illegal and inoperative when it was made and did not become operative on the subsequent enfranchisement of the lands.

SADASIVA AYYAR, J.—I agree with my Lord in the answers to be given to the two questions referred to us.

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WALLIS, C.J.

KUMARASWAMI SASTRIYAR, J.—I agree.

KUMARA-
SWAMI
N.R. SASTRIYAR, J.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Ayling, Mr. Justice Coutts Trotter and
Mr. Justice Seshagiri Ayyar.

PANDIRI VEERANNA (PLAINTIFF), APPELLANT,
v.

GRANDI VEERABHADRASWAMI alias VEERABHADRU DU
(SECOND DEFENDANT), RESPONDENT.*

1917,
September
28,
October 1 and
1918
February 20.

Limitation Act (IX of 1908), ss. 21 (2), 19 and 20—Partnership—Acknowledgment of liability or payment by one partner, when binding on others.

Direct evidence that one of several partners or co-contractors had authority to acknowledge liability or make payments so as to save limitation as against his partners or co-contractors is not necessary, but such authority can be inferred from surrounding circumstances such as the position of other co-contractors or partners.

Valasubramania Pillai v. S. V. R. R. M. Ramunathan Chettiar (1909) I.L.R. 32 Mad., 421 and *Shaik Mohideen Sahib v. The Official Assignee of Madras* (1912) I.L.R., 35 Mad., 142 at p. 145, considered.

(1) (1728) 1 Bro. P.C., 240.

(2) (1888) 13 A.C., 523 at p. 552.

* Appeal No. 343 of 1916 (F.B.).

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v.
VEERA-
BHADRA-
SWAMI.

APPEAL against the decree of P. C. TIRUVENKATA ACHARIYAR, the Additional Temporary Subordinate Judge, Rajahmundry, in Original Suit No. 3 of 1916.

This was a suit brought in December 1914 for Rs. 11,000 due on transactions carried on between the plaintiff and the defendants Nos. 1 and 2 (father and son) under an agreement that the plaintiff was to advance the necessary capital at 12 per cent interest to the defendants to enable them to purchase timber on their own account and to forward the same to the plaintiff for sale at 2 per cent commission. The defendants constituted a joint Hindu family and were carrying on the trade as a joint family concern and the account of the plaintiff for several years showed the names of both the defendants as the parties liable. There were several periodical settlements of accounts and acknowledgments of liability by both the defendants up to the year 1910. In the year 1913 the first defendant alone settled accounts with the plaintiff and executed in his favour a promissory note for the balance found due and also gave a letter to the plaintiff acknowledging the joint liability of himself and his son (the second defendant) for Rs. 9,855. On these facts the plaintiff prayed for a decree against both the defendants for Rs. 11,000. The first defendant was *ex parte*. The second defendant contended *inter alia* that he had no connexion with the timber trade, that he was carrying on separately a cloth trade, that at any rate his father had no authority to acknowledge liability on his behalf and that the settlement, acknowledgment of liability, and the promissory note signed by his father were not binding on him. The Subordinate Judge held that the timber trade was an ancestral family trade of both the defendants, that both of them were liable to pay the plaintiff Rs. 11,000 from out of their family ancestral property and that the first defendant alone and not the second defendant was personally liable for the claim as the second defendant was not a party to the settlement, promissory note and the letter of acknowledgment given to the plaintiff by the first defendant.

The plaintiff preferred this appeal for a personal decree against the second defendant also on the ground that the settlement, promissory note and acknowledgment made by the father in 1913 bound the second defendant also.

ON THIS REFERENCE—

V. Ramadoss for appellants.—The authority to acknowledge liability, to pay or settle so as to bind partners or co-contractors need not be expressed but may be implied. Implication may be from other evidence in the case, such as that such acts are usually done by the partners: see *Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar*(1) and *Shaik Mohideen Sahib v. Official Assignee of Madras*(2). In section 21 (2) of the Limitation Act the words are “by reason *only* of payment;” i.e., mere *payment* alone is not such evidence. The case of *K. R. V. Firm v. Seetharamaswami*(3) is *inclined* to the opinion that such authority can be inferred from other evidence. There is really no inconsistency between all the three Madras cases. Compare section 251 of the Contract Act. Such authority can be implied if the partner had authority to borrow: *Muthuswami Nadan v. Sankaralingam Chetty*(4) and *Chidambaram Chetti v. Ramaswami Chetti*(5). The fact that the person paying is father of the second defendant and manager of the family is other evidence from which the authority can be inferred. See also *In re Tucker*(6) and *In re Macdonald, Dick v. Fraser*(7).

T. Ramachandra Rao for respondents.—From the mere fact of the person paying being a partner, authority to pay on behalf of another cannot be inferred. It is true that express authority to pay need not be proved. The mere fact that he is the manager or that he was generally conducting the business is not enough. There are no facts in the case from which authority can be inferred.

OPINION.—In this case the two defendants carried on the business of timber merchants as a family business, they being father and son in an undivided Hindu family. They are sued on a debt which would be statute barred in the absence of an acknowledgment, sufficient within section 19 of the Limitation Act to take it out of the statute. There is such an acknowledgment, but it is only signed by the first defendant, the father, and the question is whether it can operate as against the son, the co-defendant also.

(1) (1909) I.L.R., 32 Mad., 421.
(3) (1914) I.L.R., 37 Mad., 146.
(5) (1914) 27 M.L.J., 631 at p. 634.

(2) (1912) I.L.R., 35 Mad., 142.
(4) (1915) 18 M.L.T., 273.
(6) (1894) 3 Ch., 429 C.A.

(7) (1897) 2 Ch. 181 at p. 188.

VEERANNA
v.
VEERA-
BHADRA-
SWAMI.

AYLING,
COUTTS
TROTTER AND
SESHAGIRI
AYYAR, JJ.

VEERANNA
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SWAMI.
—
AYLING,
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TROTTER AND
SESHAGIRI
AYYAR, JJ.

The learned Judges who referred the case have propounded a question about the answer to which we feel no hesitation, but it is obviously referred to us because they felt a doubt as to whether the decisions in *Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar*(1) and *Shaik Mohideen Sahib v. The Official Assignee of Madras*(2) did not preclude them from arriving at the conclusion which they clearly thought to be the right one.

The exact question propounded is "whether in the absence of direct evidence that a co-contractor or partner has authorized his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other circumstances such as the position of the other co-contractors or partners in the business." Our answer is in the affirmative. We think that direct evidence of a specific authority to give acknowledgments is quite unnecessary, and that authority may be inferred from the surrounding circumstances, though it is of course quite beyond our province to indicate what circumstances should in our opinion be deemed sufficient to warrant the inference. It is important to notice the exact wording of section 21 (2) of the Limitation Act. The section does not say that a person shall not be liable on an acknowledgment signed by the partner by reason only of his being a partner but by reason only of a written acknowledgment signed by his partner; and it amounts to saying that if you have no more than a written acknowledgment signed by one defendant the fact that the other defendant is his partner cannot affect the latter's liability. You could obviously have a case where one partner signed an acknowledgment in respect of a gambling debt of his own; but for the sub-section, proof of the acknowledgment would be sufficient to fix the other partner with liability, a conclusion manifestly repugnant both to sense and justice. We see nothing in the sub-section to make it necessary to suppose that it is intended to apply to transactions conducted in the ordinary course of partnership business. We need only refer to the general principle of law embodied in section 251 of the Contract Act that partners are the agents of one another and that their acts done in the ordinary course of the partnership business bind the partnership.

(1) (1909) I.L.R., 32 Mad., 421.

(2) (1912) I.L.R., 35 Mad., 142.

As regards the two decisions referred to, it is not quite easy to say whether they should properly be regarded as laying down as a condition of liability that there should be direct evidence of express authority to give acknowledgments. But at least one sentence in *Shaik Mohideen Sahib v. The Official Assignee of Madras*(1) lends colour to that view. WHITE, C.J., referring to the former decision in *Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar*(2), says: "Following the principle we here (i.e., 32 Mad., 421) lay down, we have to see in this case if there is evidence that the person who made the acknowledgment had authority to do so on behalf of his firm." Those words are capable of the construction that what is meant is direct evidence of specific authority, and they were obviously so regarded by the learned Judges who referred this question to us. If that be so we have no hesitation in saying that they were wrongly decided and should no longer be regarded as law. Such a view is completely at variance with that taken by the other Courts of India and by the English Courts in their construction of the corresponding sections of the English Acts and would obviously put a premium on commercial dishonesty.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

SINGA PILLAY (PLAINTIFF), APPELLANT,

v.

AYYANERI GOVINDA REDDY AND ANOTHER
(DEFENDANTS), RESPONDENTS.*

Mortgage—Transferee from benamidar—Right of suit.

A transferee—Mortgagee can maintain a suit on the mortgage though the mortgagee named in the bond is only a benamidar and though the beneficial owner is not added as a party.

Kirtibas Das v. Gopal Jiu (1914) 19 C.L.J., 193, and *Parameshwar Dat v. Anardan Dat* (1915) I.L.R., 37 All., 118, followed.

SECOND APPEAL against the decree of K. KRISHNAMA ACHARIYAR, the Subordinate Judge of North Arcot, in Appeal No. 113 of

(1) (1912) I.L.R., 35 Mad., 142 at p. 145. (2) (1909) I.L.R., 32 Mad., 421.
* Second Appeal No. 1887 of 1915.

VEERANNA
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1914, preferred against the decree of M. A. KRISHNA RAO, the District Munsif of Sholingar, in Original Suit No. 203 of 1913.

The plaintiff brought this suit upon a registered mortgage deed executed by the first defendant in favour of one Rengasami Reddi and transferred by him to the plaintiff. The second defendant is a subsequent purchaser of the property. The second defendant contended that the original mortgagee, Rengasami Reddi, was only a benamidar for the second defendant's judgment-debtors, the mother and sister of the first defendant, and that the assignment in favour of the plaintiff was a nominal and sham transaction. The court of first instance upholding the above contentions dismissed the plaintiff's suit. The lower Appellate court confirmed the above decision, observing that a benamidar in respect of a mortgage deed cannot sue and recover on the mortgage. The plaintiff preferred this Second Appeal.

C. V. Anantakrishna Ayyar for the appellant.

P. Venkataramana Rao for the respondents.

SPENCER, J.

SPENCER, J.—In the Calcutta and Allahabad High Courts it appears to have been settled by judicial decisions that a benami mortgagee may maintain a suit upon a mortgage: vide *Kirtibas Das v. Gopal Jiu*(1), *Sachita Nandu Mohapatro v. Baloram Gorain*(2), and *Parmeshwar Dat v. Anardan Dat*(3). In this Court there is no reported case on the point so far as I am aware; but in *Chidambara Mandarayan v. Singaram*(4), the same view was taken as in Calcutta and Allahabad and three more unreported cases were therein referred to as authorities that precluded arguments being raised to the contrary. In *Kutha Perumal Rajali v. The Secretary of State for India*(5), the decision in *Chidambara Mandarayan v. Singaram*(4), was quoted with approval and its principle was explained as being that a benamidar's suit is equivalent to a suit by an agent of an undisclosed principal. If a mortgagor can successfully resist a suit brought by the beneficial owner of the bond on the ground that he is not the person named in the bond as mortgagee, it is difficult to see on what grounds he could also be successful

(1) (1914) 19 C.L.J., 193.

(3) (1915) I.L.R., 37 All., 113.

(2) (1897) I.L.R., 24 Calc., 644.

(4) Second Appeal No. 186 of 1903.

(5) (1907) I.L.R., 30 Mad., 245.

is unnecessary for us in the present case to consider whether a suit by a creditor to avoid an alienation as infringing against section 53 of the Transfer of Property Act must be brought in a representative capacity on behalf of the body of creditors, but apart from this I have no hesitation in concurring in the views expressed by CUTTS TROTTER and SESHAGIRI AYYAR, JJ., in that case. The only case quoted by Mr. Sesha Achariyar which has not been dealt with in their judgment and which appears to have any bearing on the question is a Calcutta case not reported in the regular series, *Abdul Kadir v. Ali Mia*(1). With all respect I cannot agree with the decision. I do not find in it sufficient authority for the proposition advanced by Mr. Sesha Achariyar that anything which can be made the basis of a suit can be pleaded as a bar in action: and I agree with my learned brother SESHAGIRI AYYAR, J., in *Palaniandi Chetti v. Appavu Chettiar*(2) that a sale such as the one we are considering must be held to continue in force until it is set aside in proceedings properly instituted for the purpose.

It follows that the decree of the lower Courts in the present suit should be set aside and plaintiffs be given a decree as sued for with costs throughout.

SESHAGIRI AYYAR, J.—I agree. The further arguments addressed to us by Mr. Sesha Achariyar have not convinced me that my view in *Palaniandi Chetti v. Appavu Chettiar*(2) is wrong and that an attaching creditor as defendant can obtain a declaration that the sale by his judgment-debtor which he has not sued to set aside is in fraud of his and other claims against the common judgment-debtor and that on that ground the suit should be dismissed.

BAKEWELL, J.—I agree.

N.R. BAKEWELL, J.

(1) (1912) 14 I.C., 715; s.c., 15 C.L.J., 649. (2) (1916) 30 M.L.J., 565.

SUBRAMANIA
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v.
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APPELLATE CIVIL.

Befre Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1917.
November
19.

THIRAVIYAM PILLAI AND ANOTHER (DEFENDANTS
NOS. 2 AND 3), APPELLANTS,

v.

LAKSHMANA PILLAI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 73 and O. XXI, r. 83—Several decree-holders—Execution—Attachment in each decree—Applications for sale—Permission to judgment-debtor to raise money by private alienation to pay off one of the decrees—Money paid into Court by alienee—Rateable distribution—“Assets held by a Court”, meaning of.

Where several decree-holders in different suits had attached the same property of their judgment-debtor and applied for sale in execution of their respective decrees, but the judgment-debtor obtained permission of the Court under Order XXI, rule 83, to raise money by private alienation of the property to pay the decree amount due in one of the decrees, and the amount was paid into Court by the alienee.

Held, that the money, having been paid into Court under a pending execution application, was assets held by the Court under section 73 of the Code, and was liable to rateable distribution among the several decree-holders who had applied for execution.

Sorabji Coovarji v. Kala Raghunath (1912) I.L.R., 36 Bom., 156, dissented from.

Kathum Sahiba v. Hajee Badsha Sahib (1915) I.L.R., 38 Mad., 221 at p. 224, referred to.

Golstrum v. Wormes Chandra Bonnerjee (1917) I.L.R., 44 Calc., 789, distinguished.

SECOND APPEAL against the decree of V. DANDAPANI PILLAI, the Subordinate Judge of Madura, in Appeal No. 40 of 1915, preferred against the decree of K. W. RAMA RAO, the Additional District Munsif of Madura, in Original Suit No. 153 of 1913.

The material facts appear from the judgment.

C. V. Anantakrishna Ayyar for the appellants.

T. R. Venkatarama Sastriyar and *P. S. Narayanaswami Ayyar* for the respondent.

The judgment of the Court was delivered by

* Second Appeal No. 1269 of 1916.

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plaint—Real valuation beyond the jurisdiction of the District Munsif's Court
 —Application by plaintiff for leave to withdraw portion of the suit with liberty to bring fresh suit—Leave, whether properly can be granted—Judicial discretion
 —Jurisdiction—Ejusdem generis—Material irregularity in exercise of jurisdiction—'Other sufficient grounds, in O. XXIII, r. 1 (2) (b), construction of.]
 The plaintiffs instituted a suit in a District Munsif's Court for recovery of possession of several items of immoveable property including a house, valuing the house at Rs. 200 and other items at Rs. 1,917 and odd for purposes of jurisdiction. The defendant objected that the house was grossly undervalued and that the suit was, on proper valuation, beyond the jurisdiction of the District Munsif. A commissioner, appointed to ascertain its value, reported that the house alone was worth Rs. 6,500. The plaintiff thereupon applied to the Court for leave to withdraw the suit in respect of the house with liberty to bring a fresh suit therefor; the Court granted the application, notwithstanding the objection of the defendant. The latter preferred a Civil Revision Petition to the High Court against the order: Held, that, assuming that the lower Court had jurisdiction to act under Order XXIII, rule 1 (2) (b), it acted with material irregularity in the exercise of its jurisdiction, as it did not exercise a judicial discretion in passing the order; that the plaintiff ought not to have been permitted to withdraw his claim for the house, as the undervaluation in the plaint was so gross that he could not have acted honestly in doing so and did not deserve any indulgence from the Court; and that consequently the High Court should interfere under section 115 of the Civil Procedure Code and set aside the order. *Per SADASIVA AYYAR, J.*—The words 'other sufficient grounds' in Order XXIII, rule (2) (b), should not be interpreted ejusdem generis with 'formal defect' in rule 1 (2) (a). Limits of the doctrine of ejusdem generis discussed. After a Court of first instance has come to the conclusion that the suit as brought is beyond its jurisdiction, it has no power to pass any other judicial order in the suit except those which the statute expressly empowers it to pass, such as an order returning the plaint for presentation to the proper Court under Order VII, rule 10, or an order awarding costs under section 35 of the Code.

Kannuswami Pillai v. Jagathambal. ... (1918) I.L.R., 41, Mad., 701

CIVIL PROCEDURE CODE (ACT V OF 1908), O. 43, R. 1 :—See MADRAS CIVIL COURTS ACT (III OF 1873), SEC. 14.

CONTRACT ACT (IX OF 1872), SEC. 73, ILL. (a)—Breach of contract to sell goods—Measure of damages—No actual loss by breach—No market for the goods at place of delivery—Liability for damages—Rule of Indian and English Law, comparison of.] The defendants agreed to sell a certain quantity of molasses to the plaintiffs by monthly instalments, and failed to deliver one of the instalments assigning as a reason the difficulty of obtaining freight. The plaintiffs did not purchase other molasses against the contract and there was no market for the goods at the place of delivery. The plaintiffs, who were not found to have incurred any actual loss from the non-delivery, sued to recover damages from the defendants for breach of the contract. Held, that the plaintiffs were entitled to damages as the case fell within illustration (a) of section 73 of the Indian Contract Act which lays down

- that the measure of damages in a case like this is the sum by which the contract price falls short of the price for which the purchaser might have obtained goods of like quality at the time when they ought to have been delivered. English and Indian cases discussed.
- Hajee Ismail and Sons v. Wilson & Co.* ... (1918) I.L.R., 41 Mad., 709
- COURT FEES ACT (VII OF 1887), SEC. 7.—*See* MADRAS CIVIL COURTS ACT (III OF 1878), SEC. 14.
- CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 247 AND 259—*Indian Penal Code* (Act XLV of 1860), ss. 352 and 504—*Summons-case—Warrant-case—Trial of both offences in one trial—Procedure to be followed—Absence of complainant at the hearing—Discharge of accused, effect of—Subsequent trial for the same offences, whether barred.*] Where a complaint was preferred against a person for offences under sections 352 and 504 of the Indian Penal Code committed in the course of the same transaction, the former offence being triable as a summons-case and the latter as a warrant-case, and the Magistrate discharged the accused owing to the absence of the complainant on the day of hearing, and a fresh complaint was preferred in respect of the same offences. *Held*, that the procedure to be followed in such a trial is the one provided for the trial of a warrant-case; and that the discharge of the accused did not amount to an acquittal of the offence under section 352 of the Indian Penal Code and was not a bar to the subsequent trial for the same offence. *Rajnarain Koonwar v. Lala Tamoli Raut* (1885) I.L.R., 11 Cal., 91, *Re Sobhanadri* (1916) I.L.R., 39 Mad., 503, *Hossein Sardar v. Kulu Sardar* (1902) I.L.R., 29 Cal., 481, and *In re Samsudin* (1898) I.L.R., 22 Bom., 711, followed.
- Raghavalu Naicker v. Singaram* ... (1918) I.L.R., 41, Mad., 727
- CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 345—*Compounding of an offence before filing complaint, whether lawful.*] The compounding of offences mentioned in the first paragraph of section 345, Criminal Procedure Code, is lawful even if it takes place before any complaint is filed in respect thereof in a Court and once a composition has been arrived at, it has the effect of an acquittal under the section so as to bar the trial of the offence.
- Kumaraswami Chetti v. Kuppuswami Chetty* ... (1918) I.L.R., 41 Mad., 685
- DAMAGES, MEASURE OF:—*See* CONTRACT ACT (IX OF 1872), SEC. 73, ILL. (a).
- ESTATES LAND ACT (MADRAS ACT I OF 1908), SS. 3 (2) (d) AND 8—*One of several inamdars, acquiring the entire kudivaram right in an inam village—Lease of lands by such inamdar—Suit for rent in Civil Court—Jurisdiction of Civil or Revenue Court—Exception to section 8, applicability of, to clause 1 or 2 of section 8—Strict construction, necessity for.*] Where one of several inamdars in an inam village, having acquired by gift the kudivaram right in the whole village and leased fifty cents of land out of the whole village, sued to recover rent in a Civil Court on the basis of the lease; *Held*, that the Civil Court had no jurisdiction to entertain the suit, and that the plaint should be returned for presentation to a Revenue Court having jurisdiction. The expression 'the inamdar' in the exception to section 8 of the Estates Land Act should be read in its strict sense as equivalent only to the owner of the entire interest in the inam, and the exception should be treated as governing only sub-section (1) and not sub-section (2) of section 8 of the Act.
- Rajachari v. Tirumuloor Devasthanam* ... (1918) I.L.R., 41 Mad., 724
- EVIDENCE ACT, INDIAN (I OF 1872), SEC. 1—*Suit under Registration Act (XVI of 1908), sec. 77—Suit to enforce registration of a will—Evidence taken before Sub-Registrar, filed in Court by the consent of parties—Evidence, not found to be relevant under sec. 33 of the Act or otherwise—Judgment and decree, based on such evidence, whether valid.*] A suit, instituted under section 77 of the Registration Act to enforce registration of a will, was decided by the Court on evidence taken before the Sub-Registrar and filed as evidence in the suit by consent of the parties who did not want to adduce any further evidence in the Court. The Court did not find that the evidence was relevant under section 33 or any other section of the Evidence Act but admitted the same solely on the ground of the consent of the parties. On objection being taken in appeal to the validity of the judgment, *Held*, that the judgment was invalid under section 165 of the Evidence Act, as it was not based on facts declared to be relevant by the Act and duly proved, that the consent of parties could not take the place of a declaration of the Evidence Act, and that consequently the judgment and the decree should be set aside. *See Raja Prakasavarani v. Garu v. Venkata Rao* (1915) I.L.R., 38 Mad., 160, *disputed from*.
- Ponkudiswami Pillay v. Singaram Pillay* ... (1918) I.L.R., 41 Mad., 731
- FRAUD—*Judgment obtained by perjured evidence—Suit to set aside, whether maintainable.*] A suit does not lie to set aside a judgment in a previous suit on the ground that it was obtained by perjured evidence. *Venkatappa Naick v. Subba Naick* (1906) I.L.R., 29 Mad., 179, overruled.
- Kadirvelu Nainar v. Kuppuswami Naiker* ... (1918) I.L.R., 41 Mad. (F.B.), 743
- LAND IMPROVEMENT LOANS ACT (XIX OF 1888), SEC. 7 (1) (c), *sale under—Loan, a first charge on the land—Sale, free of prior encumbrances—Improvements effected before receipt of loan, effect of—Non-completion of improvements within time and extension of time, effect of, on further advance of loan—Proviso to a section, use of, to interpret the section.*] A loan advanced under the Land Improvement Loans Act (XIX of 1888) is subject to proviso to section 7 (1) a first charge on the land for the improvement of which the loan is advanced; hence a sale under section 7 (1) (c) of the Act to recover the loan is free of prior encumbrances. Neither the fact that a portion of the improvement had been effected with the help of a private loan before the loan applied for was actually advanced, nor the fact that the Government relaxed the rigour of its rules and allowed the borrower an extension of time to utilize the first instalment of the loan before the second was disbursed makes the loan any the less a loan under the Act, if in effect the loan was utilized for the purpose for which it was borrowed. Though a proviso to a section cannot be used to extend its operation, yet in case of doubt or ambiguity as to the meaning of the substantive part of the section, the proviso can be looked to to ascertain its proper interpretation. *West Derby Union v. Metropolitan Life Assurance Society* (1897) A.C., 647, followed.
- Bankaran Nambudripad v. Ramaswami Ayyar* ... (1918) I.L.R., 41 Mad., 691

LIMITATION ACT (IX OF 1908), SCH. II, ARTS. 120, 142 AND 144:—*See* UNSETTLED PALAYAM.

MADRAS CIVIL COURTS ACT (III OF 1873), SEC. 14—*Court Fees Act* (VII of 1887), sec. 7, (v) and (vi)—*Suit for pre-emption—Valuation of suit for purposes of jurisdiction—Suit originally filed in District Munsif's Court—Return of plaint as beyond its jurisdiction—Presentation of plaint in a Subordinate Judge's Court—Plaint again returned by latter Court—Appeal to District Court against order of District Munsif, whether competent—Election of remedies—Civil Procedure Code, O. 48, r. 1.*] The plaintiff instituted the suit in a District Munsif's Court to enforce his right of pre-emption in respect of the suit lands which had been mortgaged to him off otti for Rs. 3,190, and were sold to some of the defendants for Rs. 4,500. The District Munsif returned the plaint for presentation to the proper Court, holding that the suit was beyond his pecuniary jurisdiction. On the plaint being presented in a Subordinate Judge's Court, it was returned again by that Court which held that the former Court had jurisdiction. The plaintiff, thereupon, preferred an appeal to the District Court against the order of the District Munsif. The defendants raised a preliminary objection that the appeal was incompetent and also contended that the District Munsif had no jurisdiction to entertain the suit. *Held*, that the appeal to the District Court was maintainable, although the plaintiff had filed the plaint in the Subordinate Judge's Court in pursuance of the order of the District Munsif: *Held* also, that the proper valuation of a suit for pre-emption is, for purposes of jurisdiction, in accordance with section 14 of the Madras Civil Courts Act that fixed in the manner provided by the Court Fees Act, section 7 (v); and that so valued the present suit was within the jurisdiction of the District Munsif's Court.

Narayana Nair v. Cheria Kathiri Kuttu ... (1918) I.L.R., 41 Mad., 721

MADRAS DISTRICT POLICE ACT (XXIV OF 1859):—*See* UNSETTLED PALAYAM.

MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895):—*See* UNSETTLED PALAYAM.

MADRAS REVENUE RECOVERY ACT (II OF 1864), SEC. 59—*Sale of a minor's ryotwari landholder's lands for arrears of revenue, validity of—Madras Regulation* (X of 1831), sec. 2—*Wrong entry of minor's mother as pattadar instead of minor, effect of—Suit to set aside revenue sale more than six months after sale, whether barred by limitation.*] On the death of a ryotwari landholder, the Revenue authorities erroneously registered his widow as the pattadar instead of the plaintiff, his minor adopted son. Default in payment of revenue having occurred, the lands were sold for arrears of revenue during plaintiff's minority and he then sued to set aside the revenue sale and recover the lands within twelve years of the sale but more than six months after attaining majority. *Held* by the Full Bench:—(a) that section 2 of Madras Regulation X of 1831 which prohibits the sale for arrears of revenue of minor's properties applies to all lands of minors whether permanently settled or only ryotwari, whether the lands be considerable or so small as not to be taken charge of by the Court of Wards; (b) that the sale being *ultra vires*, the special period of limitation of six months prescribed by section 59 of the Madras Revenue Recovery Act (II of 1864)

did not apply to the suit; and (c) that the fact that the Revenue authorities mistakenly registered the plaintiff's adoptive mother as pattadar did not in any way affect him. *Krishna v. Mekam Peruma* (1887) I.L.R., 10 Mad., 44, considered. *Subramania Chetty v. Mahalingasami Sivan* (1910) I.L.R., 38 Mad., 41, distinguished. *Secretary of State v. Ashtamurthi* (1890) I.L.R., 18 Mad., 89, followed.

Swaminatha Ayyar v. Govindaswami Padayachi ... (1918) I.L.R., 41 Mad. (F.B.) 738

MADRAS SALE OF MINORS' ESTATES REGULATION (X OF 1831):—*See* MADRAS REVENUE RECOVERY ACT (II OF 1864).

PALAYAM, *unsettled*, and ZAMINDARI, *difference between*:—*See* UNSETTLED PALAYAM.

PROVISO TO SECTION, *use of, to interpret section*:—*See* LAND IMPROVEMENT LOANS ACT.

REGISTRATION ACT (XVI OF 1908), SEC. 77:—*See* EVIDENCE ACT (I OF 1872), ss. 33 AND 165.

REGULATIONS, 1802—XXV:—MADRAS PERMANENT SETTLEMENT REGULATION:—*See* UNSETTLED PALAYAM.

—X—, 1831—VI.

—, 1831—X:—MADRAS SALE OF MINORS' ESTATES REGULATION:—*See* MADRAS REVENUE RECOVERY ACT.

UNSETTLED PALAYAM, *alienability of, for debts of holder for the time being—Lands held on service tenure, alienability of—Enfranchisement of service tenure, effect of, on alienation, prior and subsequent—Regulation XXV of 1802, effect of—Private Police service, abolition of, by legislation—Military service, imposition of, on landed proprietors—Abolition of—Limitation* (Act IX of 1908), sch. II, arts. 120, 142 and 144—*Madras Regulation XI of 1816—Madras Regulation VI of 1831—Madras District Police Act XXIV of 1859—Madras Act III of 1895.*] Lands held on service tenure are, even apart from statute, inalienable by the Common Law of India beyond the life-time of the holder for the time being. *Papaya v. Ramana* (1884) I.L.R., 7 Mad., 85 and *Pakkiam Pillay v. Seetharama Vadhyar* (1904) 14 M.L.J., 134, followed. Abolition of service prior to the alienation renders the alienation valid. *Mussamut Kustooru Koomares v. Monohur Deo* (1864) W.R., 39, *Rajlojirav Bin Tamajirav v. Balwantrav Venkatesh* (1881) I.L.R., 5 Bom., 437 and *Radhabai and Ramachandra Konher v. Anatrav Bhagavant Deshapande* (1885) I.L.R., 9 Bom., 198 at p. 212 (F.B.), followed. Enfranchisement of the land from service subsequent to an alienation thereof will not validate the alienation. *Fadapa v. Swamirao* (1900) I.L.R., 24 Bom., 556 (P.O.) and *Sannamma v. Radhabhai* (1918) I.L.R., 41 Mad., 418 (F.B.), followed. An unsettled palayam in the Presidency of Madras resembles a zamindari, is hereditary in its character and is alienable for the debts of the previous holders and of the holder for the time being, so as to bind the successors. The only difference between an unsettled palayam and a permanently settled zamindari is that in the latter the Government is precluded for ever from raising the revenue, and in the former the Government may or may not have that power. *Olagappa Chetty v. Arbutnot* (1874) 1 I.A., 268 at p. 306, followed. *Held*, on a review of the facts of the case, that the palayam of Kannivadi

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in Madras district which was permanently settled in 1905 and which was in the eighteenth century liable to render military and police service to the Government of the day, was as a fact unconditionally released from such services prior to 1895 and that accordingly a mortgage executed by the grandfather and father of the present zamindar in 1895 for debts incurred by the grandfather prior to that date and a decree and a Court sale held to satisfy the mortgage debt were binding upon the present zamindar and precluded him from recovering the zamindari from the auction purchaser. That the East India Company had by its Proclamations of 1799 and 1801 suppressed military service once imposed on landed proprietors in Southern India and police service similarly imposed was abolished pursuant to Regulation XXV of 1802, Regulation XI of 1816, Act XXIV of 1859, Act XVII of 1862 and Madras Act III of 1895. Regulation VI of 1831 which restrained the alienation of all public service inams is only partially repealed and replaced by Act III of 1895, as services other than those of village officers had become long ago obsolete. *Quære*: Whether if the plaintiff's father had debarred himself from suing, article 120 of the Limitation Act was the article applicable in which case the plaintiff would not be barred.

Midnapore Zemindari Company v. Appayasami Naicker.

(1918) I.L.R., 41 Mad., 749

Words:—‘Other sufficient grounds,’ meaning of:—See CIVIL PROCEDURE CODE (V of 1908), O. XXIII.

APPELLATE CRIMINAL.

Before Mr. Justice Abdur Rahim and Mr. Justice Napier.

KUMARASWAMI CHETTY (COMPLAINANT), PETITIONER,

v.

KUPPUSWAMI CHETTY (ACCUSED), RESPONDENT.*

1913,
January,
21 and 22.

Criminal Procedure Code (Act V of 1898), sec. 345—Compounding of an offence before filing complaint, whether lawful.

The compounding of offences mentioned in the first paragraph of section 345, Criminal Procedure Code, is lawful even if it takes place before any complaint is filed in respect thereof in a Court and once a composition has been arrived at, it has the effect of an acquittal under the section so as to bar the trial of the offence.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of C. S. ANATARAMA AYYAR, the Subdivisional First-class Magistrate of Usilampatti, in Criminal Appeal No. 66 of 1917, preferred against the conviction and sentence of V. S. RAMASWAMI AYYAR of the Second-class Magistrate of Periyakulam, in Calendar Case No. 306 of 1917.

The necessary facts and arguments appear from the judgment of ABDUR RAHIM, J.

E. L. Thornton for the petitioner.

K. N. Ayya Ayyar, K. Sankarasubba Ayyar and *A. Narayanaswami Ayyar* for the accused.

E. R. Osborne, acting Public Prosecutor for the Crown.

ABDUR RAHIM, J.—This is an application to revise an order of acquittal passed by the Subdivisional Magistrate in appeal in a case in which the accused were convicted by a Second-class Magistrate of offences under sections 147, 355 and 323 of the Indian Penal Code. The Appellate Magistrate found that the charge of rioting could not be sustained upon the evidence and thereupon acquitted the accused of that offence. That acquittal must in my opinion stand, as no sufficient reason has been made out for interference with that part of the order of the Appellate

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* Criminal Revision Case No. 613 of 1917 (Criminal Revision Petition No. 482 of 1917).

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Magistrate. He has acquitted the accused of charges under sections 323 and 355 on the ground that there had been a valid composition of those offences within the meaning of section 345, Criminal Procedure Code, before the complainant laid the charge in Court. There are two questions of law which arise in connexion with this matter. First of all, a doubt has been expressed by OLDFIELD, J., who admitted this application with regard to a decision of mine in *Kanni Rowther v. Inayathalla Sahib*(1) in which it was laid down that it was not necessary for section 345, Criminal Procedure Code, to operate, that the complainant, after the composition has been arrived at, should still be of the same mind and join the accused in asking the Court that the case should be dismissed as there has been a valid composition. Once there has been a composition of an offence compoundable under the Criminal Procedure Code, the matter is at an end and the person injured cannot afterwards effectively resile from the agreement. If he chooses to do so, it is for the Court to enquire into the allegation of the accused that the offence was compounded out of Court and if it finds that it was so compounded, to acquit the accused under the provisions of section 345. In holding this view, I followed a ruling of Calcutta High Court—*Murray v. The Queen Empress*(2). There is also another ruling of the same Court *Kusam Bewa v. Bechu Bewa*(3) which proceeds upon the same principle. Both learned public prosecutor and the learned counsel who appeared for the petitioner urged no arguments against the decision in *Kanni Rowther v. Inayathalla Sahib*(1) and on giving the question my best consideration again, I do not find any sufficient reasons for taking a different view.

The next point of law that has been discussed relates to the question whether a composition which takes place before any complaint has been laid in Court by the person injured is covered by the provisions of section 345. In its first part the section says that the offences described in the table attached may be compounded by the persons mentioned in the third column of the table. Looking at the third column, we find that the persons who can compound these offences are, generally

(1) (1916) I.L.R., 39 Mad., 946.

(2) (1894) I.L.R., 21 Calc., 103.

(3) (1899) 3 C.W.N., 322.

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speaking, the persons injured and not a person who has already laid a charge in Court. When the person injured has entered into a composition, that composition is complete; and paragraph 6 of the section lays down what the effect of such a composition is. It says that

“the composition of these offences under this section shall have the effect of an acquittal of the accused.”

It is argued that the use of the words “offence” and “accused” shows that the composition which is contemplated is one arrived at after a complaint has been laid and there is an accused person before the Court. I cannot accept this argument as at all sound. An offence is complete when the acts constituting it have been committed apart from whether any complaint or charge has been laid before the Court or not. The allusion to “the accused” in paragraph 6 of section 345 only describes his character at the time of the trial when the question of the effect of the composition is under consideration. As regards certain classes of offences which may be compounded, the legislature provides that they may be compounded only with the permission of the Court. In those cases, the operation of the composition is necessarily suspended until the Court sanctions it. But in the other cases, no such permission is needed and no reason is apparent to me or has been suggested why the legislature having permitted certain classes of offences to be compounded by the parties themselves, without any reference to Court, should insist that composition should be arrived at after the person alleged to have committed the offence has been brought before the Court. In the absence of clear language showing that that was the intention of the Legislature, I should not be prepared to impute to it any such intention. I think it is quite clear upon the interpretation of section 345 that the contention on behalf of the complainant on this point cannot be sustained. It is unnecessary therefore to discuss the English law on the subject to which some reference has been made at the bar. But I may point out that so far as I have been able to go into the matter, *Keir v. Leeman*(1) supports the view which I have indicated as the one adopted in the Criminal Procedure Code rather than otherwise. This was a judgment of Lord DENMAN, C.J., and he,

(1) (1844) 6 Q.B., 308.

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after reviewing the cases at some length, laid down the following proposition on the subject of compromise of offences :—

“ We shall probably be safe in laying it down that the law will permit a compromise of all offences though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.”

The exact point we have to consider here was not before the learned Judges in that case, but the proposition seems to imply that a composition of an offence of a particular description would be not the less valid because it took place before any complaint was laid in Court. Then the exception to section 214 of the Penal Code exempts from the provisions of sections 213 and 214 cases of compounding offences which may be lawfully compounded. If the contention submitted on behalf of the prosecution in this case were sound, the compounding of particular offences dealt with under sections 213 and 214, Indian Penal Code, would be no offence if the compounding took place before the charge was laid. It seems to me that this would be an untenable proposition.

On the facts, however, of this case, I am not satisfied that the Subdivisional Magistrate quite clearly realised whether there was a completed agreement or composition within the meaning of section 345, Criminal Procedure Code. It appears that there was an arbitration and the arbitrator decided after some parley that accused No. 1 was to pay to the complainant Rs. 300. It is argued on behalf of the complainant that he did not accept this composition and had not even agreed to the arbitration. The Subdivisional Magistrate does not seem to have arrived at a clear conclusion on these points. A further question arises as to whether the Rs. 300 was to be actually paid before there was any completed composition within the meaning of section 345, or whether the complainant was satisfied with the promise of the accused to pay that amount. The amount was not actually paid before the complaint was lodged in court. Unless it is found that the compounding was completed before the complaint was made any incomplete agreement would not amount to an acquittal within the meaning of the law. I may

say, speaking for myself, that I should ordinarily be very reluctant to interfere in a case of this nature. But there is no finding of the Appellate Magistrate on the subject of the charges under sections 323 and 355 of the Penal Code, the acquittal of the accused of these charges being based merely on an alleged composition. The facts found are not enough to show that the Subdivisional Magistrate had in this connexion quite clear before his mind's eye the element which would be necessary for a complete and valid composition. I would therefore set aside the order acquitting the accused of the charges under sections 323 and 355 of the Penal Code and remand the appeal to be reheard and disposed of by the Appellate Magistrate on these charges in the light of the above observations.

NAPIER, J.—I agree and wish to add only a few words. With regard to the decision in *Kanni Rowther v. Inayathalla Sahib*(1) which has been referred to in the admission order, I desire to say that I am in entire accord with it. It lays down that the composition referred to in section 345, Criminal Procedure Code, is not limited to acts done in Court nor to cases in which the parties continue to be of the same mind until the cases come on for further hearing before the Court; that view seems to me to be entirely warranted by the language of the section. The sole question to be ascertained is whether there was a contract, and once that has been ascertained, there is nothing on principle which would allow a party to resile from his contract and lay a charge which he agreed for consideration not to lay. A further question has been argued whether such a composition can be made before any complaint has been made to a Magistrate or any proceedings taken in Court. Considerable stress has been laid on the words “ offence ” and “ accused ” in the section ; and the learned public prosecutor has pointed out that it may be difficult to say whether a composition was lawful or unlawful unless the facts had been considered by the Court. The difficulty will arise however in the actual offence of compounding. It is clear from the very earliest authorities that the offence of compounding a felony could be committed before any charge had been laid. With reference to compounding theft, the language of Lord Coke is quoted in

(1) (1916) I.L.R., 39 Mad, 946.

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The Queen v. Burgess(1) which language is reproduced in Archbold on "Pleading and Evidence in Criminal Cases" in the section dealing with compounding offences. The offence known as theft-bote is committed,

"where the owner not only knows of the felony but taketh of the thief his goods again or amends for the same to favor or maintain him, that is, not to prosecute him to the intent that he may escape."

It is reproduced in Blackstone in his Commentaries as follows:—

"The offence of theft-bote which is where the party robbed not only knows the felon but also takes his goods again or other amends upon agreement not to prosecute."

This is the language of the earliest authorities and there cannot be the slightest doubt that the offence of illegal compounding is one that can be committed in relation to a matter which has not been brought before the Court. Now the connexion between illegal compounding and legal compounding is very close because in the Penal Code the exception to section 214 says that,

"the provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded."

Of course, lawful compounding is that which is dealt with under section 345, Criminal Procedure Code. So the principles which apply to the offence must necessarily apply to the exception. I am therefore satisfied that a composition made to prevent a case going into a Court is just as much a composition under section 345 as one made after the case has come into Court. As my learned brother has pointed out, it will have no effect as a plea in bar of conviction in cases covered by clause (2), unless the Court has given its sanction. But where a composition has been made out of Court and at a certain stage in the proceedings, the Court gives the sanction required by clause (5) then that is a good composition.

On the facts of this case, it seems to me that the Sub-divisional Magistrate has entirely misunderstood the alleged composition. He seems to have thought that he cause prosecution witness No. 2 representing prosecution witness No. 1 agreed to

(1) (1885) 16 Q.B.D., 141.

abide by the decision of the arbitrators and there was a decision of a certain sort, that amounted necessarily to a contract not to prosecute. Speaking for myself, I think that the evidence is perfectly clear on that point: but I do not wish to decide this case on a question of evidence because we are sitting in revision of an order of acquittal. What the Subdivisional Magistrate should have done was to examine the evidence and see whether the panchayatdars decided that the complainant was to accept the promise of the accused to pay or whether the decision of the panchayatdars was that if the accused did pay, no complaint should be laid. I agree with my learned brother that this is a matter to which the Subdivisional Magistrate must direct his attention. I agree with the order proposed.

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APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

SANKARAN NAMUDRIPAD (PLAINTIFF), APPELLANT.

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RAMASWAMI AYYAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Land Improvement Loans Act (XIX of 1883), sec. 7 (1) (c), sale under—Loan, a first charge on the land—Sale, free of prior encumbrances—Improvements effected before receipt of loan, effect of—Non-completion of improvements within time and extension of time, effect of, on further advance of loan—Proviso to a section, use of, to interpret the section.

A loan advanced under the Land Improvement Loans Act (XIX of 1883) is subject to proviso to section 7 (1) a first charge on the land for the improvement of which the loan is advanced; hence a sale under section 7 (1) (c) of the Act to recover the loan is free of prior encumbrances. Neither the fact that a portion of the improvement had been effected with the help of a private loan before the loan applied for was actually advanced, nor the fact that the Government relaxed the rigour of its rules and allowed the borrower an extension of time to utilize the first instalment of the loan before the second was disbursed makes the loan any the less a loan under the Act, if in effect the loan was utilized for the purpose for which it was borrowed.

* Appeal No. 377 of 1918.

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Though a proviso to a section cannot be used to extend its operation, yet in case of doubt or ambiguity as to the meaning of the substantive part of the section, the proviso can be looked to to ascertain its proper interpretation. *West Derby Union V. Metropolitan Life Assurance Society* (1897) A.C., 647, followed.

APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU, the Subordinate Judge of Coimbatore, in Original Suit No. 148 of 1915.

This was a suit by the plaintiff, mortgagee, to recover from the first defendant, the mortgagor, and by the sale of two items of property mortgaged, Rs. 16,000 and odd due on a hypothecation of 1912 of the suit properties. The Secretary of State who was added as the second defendant, contended that he had advanced Rs. 10,000 in 1915 on the security of the first item of the mortgaged properties to the first defendant under the Land Improvement Loans Act (XIX of 1883), that the loan was a first charge on that item, that he had sold that item for the recovery of the loan under Madras Revenue Recovery Act (II of 1864), that the purchaser was a necessary party and that the purchaser had thus acquired an absolute title to the first item. The plaintiff denied the second defendant's right so to sell the first item and added (a) that at least a portion of the loan was not a loan under the Act as the improvement was effected before the loan was advanced, with the help of a loan from a stranger and the portion of the Government loan went to discharge the stranger's loan and (b) that the Government exceeded its powers in advancing a second instalment of the loan as the first defendant had not utilized the first instalment within the time allowed by the rules. The Subordinate Judge framed only one issue, viz., "Whether the amount borrowed from Government under Madras Act XIX of 1883 should have priority over the mortgage amount?" and held that the loan advanced by the Government was a first charge under the Act, that the first item had therefore rightly passed to the purchaser, and that the last two objections of the plaintiff were not sustainable as (a) the first defendant had in effect utilized the portion of the loan advanced, for the improvement already effected and as (b) the Government had a right to relax the time limit and to lend the second instalment when the first instalment had before then been actually spent on improvements. So holding, the Subordinate Judge gave a mortgage decree as prayed for against the person of the first

defendant and against the second item and dismissed the suit as against the Secretary of State. The plaintiff preferred this appeal to the High Court against both the defendants.

C. V. Ananthakrishna Ayyar and *P. V. Parameswara Ayyar* for the appellant.

V. Ramesam, acting Government Pleader, for the second respondent.

AYLING J.—The main point for our disposal in this appeal is the general question raised in the single issue framed, whether the provisions of section 42 of Madras Act II of 1864 apply to a sale under section 7 (1) (c) of the Land Improvement Loans Act (XIX of 1883): in other words whether such a sale is free of prior encumbrances.

The Subordinate Judge has decided that it is; and in my opinion, he is right. The point is not covered by authority as the cases quoted on appellant's side *Ramachandra v. Pitchaikanni*(1) and *Chinnasami Mudali v. Tirumalai Pillai and the Secretary of State for India*(2), all relate to sales under clause (a) and not clause (c) of section 7 (1). A comparison of the various clauses (a), (b), (c) and (d) shows that the framers of the Land Improvement Loans Act considered that there was some substantial difference between a sale for arrears of land revenue of the land on which the arrears accrued and a sale for the same purpose of other lands whether belonging to the defaulter or some one else. The same distinction was present to the minds of the learned Judges in the earlier of the above cases, *Ramachandra v. Pitchaikanni*(1). After referring to various sections of the Revenue Recovery Act, they say

"the intention is clear that the purchase is free of prior incumbrances, only when the arrear is of public revenue of which the land is the first security by statutory declaration:" and again "arrear of abkari revenue is not due upon any specific land owned by the abkari renter."

This in fact seems to be the main ground on which their decision is based. The judgment in *Chinnasami Mudali v. Tirumalai Pillai and the Secretary of State for India*(2), also draws the same distinction. The above decisions are therefore of no help to appellant in the present case and indeed indirectly tend to a conclusion adverse to him.

(1) (1884) I.L.R., 7 Mad., 434.

(2) (1902) I.L.R., 25 Mad., 572.

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The learned vakil for appellant has argued that the words "in all or any of the following modes" and "as if" contained in section 7 have reference solely to procedure and were not intended by the Legislature to import the operation of section 42 of the Revenue Recovery Act. The weak point in this argument is that he is unable to indicate (and we are unable to detect) any difference between the procedure laid down for bringing to sale the lands on which arrears of land revenue have accrued and other lands liable to sale for the same arrears. On this view the inclusion of a special clause (c) is unexplained.

In this connexion reference has been made to a decision of this Court in *The Secretary of State for India in Council v. Pisipati Sankarayya*(1) in which MILLER and MUNRO, JJ., held that all sales of land for arrears of land revenue were free of incumbrances, whether the lands sold were those on which the arrears accrued or other lands belonging to the defaulter. It may be argued that on this view of the law the enactment of clause (c) in addition to clause (a) is in any case unnecessary. I think the explanation lies in the fact that the Land Improvement Loans Act is an Act of the Government of India and that there is no reason to suppose that it was framed with sole regard to the provisions of the Madras Revenue Recovery Act. Other Revenue Recovery Acts in force in 1883 recognized a distinction between the conditions of sale of land on which arrears had accrued and other lands belonging to the defaulter: vide sections 11 and 12 of Bengal Act VII of 1868, sections 94 (f) and (g) and 108 of the Central Provinces Land Revenue Act XVIII of 1881 and sections 133 and 135 of Act XVII of 1878 Oudh Land Revenue Act. Even assuming therefore that the framers of the Land Improvement Loans Act shared the view of the Madras Act II of 1864 taken by the learned Judges in *The Secretary of State for India in Council v. Pisipati Sankarayya*(1) this is not inconsistent with their having deliberately distinguished the cases having in mind the provisions of the Acts in force in other parts of India. Even in this Presidency so far as I am aware, *The Secretary of State for India in Council v. Pisipati Sankarayya*(1) was the first case in which the broader view of the applicability of section 42 was expressed; and with all respect

(1) (1911) I.L.R., 34 Mad., 493.

to the learned Judges in that case, I am inclined to think the learned Judges who decided *Ramachandra v. Pitchaikanni*(1) were inclined to take the narrower view. There is no reason to suppose that the framers of section 7 of the Land Improvement Loans Act acted under the impression that there was no difference in this respect.

I am inclined to think that while the words "in all or any of the following modes", if they stood alone, might be indicative only of procedure, some wider meaning should be attached to the words "as if" in clause (c) when contrasted with the words "according to the procedure, etc.," in clause (d). The use of the latter words is significant and shows at any rate that the framers of the Act had other words in their minds which might have been more suitably employed to express the meaning contended for by appellant's vakil.

There is, however, another argument to my mind conclusive on the point, furnished by the proviso to the section, which runs:—

"Provided that no proceeding in respect of any land under clause (c) shall affect any interest in that land which existed before the date of the order granting the loan, other than the interest of the borrower and of mortgagees, of, or persons having charges, on, that interest and where the loan is granted under section 4 with the consent of another person, the interest of that person, and of mortgagees of, or persons having charges on, that interest."

This clearly implies that the interests of prior mortgagees are affected by a sale under clause (c) and is in fact incapable of any other meaning. Mr. C. V. Anantakrishna Ayyar's only argument in this connexion is that the words of a proviso cannot be used to extend the operation of the section to which it is attached. This is no doubt true, and is clearly established by the judgment of the Privy Council in the case on which he mainly relies—*West Derby Union v. Metropolitan Life Assurance Society*(2)—but where there is doubt as to the true meaning of the substantive part of a section it is surely legitimate to look to the words of a proviso to it in order to determine which interpretation is correct. This is recognized by Lord HERSHELL in his judgment in the very case referred to. It cannot be said that

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(1) (1884) I.L.R., 7 Mad., 434.

(2) (1897) A.C., 647.

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the words of the main part of the section read so clearly in appellant's favour as not to be at any rate ambiguous : and here we have a proviso which is perfectly compatible with one interpretation, and clearly incompatible with another. It must also be noticed that one main objection of their Lordships to reference to provisos is inapplicable to the present case, viz., that provisos are frequently inserted simply to allay the apprehensions of persons against whom the Act was never intended to apply. This cannot be said of the exception against mortgagees which is contained in the proviso itself. There is nothing as far as I can see in the judgment of their Lordships in that case to preclude reference to the proviso for the interpretation of the section with which we are dealing : and it seems to me to be conclusive against appellant.

I must therefore hold that a sale of land under section 7 (1) (c) is free of incumbrances.

Two other objections raised on behalf of appellant may be briefly noticed. It is pointed out that Rs. 2,500 of the first instalment advanced was devoted to discharging a loan privately taken for the purpose of paying for an oil-engine, the installation of which on the land was part of the improvements for which the loan was granted. Appellant contends that to this extent the loan from Government cannot be said to have been taken for the purpose of making an improvement within the meaning of section 4 of the Act. No authority is quoted and I am unable to accept such a contention. A considerable time usually elapses between the application for a loan under the Act, and its disbursement to the borrower : and in the present case the borrower being anxious to set about the work arranged to purchase the engine on the hire purchase system and apparently took a temporary loan from some private person, to enable him to discharge the earlier instalments. There is nothing in all this to affect the essential object for which the loan was taken from Government of the borrower's liability under the Act.

The second objection is that because the first instalment of the loan was not utilized within the period allowed by the Government rules, the disbursement of the second instalment cannot be treated as the disbursement of a loan under the Act and to the extent of that instalment no priority can be claimed

for it over plaintiff's mortgage. This contention is also baseless ; it is not denied that the first instalment had been utilized to the satisfaction of the Government Officers on the specified improvements prior to the disbursement of the second instalment : and I fail to see how the action of Government in relaxing the strict operation of the rule regarding the time limit in favour of the borrower can prejudicially affect Government's right in this connexion.

I would dismiss the appeal with costs of the second respondent.

SESHAGIRI AYYAR, J.—Although I agree with the conclusion at which my learned brother has arrived having regard to the fact that the point argued is practically one of first impression and to the important issues involved in the case, I have ventured to add a few words of my own.

The facts have been stated by my learned colleague and it is unnecessary to repeat them.

The main point for consideration is whether a sale for the loan advanced by the Government in respect of agricultural improvement of a property avoids previous existing incumbrances upon that property. I do not agree with Mr. C. V. Anantakrishna Ayyar that unless the loan is advanced for making future improvements the provisions of the Act have no application. Where in anticipation of loan from Government work which satisfied the definition of the term "improvement" is started in my opinion, the loan must be taken to have been granted for the purpose of making the improvement. The test is not whether the improvement was subsequently made but whether the money was applied for the construction of agricultural improvements upon the property. Nor do I think that the fact that time was extended for completing the work in regard to which the first instalment of payment was made in any way affects the validity of the subsequent advance. The provision in the rules for the completion of the work within the time stipulated is minatory in its nature and it is as much open to the Government to extend the time for performance as it is open to any private party to do so in respect of contracts fixing a time for performance. The rules do not compel the Government to refuse the loan if the time stipulated has been exceeded.

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On the main question, I have been greatly influenced by the contention of the learned Government Pleader on the use to be made of clause (a) of Act XIX of 1883. If clause (c) of that section is intended to have the same result as clause (a) I am prepared to agree with the learned vakil for the appellant that the words, "as if they were arrears of land revenue" would *prima facie* only attract the procedure prescribed in the Revenue Recovery Act and not the substantial declaration contained in sections 2 and 3 of that Act. The decisions of this Court have been uniform on that question. See *Ramachandra v. Pitchaikanni* (1), *Ibrahim Khan Sahib v. Rangasami Naicken* (2), *Kadir Mohideen Marakkayar v. Muthukrishna Ayyar* (3) and *Muthusamier v. Sree Sreemethanithi Swamiyar* (4). But in clause (c) of section 7 we have in addition to the words, "as if they were arrears of land revenue" a preceding and a subsequent clause which give a different complexion to the policy of the Act. The first four words "out of the land" and the last five words "in respect of that land" make it clear that the loan granted is to be regarded as a first charge upon the property. In *Ramachandra v. Pitchaikanni* (1) which was under the Abkari Act two eminent Judges of this Court while holding that the words "in like manner as for the recovery of arrears of land revenue" only denoted the procedure to be adopted, say :

"Arrear of abkari revenue is not due upon any specific land owned by the abkari renter."

That to my mind is the keynote to the construction of similar provisions in other Acts. In the case of abkari rent, in the case of income-tax, in the case of cesses under Local Boards Act, the amount payable to the Government is not due in respect of any specified land, whereas the essence of the stipulation under Act XIX of 1883 is the loan is payable out of and in respect of the land for improving which the loan is granted. In my opinion the language of section 7, clause (c), amounts to a declaration that the land is charged with the payment of the loan; and when in addition to that declaration the legislature refers to Act II of 1864, I am inclined to think that the provisions of sections 2, 5 and 42 of that Act are intended to be

(1) (1884) I.L.R., 7 Mad., 434.

(2) (1905) I.L.R., 28 Mad., 420.

(3) (1903) I.L.R., 26 Mad., 230.

(4) (1915) I.L.R., 38 Mad., 356.

read with clause (c) of section 7 of Act XIX of 1883. Whatever doubt there may exist on this question is removed by the proviso which in distinct terms says that the interest in the land which is available to the Government is restricted to that of the borrower and to that of the mortgagee.

Mr. C. V. Ananthakrishna Ayyar addressed to us an elaborate argument upon the inadvisability of utilizing provisos to supplement the operative portion of a section. I adhere to what I said on this question in my judgment in *In re Mrs. Besant* (1). It is a well-known canon of construction that where the language of a section is clear and unambiguous, the proviso should not be construed as adding to any right or disability created by the section; but where there is room for doubt regarding the construction of the section it has always been the practice to invoke the aid of the proviso to help in the proper interpretation of the section. The observations of Lord WATSON in *West Derby Union v. Metropolitan Life Assurance Society* (2) to which the learned Government Pleader drew our attention support this principle and there is nothing in the judgment of the other noble lords to throw doubt on the correctness of the dictum of Lord WATSON. In my opinion the proviso is strictly and rightly in place in this particular instance. By the operative portion of clause (c) the legislature provided that out of the whole land the loan shall be realized. The proviso releases rights other than those of the borrower and of the mortgagees, e.g., the rights of an occupancy tenant. Therefore the proviso is aptly in place and has the further effect of elucidating the meaning of the operative clause.

There is only one other observation that need be made and that is this: Section 7 provides for cumulative remedies: it is open to the Government to proceed against the borrower personally; they may proceed to sell the land: lastly they may also proceed to sell the land given as collateral security. Now, under clause (a) when the legislature provided that the borrower can be proceeded against personally it would follow as a matter of course that his property can be attached and sold. It seems to me that even where properties other than

(1) (1916) I.L.R., 39 Mad., 1164 at p. 1195.

(2) (1897) A.C., 647.

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those upon which revenue is due is sold under Act II of 1864 all pre-existing incumbrances on such properties are wiped off. During the course of the argument I felt some little doubt as to whether the decision of Justices MILLER and MUNRO in *The Secretary of State for India in Council v. Pisipati Sankarayya* (1) was right. But on closely examining the sections of the Revenue Recovery Act, I feel that the effect of section 42 is not only to discharge pre-existing incumbrances upon the property on which the arrear is due but also pre-existing incumbrances upon every property which is brought to sale for arrears of revenue due from the defaulter. Section 32 to which Mr. C. V. Ananthakrishna Ayyar drew our attention does not save the incumbrances as was contended. Therefore if the Government avail themselves of the remedy provided by clause (a) and if the words "as if they were arrears of land revenue" were to be construed as only indicating the procedure to be adopted then it would follow that the previous existing incumbrances would subsist and that the Government would only be entitled to the surplus sale proceeds, if any, after satisfying such incumbrances. If clause (c) is also to be similarly interpreted the legislature must be deemed to have been guilty of redundancy. According to Mr. Ananthakrishna Ayyar under clause (c) also, if a sale is effected for the loan, the incumbrance would subsist. I do not think Courts will be justified in imputing to the legislature the enacting of an unnecessary provision of law where they can give a consistent meaning to it otherwise. It is clear whereas under clause (a) the ordinary remedy is given, under clause (c), the remedy of avoiding existing incumbrances is provided by the legislature. At first sight it looks as if the legislature was not aware that under the Madras Revenue Recovery Act sales of property other than those upon which arrears are due would put an end to the existing incumbrances. Very likely the Imperial Government had in mind the provision of Bengal Act VII of 1868 which by section 11 enables the Collector to sell only previous incumbrances only in respect of that particular tenure. The Madras legislature has given a more drastic remedy for arrears of revenue than is given in Bengal. However that may

(1) (1911) I.L.R., 34 Mad., 493.

be, there can be no doubt that the effect of section 7, clause (c), is to make a declaration on behalf of the Government that it has a first charge upon the property for the loan advanced in respect of that property just as under section 2 of the Revenue Recovery Act, the Government has a first charge for arrears of revenue. In this view, the decision of the Subordinate Judge is right, and I agree that the appeal should be dismissed with costs of the second respondent.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

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v.

JAGATHAMBAL (PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (2) (a) and (b); O. VII, r. 10 and sec. 115—Withdrawal of suit—Suit grossly undervalued in the plaint—Real valuation beyond the jurisdiction of the District Munsif's Court—Application by plaintiff for leave to withdraw portion of the suit with liberty to bring fresh suit—Leave, whether properly can be granted—Judicial discretion—Jurisdiction—Ejusdem generis—Material irregularity in exercise of jurisdiction—'Other sufficient grounds' in O. XXIII, r. 1 (2) (b), construction of.

The plaintiffs instituted a suit in a District Munsif's Court for recovery of possession of several items of immoveable property including a house, valuing the house at Rs. 200 and the other items at Rs. 1,917 and odd for purposes of jurisdiction. The defendant objected that the house was grossly undervalued and that the suit was, on proper valuation, beyond the jurisdiction of the District Munsif. A commissioner, appointed to ascertain its value, reported that the house alone was worth Rs. 6,500. The plaintiff thereupon applied to the Court for leave to withdraw the suit in respect of the house with liberty to bring a fresh suit therefor; the Court granted the application, notwithstanding the objection of the defendant. The latter preferred a Civil Revision Petition to the High Court against the order:

Held, that, assuming that the lower Court had jurisdiction to act under Order XXIII, rule 1 (2) (b), it acted with material irregularity in the exercise of its jurisdiction, as it did not exercise a *judicial discretion* in passing the order;

* Letters Patent Appeals Nos. 157 and 158 of 1917.

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that the plaintiff ought not to have been permitted to withdraw his claim for the house, as the undervaluation in the plaint was so gross that he could not have acted honestly in doing so and did not deserve any indulgence from the Court; and

that consequently the High Court should interfere under section 115 of the Civil Procedure Code and set aside the order.

Per SADASIVA AYYAR, J.—The words 'other sufficient grounds' in Order XXIII, rule (2) (b), should not be interpreted *ejusdem generis* with 'formal defect' in rule 1 (2) (a).

Limits of the doctrine of *ejusdem generis* discussed.

After a Court of first instance has come to the conclusion that the suit as brought is beyond its jurisdiction, it has no power to pass any other judicial order in the suit except those which the statute expressly empowers it to pass, such as an order returning the plaint for presentation to the proper Court under Order VII, rule 10, or an order awarding costs under section 35 of the Code.

APPEALS under clause 15 of the Letters Patent against the judgment of ABDUR RAHIM, J., in *Jagathambal v. Kannuswami Pillai*(1).

The material facts appear from the judgment of SADASIVA AYYAR, J.

G. S. Ramachandra Ayyar for the appellant.

T. V. Muthukrishna Ayyar for the respondent.

OLDFIELD, J.

OLDFIELD, J.—I am not disposed to reconsider the principle referred to in *Aiya Koundan v. Jagan Mandalathipathiar*(2) since as my learned colleague has shown in the judgment which I had the advantage of reading, it has been accepted by this and other High Courts in cases in the authorized reports; and I do not think it necessary to decide whether the District Munsif has jurisdiction to pass his order. For I am clear that it was not one passed in the exercise of a judicial discretion, since in passing it he gave no weight to the fact that plaintiffs, appellants, gave an undervaluation of one item of the suit property so gross that it can hardly have been honest and that they therefore deserved no consideration. In the circumstances, the District Munsif had no right to use his powers to assist them; and on that ground, I concur in dismissing the Letters Patent Appeal with costs.

(1) Civil Revision Petitions Nos. 19 and 306 of 1917 preferred to the High Court against the order of THOMAS MUNRO FRENCH, District Munsif of Negapatam, in Insolvency Applications Nos. 1895 and 1196 of 1916 in Original Suit No. 453 of 1916.

(2) (1914) 27 M.L.J., 480.

SADASIVA AYYAR, J.—The plaintiffs are the appellants in these Letters Patent Appeals. They brought the suit in the Negapatam District Munsif's Court for possession of several items of property (including a house item No. 76) alleged to have been inherited by the second plaintiff as the adopted son of one Natesa Pillai whose widow is the defendant. The plaintiffs valued the other items at Rs. 1,917-10-0 and the house item No. 76 at Rs. 200, thus making the total value of the subject-matter of the suit Rs. 2,117-10-0. The defendant contended that item No. 76 was grossly undervalued and that the suit was beyond the jurisdiction of the District Munsif. A commissioner was appointed to value item No. 76 and he valued it at Rs. 6,500, the result being that the total value of the plaint items for purposes of jurisdiction and court-fees was more than Rs. 8,400. Then the plaintiffs put in a petition on the 14th December 1916 for permission to withdraw the suit so far as house, item No. 76, was concerned with liberty to bring a fresh suit in respect of the said property, on the ground that the plaintiffs had no objection whatever to the defendant, the adoptive mother of the second plaintiff, residing during her lifetime in that item, the second plaintiff being bound to provide her with residence. The defendant who denied the second plaintiff's alleged adoption objected to the granting of the petition on the following grounds: (a) the plaintiff is not legally entitled without paying court-fees thereon to apply for withdrawal with liberty to bring a fresh suit; (b) the Court has no jurisdiction to permit the withdrawal; (c) there is no legal ground for allowing the withdrawal; and (d) the plaintiffs knew that the suit was not within the jurisdiction of the Court and they wanted to defraud the Government of a large amount of court-fees. The learned District Munsif granted the plaintiff's petition, that is, permitted the second plaintiff to withdraw his claim as regards the plaint item No. 76 with liberty to bring a fresh suit. This order was passed on the 17th January 1917. There was a connected petition for amendment of the plaint by striking out item No. 76 from the plaint schedule and by making consequent alterations; that petition was also allowed.

The defendant thereupon filed two revision petitions under section 115, Civil Procedure Code, against the District Munsif's orders. They came on before Mr. Justice ABDUR RAHIM and he

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allowed the petitions by a single judgment. The grounds for decision are thus set out :

"Rule 1 (2) of Order XXIII says where the Court is satisfied (a) that a suit must fail by reason of some formal defect or (b) that there are *other sufficient* grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may . . . grant the plaintiff permission to withdraw from such suit. It has been held by a bench of this Court in *Aiya Koundan v. Jagan Mandalathipathiar* (1) that the sufficient ground mentioned in rule 1 (2) (b) of Order XXIII, Civil Procedure Code, must be interpreted as being *ejusdem generis* with the formal defect referred to in rule 1 (2) (a). That being so, can it be said that there was a defect of that character in this suit? If it were a mere question of general discretion, I should be prepared to hold that this discretion was rightly exercised by the first Court. But I am bound by the ruling of the Division Bench of this Court above referred to. Therefore unless it could be said that there was a defect in the suit of a character akin to a formal defect the order of the District Munsif must be held to be unauthorized by law."

This doctrine of *ejusdem generis* has, in my humble opinion, been pushed too far in some of the English cases :—(a) where the generic words follow specific words in the very same clause of a sentence, (b) where the specific words are all of the same genus and not of different genera and (c) where the general object of the Act is so clearly expressed and the intention of the Statute is patently opposed to giving the wider meaning to the succeeding words, then alone in my opinion the meaning of the general words ought to be restricted as coloured by the preceding specific terms. Now as regards Order XXIII, rule 1 (old section 373), I find that the expression "formal defect" occurs in clause (a) of sub-section (2) in a separate sentence relating to the whole suit failing, whereas the expression "other sufficient grounds" occurs in clause (b) which contemplates cases where the suit may not wholly fail but the plaintiff might be put to great inconvenience if he is not allowed to withdraw, which contemplates again cases where only a part of the claim may fail in that same suit if he is not allowed to withdraw with liberty to bring a fresh suit for that part and where if he is not given such permission, he might

(1) (1914) 27 M.L.J., 480.

be precluded also from bringing a separate suit therefor. Further clause (a) does not mention several things which could be brought under one genus, but it refers to a single class of things as "formal defect," while clause (b) refers to "other sufficient grounds," that is, other than "formal defect." There is nothing again clearly indicated in the section itself from which we could infer that the legislature intended to allow withdrawal with permission only in the cases where the suit was bad by reason of a formal defect or something analogous to a formal defect. Thus in *R. v. Payne*(1), it was held that an Act, which made it penal to convey to a prisoner in order to facilitate his escape "any mask, dress or disguise or any letter or *any other article or thing*", did not intend to restrict the meaning of the general terms "any other article or thing" by the particular words "disguise or letter" and that therefore a crow-bar was also included under the expression "other article or thing." See also *Shillito v. Thompson*(2), *R. v. Edmundson*(3), *The Queen v. Spratley*(4), and *Lowther v. Bentinck*(5). In *Watson v. The Collector of Rajshahye*(6), the first suit in which liberty to bring a fresh suit was given was instituted in 1856 and decided in 1857 even before the enactment of the first Civil Procedure of 1859 (see section 97 of that Code where the provision as to withdrawal appears), the suit was again not allowed to be withdrawn, but it was dismissed for want of sufficient evidence and then the Judge said that his order dismissing the suit was "not intended to bar the plaintiffs from proceeding again as if the action had not been brought". The remarks of Their Lordships of the Privy Council at page 170 mainly dealt with the procedure of the Courts of Equity in England as distinguished from other Courts even in England and could have no reference whatever to the powers of Indian Courts under the provisions of the Civil Procedure Codes. I therefore with the greatest respect feel myself unable to agree with the dicta of MOOKERJI, J., in *Khanda Co., Ltd., v. Durga Charan Chandra*(7) and *Mabulla Sardar v. Rani Hemangiri Debi*(8), that "other sufficient grounds" means

(1) (1866) L.R. I.C.C., 27.
(3) (1859) 2 E. & E., 77.
(5) (1874) L.R., 19 Eq. C., 166.
(7) (1910) 11 C.L.J., 45.

(2) (1875) L.R., 1 Q.B.D., 12.
(4) (1856) 6 E. & B., 363.
(6) (1869) 13 M.I.A., 160.
(8) (1910) 11 C.L.J., 512.

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grounds analogous to a "formal defect". Suppose a case like this: *A* sues *B* on a mortgage bond for sale of *B*'s family house within three years of its execution. It is found that it would ruin *B*'s credit and health to have a decree for sale of his dwelling house passed just then and as the security is good and as *A* has nine years more to sue and as he was paid up his costs, he applies at the request of *B* and of mutual friends to withdraw the suit with liberty to bring a fresh suit five years afterwards if the money be not paid up meanwhile. Even such an application would have to be refused if the expression "other sufficient grounds" is to be restricted to "formal defect" or to something analogous to "formal defect." Again in *Lakshminarayana Tantri v. Ramachandra Tantri*(1), Mr. Justice ABDUR RAHIM following *Luhavin v. Lachya*(2), refused to apply the doctrine of *ejusdem generis* for interpreting the word "otherwise invalid" in rule 15 (c) of schedule II of the Civil Procedure Code on the ground that the intention of the legislature was to allow an attack on the validity of an award on all other grounds besides those mentioned on the earlier clauses. I think that similar reasons apply to give a wide meaning to words "other sufficient grounds" in Order XXIII, rule (1), clause (b). *Kharda Co., Ltd., v. Durga Charan Chandra*(3), and *Mabulla Sardar v. Rani Hemangini Debi*(4), and *Burathagunta Pentadee v. Kurlapati Rajamma*(5), *Mahipathi v. Nathu*(6), *Hriday v. Akshai*(7), *Ramachandra Doss v. Hachanna Fakir*(8), and *Aiya Koundan v. Jagan Mandalathipathiar*(9), might have been supported on other grounds and in fact, so far as the cases in this Court are concerned, namely, *Burathagunta Pentadee v. Kurlapati Rajamma*(5), and *Aiya Koundan v. Jagan Mandalathipathiar*(9), they were supported on such other grounds principally. Mr. Justice KRISHNASWAMI AYYAR says for instance in *Burathagunta Pentadee v. Kurlapati Rajamma*(5). "But even apart from that", that is, the interpretation of the word 'other' in clause (b) of Order XXIII, rule 1, "the mere inability of the party to prove her case does not appear to me to be a sufficient

(1) (1918) 34 M.L.J., 71 at p. 75.

(3) (1910) 11 C.L.J., 45.

(5) (1911) 1 M.W.N., 105.

(7) (1917) 25 C.L.J., 454.

(2) (1916) I.L.R., 36 All., 69.

(4) (1910) 11 C.L.J., 512.

(6) (1909) I.L.R., 33, Bom., 722.

(8) (1916) 35 I.O., 843.

(9) (1914) 27 M.L.J., 480.

ground for giving her leave to institute a fresh suit." So also Mr. Justice OLDFIELD says in *Aiya Koundan v. Jagan Mandalathipathiar*(1).

"But whether or no this interpretation of the phrase 'sufficient ground' be adopted, we must hold that his discretion was not exercised judicially."

In the present case, even if the other ground must be analogous to a formal defect, I think that objections to a suit on the ground of jurisdiction and insufficient court-fees are analogous to formal defects and hence, I think, with great respect, that the judgment of the learned Judge of this Court, against whose decision this letters patent appeal has been filed cannot be supported on the ground on which he has decided it. I might state that even where in the same clause of the same sentence in the Limitation Act, section 14, the words 'other cause' followed again by the express words "of a like nature" were inserted after the words 'defect of jurisdiction', the Courts have given a very liberal interpretation to the words 'other cause' as including cases where the suit failed for want of a prior notice under section 80, Civil Procedure Code, or where it was brought without proper leave of the Court or without production of the Collector's certificate required by section 6 of the Pensions Act. I think, however, that the judgment of the learned Judge can be supported on the ground that the District Munsif acted with very material irregularity in allowing the petition under Order XXIII, rule 1, in this case. It seems to me to be very difficult to hold that a house found by the commissioner to be worth Rs. 6,500 could have been valued at Rs. 200 by the plaintiffs with any shadow of good faith on their part. Order XXIII, rule 1, gives full discretion to the Court, but of course such a discretion should be judicially exercised. I do not think that the discretion was at all properly or rightly exercised in this case. I think that there was very material irregularity committed by the lower Court in the exercise of its jurisdiction (assuming that it had jurisdiction) in having allowed the portion of the claim relating to the house to be withdrawn with liberty to bring a fresh suit as regards that portion.

Lastly, I have, after anxious consideration, arrived at the opinion that the Court of first instance had no jurisdiction to pass

(1) (1914) 27 M.L.J., 480.

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any other judicial order in the suit after it had once arrived at the conclusion that the suit as brought was beyond its jurisdiction except to return it for presentation to the proper Court. Section 57 of the former Civil Procedure Code provided that the plaint should be returned to be presented to the proper Court in cases (a), (b) and (c), all involving questions of jurisdiction. But the section did not expressly state at what stage of the suit it was obligatory on the Court to return the plaint. As this section appeared before section 64 which begins by saying 'when the plaint has been registered,' it may be plausibly argued that under the old Code the return of the plaint directed in section 57 related to the period before the registry of the plaint. The present Order VII, rule 10, imperatively says that the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should be instituted. I think it is clear that the legislature intended that as soon as the Court arrives at the conclusion at any stage of the case that the suit should have been instituted in some other Court, the plaint should at once be returned to be presented to the proper Court. It also stands to reason and principle that a Court which has no jurisdiction over a suit cannot pass any valid orders in such a suit except orders which the statute expressly empowers it to pass such as the order returning the plaint to be presented to the proper Court which it is specially empowered to pass by Order VII, rule 10, and orders as to costs incurred before it, as to which also there is a special provision in section 35. The last sentence of section 35 is very significant in this connexion. It is as follows: "The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers", that is, powers to determine by whom or out of what property and to what extent costs are to be paid. The clear implication, therefore, is that in the absence of such express statutory provision the Court which has no jurisdiction over the suit would have under the general principles of jurisprudence no power to award costs incurred before it in respect of such proceedings. *Venkatarama Aiyar v. The Secretary of State for India in Council*(1) relied on by the respondent has no relevancy on the question now under consideration. In that case, the plaint had been rightly returned by the District

(1) (1910) I.L.R., 33 Mad., 262.

Munsif as soon as it was found that it was beyond his jurisdiction and the District Munsif did not again take cognizance of the suit till the plaintiff struck out some of the properties from the plaint and properly amended the valuation so as to bring it within the cognizance of the District Munsif's Court. The fact that the plaintiff put in an unnecessary petition stating that he relinquished his claim to the properties which he had struck out was rightly held to be no bar to the District Munsif's accepting the amended plaint which was confined to properties, whose value was within the District Munsif's jurisdiction.

In the result, I would dismiss the Letters Patent Appeal with costs.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Sadasiva Ayyar.

HAJEE ISMAIL AND SONS (PLAINTIFFS), APPELLANTS,

v.

MESERS. WILSON & CO. (DEFENDANTS), RESPONDENTS.*

Contract Act (IX of 1872), sec. 73, ill. (a)—Breach of contract to sell goods—Measure of damages—No actual loss by breach—No market for the goods at place of delivery—Liability for damages—Rule of Indian and English Law, comparison of.

The defendants agreed to sell a certain quantity of molasses to the plaintiffs by monthly instalments and failed to deliver one of the instalments assigning as a reason the difficulty of obtaining freight. The plaintiffs did not purchase other molasses against the contract and there was no market for the goods at the place of delivery. The plaintiffs, who were not found to have incurred any actual loss from the non-delivery sued to recover damages from the defendants for breach of the contract.

Held, that the plaintiffs were entitled to damages as the case fell within illustration (a) of section 73 of the Indian Contract Act which lays down that the measure of damages in a case like this is the sum by which the contract price falls short of the price for which the purchaser might have obtained goods of like quality at the time when they ought to be delivered.

English and Indian cases discussed.

* Original Side Appeal No. 32 of 1917.

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APPEAL against the judgment and decree of KUMARASWAMI SASTRIYAR, J., in Civil Suit No. 89 of 1916.

The plaintiffs entered into two contracts with the defendants under each of which the defendants agreed to sell and deliver 2,400 tons of molasses in equal monthly instalments of 400 tons, c.i.f. Madras from July to December 1914 at the rate of Rs. 2 per cwt. in the one and Rs. 1-15-0 in the other. The defendants failed to make the shipment for October which ought to have been delivered at Madras in November 1914. The plaintiffs sued to recover the sum of rupees twenty-three thousand as damages for breach of the contract, alleging that that was the difference between the contract price and the market price in November 1914, which was the time for delivery at Madras. The defendants pleaded that, owing to difficulties and risks caused by the outbreak of war, it was impossible to make the October consignment, that they had offered to make the October shipment along with the November shipment but that the plaintiffs had unreasonably refused to accept it. The plaintiffs had ordered the goods in question for use in their distillery in Mysore where they had a contract with the Mysore Government. Notwithstanding the default of the defendants in making the October shipment, the plaintiffs had not made any purchases against the contract and it was not found as a fact that they had suffered any actual damage owing to the non-shipment. The learned trial Judge allowed only Rs. 100 as damages for the breach complained of besides some other amounts claimed in the plaint. The plaintiffs preferred this appeal.

D. Chamier and Pandalay for the appellants.

N. Grant for the respondents.

WALLIS, C.J.

WALLIS, C.J.—The plaintiffs in this case are a well-known firm carrying on business in Mysore and Madras. In 1913 they obtained from the Mysore Government the Abkārī contract for Mysore and arranged with the defendants who carry on business in Madras that they should go on importing molasses for them in the same way as they had done for the previous holders of the contract. Admittedly the goods contracted for were intended for use by the plaintiffs in their factories at Bangalore. Owing to the disorganization of shipping consequent on the outbreak of the war at the beginning of August 1914, the defendants

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were unable to ship 800 tons from Java in the month of October 1914 as they were bound to do under their contract. This was a breach of contract for which admittedly they are bound to compensate the plaintiffs in damages, and the main question argued before the learned Judge and before us is as to the measure of damages. The learned Judge awarded the plaintiffs only nominal damages on the ground that they had failed to put before him the proper materials for estimating the damages, and the plaintiffs have appealed. The law as to this subject is to be found in section 73 of the Indian Contract Act and the Explanation thereto. Under the body of the section the damages are to be those which naturally arise in the usual course of things from the breach or which the parties knew when they made the contract to be likely to result from the breach. By the Explanation, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. The Explanation is in accordance with the decisions in *Dunkirk Colliery v. Lever*(1), and the decision of the House of Lords in *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited*(2). In that case Lord HALDANE, L.C., observed :—

“The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps.”

The law was recently laid down to the same effect by the Judicial Committee in *Jamal v. Moolla Duwood Sons and Co.* (3). The rule that, where there is a market at the place of delivery, the damages are the difference between the contract price and the market price at the date of delivery may be regarded as an application of the principle embodied in the Explanation that the buyer must take the necessary steps to minimize the damage. Where there is a market and the seller has no notice of any contract entered into by the buyer, the market price in the case of failure to deliver is the test by which to estimate

(1) (1878) 9 Ch. D., 20, 25.

(2) (1912) A.C., 673, 689.

(3) (1916) I.L.R., 43 Calc., 493.

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the value of the goods, independently of any circumstances peculiar to the buyer and so independently of any contract made by him for sale of the goods. This is the rule in *Rodocanachi v. Milburn*(1) approved by the House of Lords in *Williams Brothers v. Agius*(2) and applied by the Judicial Committee under the Indian Contract Act in *Jamal v. Moolla Dawood Sons and Co.*(3). This is the rule in cases of non-delivery. It has recently been stated in the House of Lords that there is a difference where delivery is only delayed, but that is not the case here, and, also, we are bound by the terms of the Indian Contract Act.

When there is no market for the goods at the place of delivery, the buyer may procure a substitute at a higher cost if it is a reasonable and business like thing to do and calculated to diminish the loss, and may recover the difference in price as damages from the seller. It has not yet been decided that he is bound to do so and apparently he may refrain from doing so and rely on his claim for damages. See the observations of Lord ATKINSON in *Erie County Natural Gas and Fuel Company v. Carroll*(4).

Where there is no market, Mr. Mayne says:

"the principle upon which the damages are to be assessed is exactly the same. They are to be taken at the value of the article at the date of breach. But the mode of estimating this value is different, for there is no market price which can be quoted."

Where the buyer was under a contract to resell, as in *Borries v. Hutchinson*(5), and *Hinde v. Liddell*(6) the resale price is evidence of the value of the goods at the place and time of delivery as observed by Mr. Mayne and as recently held in *Stroms Bruks Aktie Bolag v. John and Peter Hutchinson*(7), which approved the judgment of BLACKBURN, J., as he then was, in *O'Hanlon v. G. W. Ry. Co.*(8), that the natural and fair measure of damages is the value of the goods at the time and place at which they ought to have been delivered to the owner, which I read as meaning the value of the goods to the owner of such goods at the time and place they ought to have been

(1) (1886) 18 Q.B.D., 67, 77.

(3) (1916) I.L.R., 43 Cal., 493.

(5) (1865) 18 C.B. (N.S.), 445.

(7) (1905) A.C., 515.

(2) (1914) A.C., 510.

(4) (1911) A.C., 105.

(6) (1875) L.R., 10 Q.B., 265.

(8) (1865) 6 B. & S., 484, 491.

delivered. In that case also, the goods were intended for resale by the buyer.

Where, as in the present case, the article is purchased not for sale but for use to the knowledge of the sellers, Mr. Mayne observes:

"Damages will also be assessed with reference to its value to the purchaser. But its value will be determined by other considerations, that is to say, by the use for which it was intended, the loss which followed from its not being supplied, and the profit which would have been made out of it if it had been delivered in time."

In *Portman v. Middleton*(1), where the defendant failed to deliver a fire box, the plaintiff recovered the price and the extra cost of procuring a substitute but not the special damages of which the defendant had no notice. In *Smeed v. Foord*(2), the defendant who had failed to supply on the due date a threshing machine was held liable for the deterioration of the wheat owing to its being stacked and injured by rain as that was a natural consequence of the delay in supplying the machine according to the contract. In *Gee v. Lancashire and Yorkshire Railway Co.*(3), as I read it, all that was ruled was that it could not be held as a matter of law that the stoppage of the buyer's mills was a natural consequence of the seller's delay in delivering cotton under his contract. In *Elbinger Actien-Gesellschaft v. Armstrong*(4) BLACKBURN, J., as he then was, delivering the judgment of the Court of Queen's Bench observed that

"where, from the nature of the article, there is no market in which it can be obtained, the rule as to the difference of contract and market prices is inapplicable,"

and the plaintiffs were allowed to retain the damages awarded them as the reasonable result of the delay in delivery. We have not been referred to any case in which a different test was applied in the case of non-delivery as distinguished from late delivery of goods intended for use.

As regards goods intended for resale where there is no market price at the place of delivery, in *O'Hanlon v. G. W. Ry. Co.*(5) (which was a case of non-delivery by a carrier, but that

(1) (1858) 4 C.B. (N.S.), 322.

(3) (1860) 6 H. & N., 211.

(2) (1859) 1 E. & E., 602.

(4) (1874) L.R., 9 Q.B., 473.

(5) (1865) 6 B. & S., 484.

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appears to make no difference) the value of the goods was arrived at by taking into account the wholesale price at the place of manufacture and adding to it the cost of carriage to the place of delivery, and the profit which a hypothetical importer at the place of delivery might be expected to charge. This hypothetical market price is by no means so satisfactory a measure of damages as the real market price where it exists, and is only applicable in the absence of other evidence of value such as the price at which the buyer had contracted to resell. It is especially unsatisfactory in cases like the present where it takes nearly a month from the date of order to procure the goods at the place of delivery. Logically, the price at the date when the goods would have had to be ordered so as to reach the place of delivery on the contract date would seem to be the price to be regarded, rather than the price at the contract date which the learned Judge has adopted; but, in the case of goods purchased for use, whichever date be taken, and whether in the present case the price be taken at Calcutta, or at Java, damages assessed on this basis bear no real relation to the buyer's actual loss, and as in the present case, give him heavy damages where he has sustained no real loss. I think therefore there is much to be said in favour of adopting Mr. Mayne's rule, and have felt considerable doubt on the question. In this Court however we are governed by the Indian Contract Act and illustration (a) to section 73 says that the measure of damages in this case is the sum by which the contract price falls short of the price for which the purchaser might have obtained goods of like quality at the time when they ought to be delivered.

On a careful consideration of the question, I have not found sufficient reason for refusing to follow the rule laid down in the illustration which also appears from the latest edition of Sedgwick on Damages to be the accepted rule in America.

In the present case the learned Judge finds, and I entirely agree with him, that the plaintiffs sustained no actual loss from the defendants' failure to ship the October consignment, as they were admittedly well stocked. They might therefore without any prejudice to themselves have accepted the defendants' offers to ship the October consignment along with the November consignment, or their subsequent offer about the 29th November to forward it by an early shipment in December. These

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considerations however are inapplicable if the rule in illustration (a) is to be strictly applied, as I think it should be.

In arriving at the price for which the goods might have been obtained on the date of delivery, I entirely agree with the learned Judge that we should look *prima facie* at the cost of obtaining them from Java, and not from Calcutta which gets its supplies from Java, especially as the evidence is that the goods can be obtained as quickly from Java as from Calcutta. Obviously, the market price at Java would ordinarily be less than at Calcutta. It is quite clear that the shipping and insurance difficulties consequent of the outbreak of war in August 1914 must have caused an advance of the prices ruling in Java and Calcutta over those at which the plaintiffs purchased before the war. Exhibit G shows that the defendants were asking Rs. 2-9-3 per cwt., ex war risk on the 29th October 1914, about the time when the hypothetical dealer in Madras might be expected to purchase the goods in Java to have them ready in Madras on the 29th November which the learned Judge has fixed as the date of delivery in Madras. Though the plaintiffs have only tendered evidence as to the prices ruling in Calcutta, and the defendants have abstained from tendering any evidence on the subject, Mr. Chamier, for the plaintiffs, has put before us certain calculations from which he estimates the c.i.f. Java Madras price on November 29th at Rs. 2-8-7 per cwt. This figure he arrived at by deducting the freight to Calcutta, as spoken to in evidence, and adding the freights from Java to Madras, but these are not proved to have been the prevailing freight either at the end of October or of November 1914, and I agree with the learned Judge that the c.i.f. prices from Java are not accurately proved. I think therefore that Mr. Chamier is not entitled to judgment as claimed by him for Rs. 8,800 as the difference on 800 tons between Rs. 2-8-7 per cwt., his estimated c.i.f. price from Java on the 29th November and the c.i.f. contract price of Rs. 1-15-6 plus Rs. 250, importer's profit and Rs. 33 lading charges, in all Rs. 9,083. On the other hand, looking at the evidence as a whole, and especially at Exhibit G-1, I think there is evidence from which I am justified in concluding that the hypothetical value of 800 tons in Madras at the end of November must have exceeded the c.i.f. contract price by not less than Rs. 5,600. It is very likely that the figure would be

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higher if all the evidence were before us, but we are agreed that that sum may safely be awarded on the evidence before us. I would accordingly allow the appeal and increase the damages to Rs. 5,000. The respondents will pay the costs of the appeal. The memorandum of objections is dismissed with costs.

SADASIVA AYYAR, J.—Plaintiffs are the appellants. The defendants under two contracts with the plaintiffs were bound to ship 800 tons of solid Java molasses in October 1914 at Java to arrive in Madras in November 1914, the plaintiffs to take delivery at Madras paying Rs. 1-15-6 per cwt. The defendants failed to make the October shipment and thus committed breach of the contract. The plaintiffs sue for recovery of (a) Rs. 23,000 alleged to be the difference “between the contract price and the market price” of the 800 tons of molasses in November 1914 when the molasses ought to have been delivered at Madras by the defendants, and (b) Rs. 2,725-15-6 being the sum paid under protest by the plaintiffs to the defendants owing to the illegal detention by the defendants of some other shipments under the contracts till that sum was paid to the defendants.

The learned Judge on the Original Side gave a decree for the Rs. 2,725-15-6 claimed under the heading (b) on account of the sum paid under protest, but gave only Rs. 100 as nominal damages in respect of the Rs. 23,000, damages claimed under heading (a). Hence the plaintiffs have appealed under the Letters Patent, the appeal being valued at Rs. 21,000 evidently because the plaintiffs’ contention in appeal is that the learned Judge on the Original Side ought to have given them Rs. 21,100 as damages instead of only Rs. 100 under the heading (a).

As stated by my Lord in his judgment, the law as to this subject is to be found in the Indian Contract Act, section 73, and in the illustrations thereto. The plaintiffs are, by the section, entitled to have

“compensation for the loss or damage caused” to them “by the breach, the loss or damage being such as *naturally* arose in the “usual course of things from such breach or which the parties knew “when they made the contract to be likely to result from the “breach of it.”

Though there are 18 illustrations (a) to (r) appended to section 73, none of them refers in terms to a case where there is no market for the goods at the place of delivery mentioned

in the contract. (Three of the illustrations, namely, (e), (o) and (q) expressly refer to “market price” as one of the essential ingredients to be considered in arriving at the damages.) If there was no illustration at all which could be reasonably held to govern the facts of this case and if the body of the section alone remained for consideration on the question of the amount of damages which the plaintiffs are entitled to, there seems much to be said in favour of the view that, as there is no market for the goods at the place of delivery, and as the pecuniary loss *naturally* flowing from such a breach cannot therefore be estimated with reference to the market price, the plaintiffs ought to prove that “damages” capable of calculation in some other reasonable manner *naturally* flowed and was sustained by them from such breach or prove (the second alternative mentioned in section 73) that both themselves and the defendants knew that some other damage was likely to result from the breach of the contract and the amount of such damage. This latter alternative right is, in my opinion, given by the section only as an additional right to that given by the clause which gives compensation for “the loss or damage which *naturally* arose in the usual course of things” from such breach, such additional right to be availed of at the plaintiffs’ option.

Assuming, as I said before, that none of the illustrations to the section throws any light on the dispute in this case in which there is no market for the goods at the place of delivery, I agree with my Lord that the plaintiffs have not proved that any loss or damage *naturally* arising in the usual course of things from the breach of the plaintiffs’ contract has been caused to them, nor (in the alternative) any loss or damage which both parties knew when they made the contract to be likely to result from its breach.

The English cases (see *Hinde v. Liddell*(1) and *Elbinger Actien-Gesellschaft v. Armstrong*(2)) no doubt decide that in such a case (which we might shortly call “no market case”) the damages must be calculated on the basis of the value fixed by the price which would actually have to be paid for the best and nearest available substitute. Some of the English cases, if I may say so with respect, use the expression “market-value”

(1) (1875) L.R., 10 Q.B., 265.

(2) (1874) L.R., 9 Q.B., 473,

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in a loose manner and lay down that the market-value for the calculation of damages must be ascertained in particular modes where there is no market at all for the goods at the place of delivery : see *Wertheim v. Chicoutimi Pulp Company* (1).

I agree with KUMARASWAMI SASTRIYAR, J., that the English and Indian cases do not lay down any inflexible rule that in estimating damages in "no market" cases that "one has to go to the place which is nearest to the place where the breach occurred" and where there is a market. I agree with him that

"It is not the nearest market that always governs but the place where, having regard to all the facts of a particular case, the plaintiff would without any material inconvenience to himself procure the goods in a manner that would throw the least amount of hardship on the other party."

In the present case, it was to Java and not to Calcutta that the plaintiffs should have turned to if they really wanted to procure molasses as a substitute for the molasses contracted for.

I further agree with KUMARASWAMI SASTRIYAR, J., that the fact that the plaintiffs did not make any purchase of molasses as a substitute for the molasses contracted for or that they have not proved that they suffered a pie of actual damage through the breach of contract does not disentitle them if the English and American law applies to this case from recovering the difference between the Java price in October 1914 plus the cost of carriage to Madras and the contract price. As I said already, it may be a question whether if the body of the section 73 stood alone, such a difference in a "no market" case could be treated as loss or damages arising *naturally* from the breach. I shall take an extreme case to illustrate what is in my mind, as extreme cases sometimes bring out clearly the principle in dispute. Suppose A at Madras wishes to bring up a wild animal found in Australia as a household pet; there being no market for such an animal at Madras, he enters into a contract with B of Australia through B's agent at Madras in March 1917 for delivery to him at Madras of the animal, the price to be Rs. 300 payable to B's agent at Madras on delivery in September 1917. B illegally repudiates the contract in July 1917 and thus commits a breach. If A had taken other steps in July or August

(1) (1911) A.C., 301 at p. 316.

1917, he could have obtained a similar wild animal from Australia delivered at Madras in September at a cost of Rs. 500. A does not take any such steps but makes a demand for Rs. 200 as damages payable to him and he dies (say) three days after the date fixed for the delivery of the animal to him at Madras under the contract. A's son and heir C does not himself care to have any such animal as a pet. Is C entitled to recover rupees 200 as damages from B for breach of the contract according to section 73 of the Contract Act? Section 73, as I said before, speaks of loss or damage which *naturally arose* from such breach using the word 'arose' in the past tense. Can we say that Rs. 200 was the damage which had naturally arisen to A by his not having had a pet wild animal by him during the three days between the date fixed for delivery of the same under the contract and A's death or to A's son and heir by not having inherited a wild animal which he does not want? If, of course, he had tried to obtain a substitute and had obtained it at a cost of Rs. 500, the loss of Rs. 200 might be said to have naturally arisen. Apart from authority therefore and on the language of the body of the section 73 alone, I would be inclined to think that no damages at all can be claimed.

But I think illustration (a) to section 73 authoritatively interprets what the legislature meant by the phrase "loss or damage which naturally arose in the usual course of things from a breach of the contract" in a "no market" case also. That illustration is as follows: "(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B *might have obtained* 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered." It will be seen that the language of the illustration is absolutely general and wide and it makes no exception on account of special circumstances like the following (a) a case where B could have used some other substitute for the saltpetre, (b) a case where B was made a gift of 50 maunds of saltpetre as substitute on the date fixed for delivery by A, (c) where there was no market at all for the saltpetre at the place of delivery. The law as stated in the illustration gives an unconditional right to B to get the

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difference between the contract price and the cost which he would have had to incur to obtain the like quantity of saltpetre with, of course, the least amount of hardship to A. I think this illustration is fully consistent with the English law as laid down in the House of Lords case *Werthiem v. Chicontini Pulp Company* (1) though that case was a case of breach by late delivery and not a case of no delivery at all. So also in *Jugmohandas v. Nusserwanji* (2) JENKINS, C.J., and CHANDAVARKAR, J., construe section 73 of the Contract Act similarly—

"There was no ready market rate. We, therefore, must have recourse to some other test."

And then the learned Judges consider all the facts including a statement prepared by the plaintiff himself in that case as to what he considered reasonable compensation from another party who committed a similar breach of contract with plaintiff. Where there are absolutely no materials put forward by the plaintiff to indicate what it would have cost him to obtain similar goods in the cheapest manner, it may be that only nominal damages would have to be allowed. But where there are some materials, the Court should, I think, as a jury try to arrive at the cost at which the plaintiff could have got other similar goods for the contracted date of delivery and give him the difference, if any, between that and the contracted price. In the present case, we have got the facts that the defendants themselves wrote the letter (Exhibit G) in October 1914 wherein they offer to deliver molasses at Rs. 2-9-3 per cwt. in November. If we take that rate as the rate at which the plaintiffs would have been obliged to pay if they had attempted to obtain 800 tons or 16,000 cwts. in substitute for the molasses contracted for, then the damages which they would be entitled to would be 16,000 × Rs. 2-9-3 minus Rs. 1-15-6 (9 annas 9 pies or Rs. 975). But it appears that the plaintiffs themselves considered the price Rs. 2-9-3 as too high a quotation and that the price of molasses was probably rising even between the beginning of October and the end of October at Java.

I might here remark that the plaintiffs might have let in evidence as to why they considered Rs. 2-9-3 as too high or what they considered as a fair price and the defendants might

(1) (1911) A.C., 801 at p. 316. (2) (1902) I.L.R., 26 Bom., 744.

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also have let in evidence as to how they arrived at the figure Rs. 2-9-3 and what the real price was of molasses at Java and what, with the freight and reasonable commission to importers the cost per cwt. would have come to when delivered at Madras. I therefore agree with my Lord that under the circumstances Rs. 5,000 must be taken as a reasonable amount to be awarded to the plaintiff as damages in this case.

I would in the result allow the appeal to the extent of this amount of Rs. 5,000 minus Rs. 100, nominal damages allowed under this head by the learned trial Judge with the costs of the appeal. The memorandum of objections is dismissed with costs

Short and Bewes & Co., Solicitors for Appellants.

King and Partridge, Solicitors for Respondents.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

1918,
February, 1.

P. NARAYANAN NAIR AND FIVE OTHERS (DEFENDANTS, NOS. 1, 2
AND 4 TO 7), PETITIONERS,

v.

A. P. M. CHERIA KATHIRI KUTTY (PLAINTIFF),
RESPONDENT.*

Madras Civil Courts Act (III of 1873), sec. 14—Court Fees Act (VII of 1887), sec. 7 (v) and (vi)—Suit for pre-emption—Valuation of suit for purposes of jurisdiction—Suit originally filed in District Munsif's Court—Return of plaint as beyond its jurisdiction—Presentation of plaint in a Subordinate Judge's Court—Plaint again returned by latter Court—Appeal to District Court against order of District Munsif, whether competent—Election of remedies—Civil Procedure Code, O. 43, r. 1.

The plaintiff instituted the suit in a District Munsif's Court to enforce his right of pre-emption in respect of the suit lands which had been mortgaged to him on otti for Rs. 3,190, and were sold to some of the defendants for Rs. 4,500. The District Munsif returned the plaint for presentation to the proper Court, holding that the suit was beyond his pecuniary jurisdiction. On the plaint being presented in a Subordinate Judge's Court, it was returned again by that Court which held that the former Court had jurisdiction. The plaintiff, thereupon,

* Civil Revision Petition No. 518 of 1917.

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preferred an appeal to the District Court against the order of the District Munsif. The defendants raised a preliminary objection that the appeal was incompetent and also contended that the District Munsif had no jurisdiction to entertain the suit.

Held, that the appeal to the District Court was maintainable, although the plaintiff had filed the plaint in the Subordinate Judge's Court in pursuance of the order of the District Munsif;

Held also, that the proper valuation of a suit for pre-emption is, for purposes of jurisdiction, in accordance with section 14 of the Madras Civil Courts Act that fixed in the manner provided by the Court Fees Act, section 7 (v); and that, so valued, the present suit was within the jurisdiction of the District Munsif's Court.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the order of H. D. C. REILLY, the District Judge of North Malabar in Civil Miscellaneous Appeal No. 4 of 1917, preferred against the order of R. RARU NAYAR, the additional District Munsif of Tellicherry in Original Suit No. 36 of 1916.

The plaintiff, an ottidar, sued in the District Munsif's Court of Tellicherry to enforce his right of pre-emption to the suit lands, alleging in the plaint that the jenmis, defendants Nos. 3 to 7, had sold their jenmam right in the lands to the second defendant on behalf of the first defendant without giving him an opportunity of exercising his right of pre-emption. The jenmam right was said to have been sold for Rs. 4,500, and the otti in favour of the plaintiff was for Rs. 3,190. The plaintiff contended that the sale to the first and second defendants in derogation of his right of pre-emption on account of his otti right was invalid as against him and prayed in the plaint that the first and second defendants should surrender to the plaintiff the jenm right and that the plaintiff should be allowed to pay either to the first or second defendant the balance after deducting the *otti amount* from the price of the jenm right aforesaid. The assessment of the lands was given in the plaint as Rs. 8-4-0 per annum. The defendant pleaded, *inter alia*, that the suit was beyond the pecuniary limits of the jurisdiction of the District Munsif's Court. The District Munsif accepted the plea and returned the plaint for presentation to the proper Court. The plaintiff accordingly presented the plaint in the Temporary Subordinate Judge's Court of North Malabar. But the Subordinate Judge returned the plaint on the ground that it should have been filed in the

District Munsif's Court. Plaintiff then appealed to the District Court against the order of the District Munsif. On appeal to the District Court, the defendants raised a preliminary objection that the appeal was incompetent as the plaintiff had elected to obey the order of the District Munsif and chosen one of the alternative remedies by filing the plaint in the Subordinate Judge's Court. They also contended that the suit was beyond the jurisdiction of the District Munsif. The District Judge overruled the preliminary objection and also held that the District Munsif had jurisdiction on the ground that the value of the suit was the net value of the property, viz., the balance of the jenm price after deducting the otti amount. The defendants preferred this Civil Revision Petition to the High Court.

K. P. M. Menon for the appellants.

P. Appu Nair for C. Madhavan Nair for the respondent.

The following JUDGMENT of the Court was delivered by

OLDFIELD, J.—The plaintiff, respondent, first filed his plaint in the District Munsif's Court. When it was returned he filed it in the Subordinate Court and it was returned again. He appealed to the lower Appellate Court against the order of return by the District Munsif and the first question is whether by electing to file his plaint in the Subordinate Court he forfeited his right of appeal. It has been held that he could do so in *Bend Madhub Das v. Jotendra Mohan Tagore* (1). But that decision was doubted in *Backunta Nath Dey v. Nawab Salimulla Bahadur* (2) and was dissented from by one of us and another learned Judge of this Court in *Chidambaram Chetty v. Karuppan Chetty* (3). We do not find in Order XII or XIII of the Civil Procedure Code any recognition of the principle that any such election as may have taken place in the case before us affects the right of appeal. We therefore hold that an appeal lay to the lower Appellate Court. On the merits the question is whether a suit to enforce a right of pre-emption should be valued for the purpose of jurisdiction with reference to the gross value of the property or otherwise, the lower Appellate Court having held that it should be valued with reference to the net value after the amount of encumbrances on it has been deducted. Under section 3 (1), Suits

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(1) (1907) 5 C.L.J., 580. (2) (1907) 6 C.L.J. 547; at p. 556,
(3) Appeal against Order No. 403 of 1914.

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Valuation Act (VII of 1887), Local Governments are empowered to make rules for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court Fees Act, section 7 (vi) and suits such as that before us are so mentioned. Under section 6 when such rules are made section 14 in Madras Civil Courts (Act III of 1873) is to be deemed repealed. Section 14, no doubt refers to the subject matter of suits for land, etc., but it is not in our opinion possible to accept the argument that subject-matter includes only immediate rights to possession and not such rights relating to land as pre-emption when the contrary is indicated clearly by the last mentioned provision of the Suits Valuation Act. We therefore hold that the proper valuation is in accordance with section 14 of the Madras Civil Courts Act that fixed in the manner provided by the Court Fees Act, section 7 (v). It is not disputed that so valued the suit will be within the District Munsif's jurisdiction. We therefore agree with the District Judge's decision and dismiss the petition with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

B. RAJACHARI (DEFENDANT-PETITIONER), APPELLANT,

v.

TIRUMUGOOR DEVASTANAM, REPRESENTED BY ITS MANAGER
VENGU NAYUDU (PLAINTIFF-RESPONDENT), RESPONDENT.*

Estates Land Act (Madras Act 1 of 1908), ss. 3 (2) (d) and 8—One of several inamdars, acquiring the entire kudivaram right in an inam village—Lease of lands by such inamdar—Suit for rent in Civil Court—Jurisdiction of Civil or Revenue Court—Exception to section 8, applicability of, to clause 1 or 2 of section 8—Strict construction, necessity for.

Where one of several inamdars in an inam village, having acquired by gift the kudivaram right in the whole village and leased 50 cents of land out of the whole village, sued to recover rent in a Civil Court on the basis of the lease.

Held, that the Civil Court had no jurisdiction to entertain the suit, and that the plaint should be returned for presentation to a Revenue Court having jurisdiction.

* Letters Patent Appeal No. 156 of 1917.

The expression 'the inamdar' in the exception to section 8 of the Estates Land Act should be read in its strict sense as equivalent only to the owner of the entire interest in the inam, and the exception should be treated as governing only sub-section (1) and not sub-section (2) of section 8 of the Act.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of SESHAGIRI AYYAR, J., in *Rajachari v. Tirumugoor Devastanam* (1).

The material facts appear from the judgment of OLDFIELD, J.

K. N. Aiyar for the appellant.

A. Krishnaswami Ayyar for the respondent.

OLDFIELD, J.—The only question argued is whether the learned Judge was right in holding that the Civil Court had jurisdiction.

The facts as now agreed on differ from those stated by the learned Judge. For they are that plaintiff, one of the fractional shareholders of the *melvaram* right in an inam village, that is, one of the inamdars, acquired by gift the *kudivaram* right in the whole village not in a portion of it, and that in 1897 he leased 50 cents of the whole to defendant, the appellant before us. The suit is on that lease for rent. Ordinarily section 8 (2) of the Estates Land Act would apply, the defendant would be deemed an occupancy ryot and the suit would lie in a Revenue Court. But it is admitted that the land is comprised in an estate falling under section 3 (2) (d) and argued that the exception to section 8 is applicable and the land has ceased to be part of an estate. In effect, therefore, the question is whether the exception governs the sub-section (2) or only sub-section (1); that is, whether the expression 'the inamdar' in the exception can be read as equivalent also to 'an inamdar' or 'any of the inamdars.'

The point is not, so far as we have been shown, covered by authority. On the one hand, the exception stands at the end of the section consistently with its application to both sub-sections (1) and (2) instead of only to the former: and as the definition of 'landholder' in section 3 (5) includes a direct reference to joint landholder, all references to 'the landholder' and therefore that to 'the inamdar' which the exception contains should, it may be argued, be read in the manner proposed by plaintiff. But on the other hand although it is not clear that a

(1) Civil Revision Petition No. 1195 of 1915.

RAJACHARI v. TIRUMUGOOB DEVASTANAM. OLDFIELD, J. distinction is drawn between 'the landholder' and 'a landholder' or can be implied regarding 'the *inamdar*' except in provisions in respect of which such distinction would be material, I think that it would be in that under consideration and that the strict reading of the expression 'the *inamdar*' is necessary in the interests of convenience and reasonable interpretation. For otherwise the anomalies involved in the application of sub-section (2) to the *inam* villages referred to in the exception are excessive. If the exception is applicable to acquisitions of the *kudivaram* by a fractional *inamdar* the land in question ceases to be part of the estate; and it can only be regarded as doing so, either (1) as between the acquiring *inamdar* and his lessee (if any) and not between the former and the other *inamdars* or (2) absolutely. The first alternative is untenable since it is not consistent with the general language used in the exception or with the fact that sub-section (2) does not refer to the acquiring *inamdar's* right in the phraseology of the Act as that of an occupancy ryot but simply as being to hold on payment in accordance presumably with the ordinary law. The second deprives the other *inamdars* without their consent and perhaps against their will of the security for their share of the rent, which the provisions of the Act relating to distraint, sale of the holding and summary procedure afford. These anomalies can be avoided only if 'the *inamdar*' in the exception is read in its strict sense as equivalent only to 'the owner of the entire interest in the *inam*' and the exception is treated as applicable only to sub-section (1). On this interpretation the decision must be that the suit holding has not ceased to be part of the estate and that the suit should have been filed in a Revenue Court. The Letters Patent Appeal is allowed: the decisions of the learned Judge and the Subordinate Judge being set aside and the plaint being returned for presentation to the Revenue Court having jurisdiction.

Plaintiff will pay defendants' costs to date.

SADASIYA AYYAR, J.—I entirely agree.

SADASIYA AYYAR, J.

K.B.

APPELLATE CRIMINAL.

Before Mr. Justice Abdur Rahim and Mr. Justice Napier.

RAGHAVALU NAICKER (COMPLAINANT), PETITIONER,

v.

SINGARAM AND ANOTHER (ACCUSED), RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), ss. 247 and 259—Indian Penal Code (Act XLV of 1860), ss. 352 and 504—Summons-case—Warrant-case—Trial of both offences in one trial—Procedure to be followed—Absence of complainant at the hearing—Discharge of accused, effect of—Subsequent trial for the same offences, whether barred.

Where a complaint was preferred against a person for offences under sections 352 and 504 of the Indian Penal Code committed in the course of the same transaction, the former offence being triable as a summons-case and the latter as a warrant-case, and the Magistrate discharged the accused owing to the absence of the complainant on the day of hearing, and a fresh complaint was preferred in respect of the same offences.

Held, that the procedure to be followed in such a trial is the one provided for the trial of a warrant-case; and that the discharge of the accused did not amount to an acquittal of the offence under section 352 of the Indian Penal Code and was not a bar to the subsequent trial for the same offence.

Rajnarain Koonwar v. Lala Tamoli Raut (1885) I.L.R., 11 Cal., 91, *Re Sobhanadri* (1916) I.L.R., 39 Mad., 503, *Mossein Sardar v. Kalu Sardar* (1902) I.L.R., 29 Cal., 481, and *In re Samsudin* (1898) I.L.R., 22 Bom., 711, followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, Act V of 1898, praying the High Court to revise the order of S. N. V. RAJACHARI, the third Presidency Magistrate of Georgetown, Madras, in Calendar Case No. 15911 of 1917.

The facts of the case are stated in the judgment of ABDUR RAHIM, J.

R. N. Aiyangar for M. Narasimham, counsel for the petitioner.

W. V. Rangaswami Ayyangar for the accused.

C. S. Smith, acting Crown Prosecutor for the Crown.

ABDUR RAHIM, J.—A complaint was made under sections 352 and 504, Indian Penal Code, before the Second Presidency Magistrate. On the date fixed for the case, the complainant was

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absent and the Magistrate discharged the accused. Then a fresh complaint was lodged with reference to the same transaction before the Third Presidency Magistrate and he held that so far as the offence under section 352, Indian Penal Code, was concerned the order of the Second Presidency Magistrate operated as an acquittal and that the case should be proceeded with only with reference to the offence under section 504, Indian Penal Code. We are asked to consider whether the order of the Third Presidency Magistrate that there has been an acquittal within the meaning of the law with respect to the charge under section 352 by reason of the previous order of the Second Presidency Magistrate is right.

The case relating to an offence under section 352 is a summons-case inasmuch as the punishment for such an offence is not more than six months' imprisonment, while the case relating to section 504, Indian Penal Code, is a warrant-case, the punishment under this section being more than six months' imprisonment. It has been ruled in *Rajnarain Koonwar v. Lala Tamoli Raut*(1) that where there are two offences complained of, one of which is triable as a warrant-case and the other as a summons-case, the proper procedure to be followed is that relating to the greater charge, namely, that of a warrant-case. There is no express provision in the Criminal Procedure Code with reference to this matter. The learned Judge of the Calcutta High Court apparently proceeded on a general principle that the procedure to be followed should be that laid down with reference to the major charge and not the more summary procedure with reference to the minor offence. Now the Magistrate under section 235 of the Criminal Procedure Code is empowered where more than one offence has been committed by a person by a series of acts so connected together as to form the same transaction to try all the offences at one trial or separately. Here the transaction in which the two offences are alleged to have been committed was undoubtedly one and the same and the Magistrate could therefore try both the offences at one trial.

Then the question is whether he treated the case before him as a summons-case or a warrant-case, or as two cases, one a

(1) (1885) I.L.R., 11 Cal., 91.

summons-case and the other warrant-case. It seems to me that if he wanted to try the two offences together, the case would be one and not two separate cases; and the punishment which could be awarded against the accused in such a case would be more than six months' imprisonment and that would bring it within the definition of a warrant-case. It has been pointed out by the learned pleader for the accused that the complainant was absent when the case was taken up and he argues that it was open to the Magistrate at that stage to separate the two charges and try them as two different cases, one a summons-case and the other a warrant-case and that we must presume that he did so and therefore his order of discharge must be taken to amount to an acquittal with reference to the offence under section 352. But the Magistrate passed only one order 'Complainant absent. Accused discharged.' If he was, as suggested by the learned pleader for the accused, treating the matter for trial before him as two separate cases and wanted to deal with the charge under section 352, Indian Penal Code, under section 247 of the Criminal Procedure Code, the proper order for him to pass would have been one of acquittal. But he did not pass any such order. The order he passed was one of discharge, which would be the proper one if he treated the case before him as a warrant-case coming under section 259, Criminal Procedure Code, which authorizes him, in the absence of the complainant in a warrant case, to discharge the accused if the offence complained of was compoundable. It would prima facie be unreasonable to suppose that where there are two charges arising out of the same transaction the Magistrate would think of separating the two applying thereto two kinds of procedure. There was one transaction in the course of which the two offences are alleged to have been committed and in such cases the proper procedure, ordinarily speaking, is to have one trial; and then, as laid down in *Rajnarain Koonwar v. Lala Tamoli Raut*(1), the case ought to be treated for purposes of the procedure to be followed as a warrant-case having in regard the graver charge. This rule has been followed in *Re Sobhanadri*(2) by a learned Judge of this Court sitting singly and also in *Hossein Sardar v. Kalu*

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(1) (1885) I.L.R., 11 Cal., 91.

(2) (1916) I.L.R., 39 Mad., 503.

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Sardar(1). It is also mentioned with approval in *In re Sam-sudin*(2). I would therefore set aside the order of the Third Presidency Magistrate in so far as it holds that the order of the Second Presidency Magistrate, dated 27th August 1917, amounts to an acquittal of the offence under section 352, Indian Penal Code.

NAPIER, J.

NAPIER, J.—I agree. In my opinion there was no summons-case before the Second Presidency Magistrate at all. The Magistrate took the complaint on his file, a number was given to it and he was prepared to hear it. The complainant was absent and he passed an order which was undoubtedly intended to be an order under section 259 of the Criminal Procedure Code. It is therefore clear to me that he was trying the whole case as a warrant-case. The definition section does not speak of summons offences and warrant offences but speaks of summons-cases and warrant-cases and has reference to the case before the Court. Where the Code deals with offences it divides them into cognizable and non-cognizable but where it is dealing with procedure then it speaks not of offence but of cases. I am, therefore, satisfied that unless the Magistrate chooses to separate the two offences which are complained of and take them up, one as a warrant-case and the other as a summons-case, the fact that one of the offences complained of and tried by him in one case is one punishable by six months or less does not make that part of the trial a summons-case. In this view it seems to me that the Magistrate had no option but to pass an order under section 259 if he decided to dispose of the case and that it was not open to him to apply the procedure which is only applicable where he is in fact trying a summons-case, namely, the procedure under section 247. For these reasons I agree with the order proposed by my learned brother.

K.B.

(1) (1902) I.L.R., 29 Calc., 481.

(2) (1898) I.L.R., 22 Bom., 711.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

PONNUSWAMI PILLAY (FIRST DEFENDANT), APPELLANT,

v.

SINGARAM PILLAY MINOR BY GUARDIAN KUMARASAMI
PILLAY AND FOUR OTHERS (PLAINTIFFS SECOND, THIRD, FOURTH AND
FIFTH DEFENDANTS), RESPONDENTS.*

1918,
February,
19 and 20.

Indian Evidence Act (I of 1872), sec. 165—Suit under Registration Act (XVI of 1908), sec. 77—Suit to enforce registration of a will—Evidence taken before Sub-Registrar, filed in Court by the consent of parties—Evidence, not found to be relevant under sec. 33 of the Act or otherwise—Judgment and decree, based on such evidence, whether valid.

A suit, instituted under section 77 of the Registration Act to enforce registration of a will, was decided by the Court on evidence taken before the Sub-Registrar and filed as evidence in the suit by consent of the parties who did not want to adduce any further evidence in the Court. The Court did not find that the evidence was relevant under section 33 or any other section of the Evidence Act but admitted the same solely on the ground of the consent of the parties. On objection being taken in appeal to the validity of the judgment.

Held, that the judgment was invalid under section 165 of the Evidence Act, as it was not based on facts declared to be relevant by the Act and duly proved, that the consent of parties could not take the place of a declaration of the Evidence Act and that consequently the judgment and the decree should be set aside.

Sri Raja Prakasaravanim Garu v. Venkata Rao (1915) I.L.R., 38 Mad., 160, dissented from.

APPEAL against the decree of A. S. BALASUBRAHMANYA AYYAR, the Subordinate Judge of Trichinopoly, in Original Suit No. 74 of 1915.

The material facts appear from the judgment.

K. V. Venkatasubramanian for appellant.

T. V. Muthukrishna Ayyar and *N. Muthusamier* for first respondent.

The following judgment of the Court was delivered by
AYLING, J.—Appellant in this case takes the preliminary ground that the judgment cannot be supported in view of the provisions of section 165 of the Indian Evidence Act.

* Appeal No. 149 of 1917.

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The suit was brought under section 77 of the Registration Act to enforce registration of a will which both the Sub-Registrar and District Registrar had declined to register. The Subordinate Judge says (paragraph 4 of his judgment):—

“The parties filed the evidence adduced before the registering authorities as evidence in this case by mutual consent. None of them wanted any further evidence to be adduced in this Court. They were content to argue the case on the evidence adduced before the registering authorities.”

The evidence in question on a consideration of which the case was decided included the statements of nine witnesses for plaintiff and eight witnesses for defendant recorded by the Sub-Registrar. These statements could only become relevant evidence in the present case, if the conditions prescribed by section 33 of the Indian Evidence Act were found by the Subordinate Judge to exist. There is nothing to even suggest and it cannot be contended that the Subordinate Judge applied his mind to the question and decided (for instance) that the presence of the witnesses could not be obtained without unreasonable delay and expense; his judgment shows that he proceeded solely on the ground of the consent of parties. That is to say, the statements recorded by the Sub-Registrar were not relevant under section 33 of the Indian Evidence Act; and the learned vakil for respondent is unable to suggest any other section under which they would be relevant. But section 165 of the Indian Evidence Act lays down that the judgment must be based upon facts *declared by this Act* to be relevant and duly proved, and the consent of parties cannot take the place of a declaration of the Evidence Act.

Our attention has been drawn to a decision of this Court in *Sri Raja Prakasaravanam Garu v. Venkata Rao*(1), in which it might appear that the consent of parties was held to be sufficient. But the attention of the learned Judges does not seem to have been drawn to the stringent provisions of section 165 of the Indian Evidence Act above quoted; and with all respect we think we are justified in declining to follow their decision.

We must, therefore, set aside the decree and judgment of the lower Court and direct that the suit be restored to file and disposed of according to law.

(1) (1915) I.L.R., 38 Mad., 160.

In view of the fact that appellant has raised this plea after consenting to the course adopted by the Subordinate Judge we direct him to bear his own costs in this Court. Respondent's costs in this Court will be costs in the cause as well as all costs hitherto incurred by both sides in the lower Court.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

SWAMINATHA AYYAR (PLAINTIFF), APPELLANT,

v.

GOVINDASWAMI PADAYACHI AND TWO OTHERS (DEFENDANTS)
Nos. 3—5), RESPONDENTS.*

1917,
December, 17
and 1918.
March, 4, 5,
and 13.

Madras Revenue Recovery Act (II of 1864), sec. 59—Sale of a minor's ryotwari landholder's lands for arrears of revenue, validity of—Madras Regulation (X of 1831), sec. 2—Wrong entry of minor's mother as pattadar instead of minor, effect of—Suit to set aside revenue sale more than six months after sale, whether barred by limitation.

On the death of a ryotwari landholder, the Revenue authorities erroneously registered his widow as the pattadar instead of the plaintiff, his minor adopted son. Default in payment of revenue having occurred, the lands were sold for arrears of revenue during plaintiff's minority and he then sued to set aside the revenue sale and recover the lands within twelve years of the sale but more than six months after attaining majority.

Held by the full Bench:—

(a) that section 2 of Madras Regulation X of 1831 which prohibits the sale for arrears of revenue of minor's properties applies to all lands of minors whether permanently settled or only ryotwari, whether the lands be considerable or so small as not to be taken charge of by the Court of Wards;

(b) that the sale being *ultra vires*, the special period of limitation of six months prescribed by section 59 of the Madras Revenue Recovery Act (II of 1864) did not apply to the suit; and

(c) that the fact that the Revenue authorities mistakenly registered the plaintiff's adoptive mother as pattadar did not in any way affect him.

Krishna v. Mekam Peruma (1887) I.L.R., 10 Mad., 44, considered.

Subramania Chetty v. Mahalingasami Sivan (1910) I.L.R., 33 Mad., 41 distinguished.

Secretary of State v. Ashtamurthi (1890), I.L.R., 13 Mad., 89, followed.

* Second Appeal No. 1465 of 1916.

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SECOND APPEAL against the decree of ANANTA NARAYANA AYYANGAR, the Temporary Subordinate Judge of Tanjore, in Appeal No. 25 of 1916, preferred against the decree of S.C. RAMASWAMI AYYAR, the District Munsif of Valangiman, in Original Suit No. 40 of 1912.

One Srinivasa Ayyar owned about two acres of ryotwari land and on his death the revenue authorities erroneously transferred the patta therefor to the name of his widow instead of transferring them to the name of the plaintiff, his adopted son who was a minor. On the widow disputing the adoption and denying the plaintiff's right to the possession of the lands, plaintiff brought a suit for a declaration of his rights as adopted son and for possession of the lands. He not only obtained a decree as prayed for, but also obtained possession through Court in 1897. While the plaintiff's natural father, the first defendant in the present suit, was managing the properties on his behalf during his minority, default was made in payment of revenue due for fasli 1309 and the property was attached and sold by Revenue authorities on 25th June 1900 to the second defendant. Plaintiff attained his majority on 2nd September 1909 and brought this suit on 8th February 1912 for a declaration of the invalidity of the revenue sale and for possession of the lands. The plaintiff alleged that the first defendant was guilty of fraud in allowing the lands to be sold for arrears of revenue, that the purchase at the revenue sale was really for the benefit of his natural father, the first defendant, and the first and second defendants colluded together to deprive him of his lands. The first defendant did not contest the suit. The second defendant denied the fraud and collusion alleged by the plaintiff and pleaded *inter alia* that the purchase by him at the revenue sale was for his own benefit and the plaintiff's suit was barred by limitation. Pending the suit, both the first and second defendants died and defendants 3 to 5, the sons of the second defendant were brought on record as the legal representatives of the second defendant. Upholding the pleas of the second defendant, both the lower Courts dismissed the suit. The plaintiff preferred this second appeal.

S. Panchapagesa Sastriyar for the appellant.

S. Muthayya Mudaliyar for respondents Nos. 1 and 3.

The second respondent did not appear.

This Second Appeal coming on for hearing in the first instance before SESHAGIRI AYYAR and BAKEWELL, JJ., the following Order of Reference to a Full Bench was delivered by

SESHAGIRI AYYAR, J.—The facts of the case are not in dispute. The appellant, plaintiff, was taken in adoption by a ryotwari landholder. The patta for the lands in dispute stood in his name. After his death, the patta was transferred to the name of the adoptive mother. She did not pay the Government revenue, and the lands were brought to sale and purchased by the second defendant. The suit is to recover possession. The Subordinate Judge has found that there was no fraud on the part of the first defendant in allowing the property to be sold for arrears of revenue. We accept that finding. He has further found that the suit is barred by limitation as it was brought more than six months after the plaintiff attained his majority; *vide* section 59 of the Madras Revenue Recovery Act.

The main argument before us was that section 59 of the Act has no application to the facts of this case. The property was admittedly sold when the plaintiff was a minor. Regulation X of 1831, section 2, enacts that no property of a minor shall be sold for arrears of revenue. Section 63 of Act II of 1864 provides :

"Nothing in the Act shall be held to bar the operation of the provisions of Regulation V of 1840 and of Regulation X of 1831 in respect to the sale of lands of minors and other disqualified landholders."

It seems therefore clear that the sale of the land was without jurisdiction. Section 44 of the Act which permits a sale for non-payment of revenue must be read subject to section 63 of the Act which in terms preserves to minors the rights they enjoyed under Regulation X of 1831. It was however held in *Raja Goundan v. Raja Goundan*(1) that a sale of a minor's property under Act II of 1864 is covered by section 59 of the Act. Reliance was placed in that judgment upon *Gobind Lal Roy v. Ramjanam Misser*(2). In this latter case, the Judicial Committee had to deal with a case to which the provisions of the Bengal Revenue Recovery Act were applicable and they pointed out that irregular as well as illegal sales should be

(1) (1894) I.L.R., 17 Mad., 134.

(2) (1894) I.L.R., 21 Calc., 70 (P.C.).

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appealed against to the Commissioner. We do not think that pronouncement is any authority for the proposition that a sale which is prohibited by a legislative enactment should be regarded as a proceeding *intra vires* the powers of the Collector so as to invite the provision of section 59 of the Act.

The next point is whether the present sale is not against the provision of Regulation X of 1831. It was contended on the authority of *Krishna v. Mekam Peruma*(1) that the estate of the minor referred to in the Regulation must be of such magnitude and importance as can be managed by the Court of Wards. Regulation V of 1804 which was in force when Regulation X of 1831 was passed makes no reference to the extent of the property which alone can be taken under the control of the Court of Wards.

Ordinarily, no doubt, the Court will not interfere with private management where the estate is not considerable; but that is no ground for saying that the Regulation provides only for a particular class of estates. In our opinion, *Krishna v. Mekam Peruma*(1) is not reconcilable with the language of either Regulation V of 1804 or of Regulation X of 1831. Moreover, there is no evidence in this case that the authorities considered that the estate should not be taken up by the Court of Wards. It does not follow that because the Court did not take up the management, it would not have done so, if appealed to.

Mr. Muthaya Mudaliyar next argued that as the patta stood in the name of the adoptive mother and as she was the defaulter, the property was rightly sold under the Act. Section 2 of Regulation X of 1831 speaks of the estate having come to the minor by inheritance, and prohibits the sale of such an estate. The provision for sale where the pattadar makes default cannot be spelled out of this Regulation. It is true that *Subramania Chetty v. Mahalingasami Sivan*(2) holds that the revenue authorities are not bound to give notice to the real owner, so long as the patta stands in the name of some other person. That was a case of vendor and purchaser. There has been no similar decision in the case of father or mother and son. *Subramania Chetty v. Mahalingasami Sivan*(2) refers specially to

(1) (1887) I.L.R., 10 Mad., 44.

(2) (1910) I.L.R., 33 Mad., 41 (F.B.).

Regulation XXVI of 1802 which relates to the case of a purchaser not taking steps to have the registry transferred to his name. Moreover, it is doubtful whether, in the face of section 2 of Regulation X of 1831, the provision of Act II of 1864 which enables a sale where the person in whose name the patta stands makes default in the payment of revenue is applicable to the sale of properties belonging to minors.

As there are earlier decisions of this Court which we think require reconsideration, we have resolved to refer the following questions for the opinion of the Full Bench:—

(1) Whether a sale of a minor's property under Act II of 1864 is a proceeding to which section 59 of the Act is applicable so as to compel the aggrieved parties to sue within six months of the sale?

(2) Whether Regulation X of 1831 only applies to such estates of minors as are ordinarily taken charge of by the Court of Wards?

(3) Whether the fact that the patta stood in the name of the mother of the minor, precludes the latter from invoking the aid of Regulation X of 1831?

ON THIS REFERENCE,

T. R. Venkatarama Sastriyar and *S. Panchapagesa Sastriyar* for the appellant.—Section 2 of Regulation X of 1831 prohibits a sale of the property of a minor for arrears of revenue and section 63 of the Rent Recovery Act makes section 59 of the Act inapplicable to sale of a minor's property. When the sale is *ultra vires* the limitation prescribed by section 59 cannot apply; *Balkishen Das v. Simpson*(1). *Gobind Lal Roy v. Ramjanam Misser*(2) is distinguishable as it turned upon the corresponding Regulation in Bengal which allowed only certain kinds of objections to be taken against a revenue sale. There must be a right to sell before the properties are sold: *Venkata v. Chendradu &c.*(3), *Mahomed Jan v. Gunga Bishun Singh*(4) and *Secretary of State for India v. Rajah Goundar*(5). The limitation of twelve years applies to recover the property when there is no

(1) (1898) I.L.R., 25 Calo., 833 at p. 842 (P.C.).

(2) (1894) I.L.R., 21 Calo., 70 at p. 79 (P.C.).

(3) (1889) I.L.R., 12 Mad., 168 (F.B.). (4) (1911) I.L.R., 38 Calo., 537.

(5) (1899) I.L.R., 22 Mad., 5.

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jurisdiction to sell: *Dhiraj Chandra Bose v. Hari Dasi Debi*(1), *Raman v. Chandan*(2), *Meka Perumal v. The Collector of Salem*(3), *Krishen Doyal v. Irshad Ali*(4), *Janukdhari Lal v. Gossain Lal Bhaya Gaywal*(5), *Nandan Missin v. Lala Harakh Narain*(6). Reference was made to *Raman Naidu v. Bhassoori Sanyasi*(7). Regulation V of 1804 and Regulation X of 1831 apply to ryotwari estates also: *Lakshmayya v. Bolla Reddy*(8). The fact that the patta was wrongly registered in the name of the minor's mother cannot prejudice the minor who cannot protect himself.

S. Muthiah Mudaliar for the respondents Nos. 1 and 3.— Regulation X of 1831 applies only to permanently settled estates and not to ryotwari lands. Reference was made to sections 2 and 7 of Regulation XXVI of 1802. The property was not the minor's at the time of the sale. It was on the death of the last male owner registered in the name of the widow, who denied the status of the minor as adopted son. The registry was made in accordance with Regulation XXVI of 1802. The widow and not the minor was the defaulter; see sections 2 and 3 of Regulation V of 1804 and *Subramania Chetty v. Mahalingasami Sivan*(9). Even if ryotwari lands come within the operation of Regulation V of 1804, *Krishna v. Mekam Peruma*(10) holds that if a minor wants to claim the exemption from section 59 of the Revenue Recovery his estate must be so big as to be taken under the control of the Court of Wards. This was a small property and not taken charge of by the Court of Wards. Reference was made to *Secretary of State v. Ashtamurthi*(11).

The second respondent did not appear.

T. R. Venkataramana Sastri in reply cited *Narayana Raja v. Ramachandra Raja*(12).

The Court expressed the following OPINIONS:—

WALLIS, C.J.

WALLIS, C.J.—I do not think that the decision in *Krishna v. Mekam Peruma*(10), is any authority for the proposition mentioned

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| (1) (1915) I.L.R., 42 Cal., 765 (P.C.). | (3) (1889) I.L.R., 12 Mad., 445. |
| (2) (1892) I.L.R., 15 Mad., 219. | (5) (1909) 13 C.W.N., 710. |
| (4) (1915) 22 C.L.J., 525. | (7) (1903) I.L.R., 25 Mad., 638. |
| (6) (1910) 14 C.W.N., 607. | (9) (1910) I.L.R., 33 Mad., 41 (F.B.). |
| (8) (1903) 18 M.L.J., 129. | (11) (1890) I.L.R., 13 Mad., 89 at p. 115. |
| (10) (1887) I.L.R., 10 Mad., 44 at pp. 48 and 49. | (12) (1903) I.L.R., 26 Mad., 521. |

in the Order of Reference. In that case, a sale of a permanently settled mitta at a time, and in respect of arrears which accrued due, when some but not all of the joint proprietors were minors, was held not to be prohibited by Regulation X of 1831. The learned Judges were of opinion that an estate so owned was not one of which the Court of Wards could have assumed management under Regulation V of 1804, and that Regulation X of 1831 only applied to estates "which might have but had not been taken under the Court of Wards." Regulation V of 1804 imposed no restriction on the Court of Wards with reference to the nature of the minor's property, and consequently the reasoning of the learned Judges in *Krishna v. Mekam Peruma*(1) has no bearing on the present case where the sole owner of the land is a minor.

It has, however, been strenuously contended before us that, as the minor's lands are ryotwari, they are not an estate within the meaning of Regulation X of 1831, and that the sale of ryotwari lands during minority is not prohibited by the Regulation. The estates of minors under the management of the Court of Wards had been protected from sale for arrears of revenue by Regulation V of 1804 and Regulation X of 1831 recites that doubts had been entertained as to the liability of the estate of a minor not taken under the management of the Court of Wards to be sold for arrears of revenue. The doubts must have arisen with reference to section V of Regulation XXVI of 1802 which empowered the Collector "where lands may be attached for arrears of revenue" to cause the lands of the defaulting proprietor to be sold. This Regulation must be read with Regulations XXV and XXVII of 1802 which were passed on the same day. It is, no doubt, true, as appears from sections 1 to 3 of Regulation XXV, that it was then the intention to fix a permanent assessment on all lands liable to pay revenue to Government but this was to be a gradual process, and the intention was soon abandoned. The provisions of Regulation XXVI, however, are not limited to such cases. The preamble recites the necessity that the property of landed estates being malguzary, or paying revenue to Government, should in the event of default be liable to sale for the purpose of making good

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(1) (1897) I.L.R., 10 Mad., 44 at pp. 48 and 49.

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the public revenue assessed on such lands, and shows that it was not intended to limit the power of sale to cases of permanently settled lands only. By section 2 the Collectors are required to keep public registers for the purpose of registering the landed property paying revenue to Government, terms which are perfectly general, as are also the terms of the succeeding sections. Section 5 confers a power of sale where lands may be attached for arrears of revenue, and the subject of attachment for arrears of revenue was dealt with by the succeeding Regulation XXVII of 1802. In that Regulation again 'proprietor' was defined so as to include "all actual proprietors of land who pay the revenue assessed upon their estates immediately to Government." Regulation II of 1806, which provided for the establishment of Zillah or District Courts in districts in which the Permanent Settlement had not been introduced, enacted in clause 4, that "in cases where the engagements may be contracted with the ryots or individual occupiers of land they shall be regulated by the Regulations of A.D. 1802 and by such subsequent Regulations as may particularly apply to them." Section 6 also provided that Regulations XXVII and XXVIII should be extended to all districts in which Zillah Courts might be established under the Regulation, and should be observed by Collectors as well as Zamindars or farmers in their engagements with the ryots or immediate occupiers of the soil. The necessity for this provision, so far as Collectors are concerned, is not apparent, but however this may be, this express extension of Regulation XXVII cannot be construed as meaning that Regulation XXVI was not to apply to ryotwari lands. It has always been treated as applicable to them. *Seshagiri v. Pichu*(1), *Secretary of State v. Ashtamurthi*(2), *Subramania Chetty v. Mahalingasami Sivan*(3). It is no doubt true that sales of ryotwari lands for default of payment of revenue were at first rare, and that the coercive process provided by Regulation XXVII was usually resorted to, a procedure, it may be observed, which might eventuate in sale. There is, therefore, no foundation for the contention that ryotwari lands owned by minors do not come within the protection of Regulation X of 1831 and the answer to the second question is that there is no such distinction as suggested.

(1) (1888) I.L.R., 11 Mad., 452.

(2) (1890) I.L.R., 13 Mad., 89.

(3) (1910) I.L.R., 33 Mad., 41 (F.B.).

As regards the third question, the answer must be in the negative. It was the duty of the responsible officer under Regulation XXVI of 1802 to register the plaintiff as the owner on his father's death, and the fact that he erroneously registered the widow of the deceased cannot affect the plaintiff's rights, and would of itself render the subsequent sale for arrears of revenue in question void as regards the minor, apart altogether from the Regulation, as held in *Secretary of State v. Ashtamurti*(1).

In *Subramania Chetty v. Mahalingasami Sivan*(2), the Bench of three Judges were dealing with a case where the registered proprietor had transferred his interest but the transfer had not been registered and was therefore void as against Government by the provisions of section 3 of Regulation XXVI, and the registered proprietor was therefore held to be the defaulter under the Revenue Recovery Act. That decision does not apply to the present case.

The answer to the first question must also be in the negative. Section 60 of the Revenue Recovery Act II of 1864 provides that nothing therein shall be held to bar the operation of the provisions of Regulation X of 1801 in respect to the sale of lands of minors and other disqualified proprietors. This clearly renders the provisions of section 59 of that Act inapplicable to cases protected by Regulation X of 1831, and it is unnecessary to rely on the further ground that, even in the absence of section 63, the provisions of section 59 would not apply to lands exempted from sale by statute.

SADASIVA AYYAR, J.—I agree.

SPENCER, J.—I agree as to the answers to be given to the questions in the ORDER OF REFERENCE. I must confess to having been a little puzzled by the form in which the second question has been put. It would indeed be strange if the scope of an enactment were to be limited by notions of what is a considerable estate or of what estates are ordinarily taken charge of by the Court of Wards, seeing that 'ordinary' and 'considerable' are relative terms. No doubt it is within the discretion of the Government, upon receiving the reports of Collectors, to decline

(1) (1890) I.L.R., 13 Mad., 89.

(2) (1910) I.L.R., 33 Mad., 41 (F.B.).

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to order the Court of Wards to superintend particular estates of incapacitated proprietors (*vide* Chapter III of Madras Act I of 1902). But I can find no authority for the suggestion that an estate must be of any definite size or must not be an estate of ryotwari lands in order to give the Court of Wards jurisdiction over it.

In Regulation V of 1804 the only description given of the estates to which the Regulation applies is that they must be estates of land or other property paying revenue directly to Government. This would include the holding of a minor ryotwari pattadar. The Regulation provided for the appointment of guardians by the Zillah Court to minors succeeding as heirs to the joint possession of estates; and Regulation X of 1831 extended this provision to the heirs of single as well as joint possessors of estates, but it was afterwards repealed in 1890 by the Guardians and Wards Act so far as it related to the property of minors not under the superintendence of the Court of Wards. This may have been in consequence of the decision in *The Petition of Subramaniam*(1), as to the powers of the District Court over minors under Act XIV of 1858. The second section of Regulation X of 1831, which forbade the sale for arrears of revenue, accruing subsequently to his accession, of estates of minors not under the charge of the Court of Wards has remained ever since unrepealed. This includes the estates of minor sole proprietors not under the charge of the Court of Wards, like that of the plaintiff in this suit. This section and the preamble to the Regulation and the foot-note to section 20 of Regulation V of 1804 make it clear that the prohibition extends to minor's estates of every description not subject to the jurisdiction of the Court of Wards, and this answers the second question referred to us. But, of course, if a minor is a member of a joint Hindu family governed by the Mitakshara Law and as such has at birth merely an undivided interest in an estate, no guardian can be appointed by Court as the manager of the family represents the family, and to such cases the Regulation will not apply.

N.R.

(1) (1883) I.L.R., 6 Mad., 187.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

KADIRVELU NAINAR. (PLAINTIFF), APPELLANT,

v.

KUPPUSWAMI NAIKER (DEFENDANT), RESPONDENT.*

Fraud—Judgment obtained by perjured evidence—Suit to set aside, whether maintainable.

A suit does not lie to set aside a judgment in a previous suit on the ground that it was obtained by perjured evidence.

Venkatappa Naick v. Subba Naick (1906) I.L.R., 29 Mad., 179, overruled.

APPEAL against the decree of C. R. THIRUVENKATA ACHARIYAR, the Madras City Civil Judge, in Original Suit No. 498 of 1916.

The facts are given in the first two paragraphs of the ORDER OF REFERENCE OF SADASIYA AYYAR, J.

K. S. Ganapathy Ayyar for the appellant.

K. Venkataraghava Achariar for the respondent.

This appeal coming on for hearing, in the first instance, before WALLIS, C.J., and SADASIYA AYYAR, J., the following ORDERS OF REFERENCE TO A FULL BENCH were made by

SADASIYA AYYAR, J.—The plaintiff is the appellant. The present defendant had brought a suit against the present plaintiffs in the Presidency Small Cause Court for money due by the plaintiff to a chit fund of which the defendant was the stakeholder and in which the plaintiff had four shares, the plaintiff having executed a promissory note in favour of the defendant. The defendant obtained a decree for Rs. 117-2-0 in the suit filed in the Presidency Court of Small Causes against the plaintiff notwithstanding certain defences raised by the plaintiff. The decree is dated the 5th February 1914. The present suit was brought on the 14th December 1916 in the City Civil Court, (a) for a declaration that the decree in Small Cause Suit No. 1492 of 1914 is null and void, and (b) for a decree directing

1917,
December,
10 and 1918,
January, 8
and
April, 9.

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the defendant to pay the plaintiff Rs. 399-12-0 (the damages incurred by the plaintiff through the defendant's fraud in obtaining the unjust decree) with interest thereon and costs of suit. The grounds alleged as the foundation of this claim are found in paragraphs 8 to 10 of the plaint as follows. "The defendant falsely swore in that suit that he paid only ten monthly instalments" (to the chit) and that certain receipts were passed only for instalments paid in respect of the chit fund transaction, and not for independent loans advanced by the plaintiff to the defendant, "that the defendant also dishonestly suppressed the fact that he was bound to give credit for Rs. 68 due to the plaintiff as premia in the chit and that the decree of the Small Cause Court which was obtained by the plaintiff's wilful perjury and suppression of material facts was obtained in fraud of the Court".

The plaintiff's suit was dismissed by the learned City Civil Judge on the ground that his Court cannot be converted into a Court of Appeal on a question of fact from the decision of the Small Cause Court. In *Venkatappa Naick v. Subba Naick*(1), Boddam and Moore, JJ., purported to follow the English cases in *Abouloff v. Oppenheimer*(2), and in *Vadala v. Lawes*(3), and held that a judgment obtained by perjury is a judgment obtained by fraud committed upon the Court and could be set aside in a separate suit. The learned Judges evidently thought that the decision in the well-known case of *Flower v. Lloyd*(4) was overruled by the two later English decisions referred to by them. The decision in *Venkatappa Naick v. Subba Naick*(1) has been afterwards considered in at least two cases in this Court. In *Kamara-swami Chetty v. Kamakshi Ammal*(5), which came before SUNDARA AYYAR, J., and myself, I said :—

"I also wish to add that I should not be understood as admitting that a plaintiff can maintain a suit to set aside a decree on the ground of fraud simply because the decree had been obtained on perjured testimony. I know it has been so held in *Venkatappa Naick v. Subba Naick*(1) but I have grave doubts as to the correctness of that decision."

(1) (1906) I.L.R., 29 Mad., 179. (2) (1882) L.R., 10 Q.B.D., 295.
(3) (1890) L.R., 25 Q.B.D., 310. (4) (1878) 10 Ch.D., 327.
(5) (1912) 23 M.L.J., 187.

SUNDARA AYYAR, J., agreed with my above observations. Then there is a reported case *Chinnayya v. Ramanna*(1), in which BENSON and SUNDARA AYYAR, JJ., dealt elaborately with the same point. At page 206 it is said—

"It is indisputable that the decree may be vacated on the ground that it was obtained by the successful party by fraud. The question is what would amount to fraud which would entitle an unsuccessful litigant to get the decree vacated. He cannot, it is clear, be allowed to get round the rule of *res judicata* and to prove that the judgment given by the Court was wrong because it came to a wrong conclusion on the evidence before it. It follows from this that the Court's conclusions both on the construction to be put on the evidence placed before it and on the inference to be drawn from such evidence as well as on the trustworthiness of the evidence should be regarded as final. If the Court acts erroneously in forming its judgment on any of these matters, the proper remedy is to invoke the help of the appellate tribunal where an appeal is allowed by law. Another mode of rectifying an erroneous judgment is to apply for review of judgment. The unsuccessful party has, in such an application, an opportunity to adduce any evidence which he failed to adduce at the hearing and which he could not, with all proper diligence, have then adduced. It cannot be doubted that, in such cases, he cannot institute a fresh suit to get the judgment vacated. . . .

The test to be applied is, is the fraud complained of not something that was included in what has already been adjudged by the Court, but extraneous to it? If, for instance, a party be prevented by his opponent from conducting his case properly by tricks or misrepresentation, that would amount to fraud. There may also be fraud upon the Court if, in a proceeding in which a party is entitled to get an order without notice to the other side, he procures it by suppressing facts which the law makes it his duty to disclose to the Court. But where two parties fight at arm's length, it is the duty of each to question the allegations made by the other and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect his duty and afterwards claim to show that the allegation of his opponent was false." (Page 208).

Then the learned Judge refers to Black's article on Judgments in 23, Cyclopædia of American Law and Procedure, as regards the acts which can be relied on as constituting the fraud which would vacate a judgment, namely, things which are collateral to the matters which have been adjudged by the Court. Then the

(1) (1915) I.L.R., 38 Mad., 203.

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passages from the judgment of the Lord Justice JAMES in *Flower v. Lloyd*(1) are quoted:

"Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very great consideration indeed, before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories or a misleading production of documents or of a machine, or of a process had been given?" . . . "There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be one on side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subordination of perjury; and so the parties might go on alternately *ad-infinitum*. There is no distinction in principle between the old common law action and the old Chancery suit and the Court ought to pause long before it establishes a precedent which would or might make, in numberless cases, judgments, supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Courts must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds." (Pages 211, 212).

The learned Judge declined therefore to follow *Venkatappa Naick v. Subba Naick*(2). As regards the two English cases *Abouloff v. Oppenheimer*(3) and *Vadala v. Lawes*(4) they were cases of suits brought upon foreign judgments. In *Nanda Kumar Howladar v. Ram Jiban Howladar*(5), JENKINS, C.J., says at page 998 that the jurisdiction to set aside a decree for fraud

"is to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation."

(1) (1878) 10 Ch. D., 327.

(2) (1906) I.L.R., 29 Mad., 179.

(4) (1890) 25 Q.B.D., 310.

(3) (1882) 10 L.R., Q.B.D., 286.

(5) (1914) I.L.R., 41 Calo., 990.

In *Ram Ratan Lal v. Bhuri Begam*(1), RICHARDS, C.J., quotes with approval passages from *Flower v. Lloyd*(2), dissents from *Lakshmi Charan Saha v. Nur Ali*(3) which was disapproved of in the Calcutta High Court itself in *Munshi Mosuful Huq v. Surendra Nath Ray*(4) and approves of JENKINS, C.J.'s observations in *Nanda Kumar Howladar v. Ram Jiban Howladar*(5). In *Janki Kuar v. Lachmi Narain*(6) also, *Venkatappa Naick v. Subba Naick*(7) was expressly dissented from and the learned Judges say that the weight of authority is in support of the view taken in *Nanda Kumar Howladar v. Ram Jiban Howladar*(5) and in *Munshi Mosuful Huq v. Surendra Nath Roy*(4), that is, in favour of the view taken in *Flower v. Lloyd*(2) and in the Madras case *Chinnayya v. Ramanna*(8). I think that in India the considerations mentioned by JAMES, L.J., in *Flower v. Lloyd*(2) apply with very great force as it is dangerous to allow a fresh suit to be brought by an unsuccessful litigant to set aside the decree passed against him on the ground that his opponent had imposed on the Court by letting in perjured evidence. The two cases relied on in *Venkatappa Naick v. Subba Naick*(7) and the latter case in *Chandler v. Blogg*(9) merely follow old English precedents and do not attempt to tackle with the weighty reasons given in *Flower v. Lloyd*(2). The passion for litigation wherever it exists in this country is likely to turn into almost incurable mania and the doctrine of *res judicata* would become practically useless if *Lakshmi Charan Saha v. Nur Ali*(3) is followed in Indian Courts.

Having regard, however, to the conflict of views found in the decisions in *Venkatappa Naick v. Subba Naick*(7) and in *Chinnayya v. Ramanna*(8) I would refer the following question to the Full Bench:—

"Was the question of law considered in *Venkatappa Naick v. Subba Naick*(7) rightly decided in that case?"

WALLIS, C.J.—I concur in the ORDER OF REFERENCE.

WALLIS, C.J.

(1) (1916) I.L.R., 38 All., 7.

(3) (1911) I.L.R., 38 Calo., 986.

(5) (1914) I.L.R., 41 Calo., 990.

(7) (1906) I.L.R., 29 Mad., 179.

(2) (1878) 10 Ch.D., 327.

(4) (1912) 16 C.W.N., 1002.

(6) (1915) I.L.R., 37 All., 535.

(8) (1915) I.L.R., 38 Mad., 208.

(9) (1898) 2 Q.B., 36.

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ON THIS REFERENCE—

K. S. Ganapati Ayyar for the appellant.—The suit is maintainable—*Obiter dictum* in *Flower v. Lloyd*(1) which has been followed in India has been dissented from in later English cases, the last of which is *Robinson v. Smith*(2): see also *Vadala v. Laues*(3), *Arunachellam Chetty v. Sabapathy Chetty*(4) and Halsbury's Laws of England, volume 18, page 216. The fact that a review can be applied for is no answer, for a review can lie only on very limited grounds. A suit is the better remedy: *Priestman v. Thomas*(5), *Chandler v. Blogg*(6). *Baker v. Wadsworth*(7) is against this view. It does not matter whether the former decision is of a foreign Court or of an English Court: *Abouloff v. Oppenheimer*(8), *Ex parte Alice Cockerell*(9). Section 44 of the Indian Evidence Act gives a right of suit to set aside a judgment for fraud. Fraud includes suppression of evidence and perjured evidence; see Contract Act, section 17, as in this case and in the case of *Venkatappa Naick v. Subba Naick*(10). Reference was made to *Chinnayya v. Ramanna*(11), *Lakshmi Charan Saha v. Nur Ali*(12), *Nanda Kumar Howladar v. Ram Jiban Howladar*(13), *Munshi Mosuful Huq v. Surendra Nath Roy*(14), *Radha Raman Shaha v. Pran Nath Roy*(15), *Khagendra Nath Mahata v. Pran Nath Roy*(16) and *Subbaiyar v. Kallapiran Pillai*(17). The last two cases also hold that the existence of other remedies is no bar to the suit.

K. Venkataraghavachariar.—The suit does not lie. *Janki Kuar v. Lachmi Narain*(18), *Ram Ratan Lal v. Bhuri Begam*(19) and *Abdul Huq Chowdry v. Abdul Hafez*(20).

The following OPINION of the Court was delivered by WALLIS, C.J. WALLIS, C. J.—In *Venkatappa Naick v. Subba Naick*(10), the Court decided that a suit could be instituted to set aside a

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| (1) (1877) 6 Ch.D., 297 (C.A.). | (2) (1915) 1 K.B., 711 (C.A.). |
| (3) (1890) 25 Q.B.D., 310, at p. 316. | (4) (1918) I.L.R., 41 Mad., 213. |
| (5) (1884) L.R., 9 Pro. D., 210. | (6) (1898) 2 Q.B., 36. |
| (7) (1898) 67 L.J.Q.B., 301. | (8) (1882) 10 Q.B.D., 295. |
| (9) (1878) L.R., 4 C.P.D., 9, at p. 39. | |
| (10) (1906) I.L.R. 29 Mad., 179. | (11) (1915) I.L.R. 38 Mad., 203. |
| (12) (1911) I.L.R., 38 Calc., 936. | (13) (1914) I.L.R., 41 Calc., 990. |
| (14) (1912) 16 C.W.N., 1002. | |
| (15) (1901) I.L.R., 29 Calc., 475 at p. 488 (P.C.). | |
| (16) (1902) I.L.R., 29 Calc., 395 P.C. | (17) (1914) 22 I.C., 500. |
| (18) (1915) I.L.R., 37 All., 535. | (19) (1916) I.L.R., 38 All., 7. |
| (20) (1910) 14 C.W.N., 695. | |

decree on the ground that it had been obtained by false evidence tendered at the trial and by the suppression of evidence. On reference, however, to the printed papers it appears that the alleged suppression of evidence consisted merely in the non-production of a promissory note the very existence of which the defendant denied when giving evidence in the case. There has been considerable difference of opinion in England as to whether an action would lie to set aside the judgment of an English Court on the ground that it had been obtained by perjured evidence. In India the weight of authority appears to be in favour of holding that such a suit will not lie for the reasons given by SUNDARA AYYAR, J., in *Chinnayya v. Ramanna*(1) by the Calcutta Court in *Munshi Mosuful Huq v. Surendra Nath Roy*(2) and by the Allahabad Court in *Janki Kuar v. Lachmi Narain*(3). We are therefore of opinion that *Venkatappa Naick v. Subba Naick*(4) was wrongly decided and must be overruled.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and
Mr. Justice Spencer.

THE MIDNAPORE ZEMINDARI COMPANY, LIMITED
(FIRST DEFENDANT), APPELLANT,

v.

APPAYASAMI NAICKER AND ANOTHER (FIRST
PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Unsettled Palayam, alienability of, for debts of holder for the time being—Lands held on service tenure, alienability of—Enfranchisement of service tenure, effect of, on alienation, prior and subsequent—Regulation XXV of 1802, effect of—Private Police service, abolition of, by legislation—Military service, imposition of, on landed proprietors—Abolition of—Limitation Act (IX of 1908), Schedule II, articles 120, 142 and 144—Madras Regulation XI of 1916—Madras Regulation VI of 1831—Madras District Police Act XXIV of 1859—Madras Act III of 1895.

Lands held on service tenure are, even apart from statute, inalienable by the Common Law of India beyond the life-time of the holder for the time being.

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| (1) (1915) I.L.R., 38 Mad., 203. | (2) (1912) 16 C.W.N., 1002. |
| (3) (1915) I.L.R., 37 All., 535. | (4) (1906) I.L.R., 29 Mad., 179. |

* Appeal No. 232 of 1916.

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Papaya v. Ramana (1884) I.L.R., 7 Mad., 85 and *Pakkiam Pillay v. Seetharama Vadhyar* (1904) 14 M.L.J., 184, followed.

Abolition of service prior to the alienation renders the alienation valid.

Mussamut Kustoora Koomaree v. Monohur Deo (1884) W.R., 39, *Ravlojirav Bin Tamajirav v. Balvantrav Venkatesh* (1881) I.L.R., 5 Bom., 437 and *Radhabai and Ramachandra Konher v. Anatrav Bhagavant Deshapande* (1885) I.L.R., 9 Bom., 198 at p. 212 (F.B.), followed.

Enfranchisement of the land from service subsequent to an alienation thereof will not validate the alienation. *Padapa v. Swamirao* (1900) I.L.R., 24 Bom., 556 (P.C.) and *Sannamma v. Radhabhai* (1918) I.L.R., 41, Mad., 418 (F.B.), followed.

An unsettled palayam in the Presidency of Madras resembles a zamindari, is hereditary in its character and is alienable for the debts of the previous holders and of the holder for the time being, so as to bind the successors.

The only difference between an unsettled palayam and a permanently settled zamindari is that in the latter the Government is precluded for ever from raising the revenue, and in the former the Government may or may not have that power. *Oolagappa Chetty v. Arbuthnot* (1874) 1 I.A., 268 at p. 306, followed.

Held, on a review of the facts of the case, that the palayam of Kannivadi in Madura district which was permanently settled in 1905 and which was in the eighteenth century liable to render military and police service to the Government of the day, was as a fact unconditionally released from such services prior to 1895 and that accordingly a mortgage executed by the grandfather and father of the present zamindar in 1895 for debts incurred by the grandfather prior to that date and a decree and a Court sale held to satisfy the mortgage debt were binding upon the present zamindar and precluded him from recovering the zamindari from the auction purchaser.

The East India Company had by its Proclamations of 1799 and 1801 suppressed military service once imposed on landed proprietors in Southern India and police service similarly imposed was abolished pursuant to Regulation XXV of 1802, Regulation XI of 1816, Act XXIV of 1859, Act XVII of 1862 and Madras Act III of 1895.

Regulation VI of 1831 which restrained the alienation of all public service inams is only partially repealed and replaced by Act III of 1895 as services other than those of village officers had become long ago obsolete.

Quære: Whether if the plaintiff's father had debarred himself from suing, article 120 of the Limitation Act was the article applicable in which case the plaintiff would not be barred.

APPEAL against the decree of F. A. COLERIDGE, District Judge of Madura, in Original Suit No. 5 of 1915.

This was a suit brought in 1914 by two brothers for the recovery of what was once known as the palayam of Kannivadi in the Madura district and now known as the Kannivadi Zamindari. The plaintiffs alleged that the first defendant purchased this estate in 1909 from the Commercial and Land Mortgage Bank of India, Ltd., to whom the plaintiffs' father's father

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and the plaintiffs' father had executed a mortgage on 14th December 1895. The plaintiffs further alleged that the Bank sued on the mortgage, obtained a compromise decree in 1898 against both the executants and in 1900 brought the mortgage property to sale and purchased it in 1900 in Court auction, and after having so bought, the Bank sold the same to the first defendant. The grounds on which the plaintiffs claimed to recover the estate were as follows:—

(a) The palayam was one of the 72 bastions of the Madura Fort from about the fifteenth century, the palayagar holding the estate on condition of doing military and police service to the ruler of the country, that this service tenure continued even during the times of the invasion of the Madura country by Haider and Tippu about the end of the eighteenth century and also after the cession of Dindigul territory by Tippu to the East India Company in 1792, that though during the middle and latter part of the nineteenth century the British Government did not actually require the services of the palayagar, the services were never actually put an end to until the issue of a permanent sanad in 1905 to the Commercial and Land Mortgage Bank.

(b) Being held on such service tenure, the estate was inalienable at least beyond the life-time of the holder for the time being.

(c) The mortgage of 1895, the compromise decree of 1898 and the Court sale of 1900 were, therefore, not valid beyond the life-time of the respective holders and did not in any way bind the plaintiffs or affect their right to succeed to the estate on the death of their father which occurred on 24th May 1911.

The second defendant was alleged to be a tenant under the first defendant.

The first defendant pleaded *inter alia* (1) that at no time in the history of the palayam was any military or police service attached to the palayam, (2) that even if there were any military service rendered before and up to the year 1804 the same was suppressed by proclamations of the Government issued in the years 1799 and 1801 and that as a fact, no military or police service was required by the Government from 1804; (3) that though no permanent sanad was issued till 1905, the amount of peshkash was settled at a certain figure in 1803 (viz., Rs. 38,080) from which it was never changed even at the time of the

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permanent settlement; (4) that a palayam though unsettled was heritable and alienable, like a permanently settled zamindari by the holders thereof; (5) that the holding of the palayam on service tenure did not render it in law any the less alienable; (6) that the mortgage, the compromise decree and the Court sale which were all for debts incurred by the plaintiffs' grandfather were valid and binding on the plaintiffs; (7) that the suit was barred by limitation having been brought more than twelve years after Court sale and (8) that the plaintiffs were also estopped by the conduct of their predecessors in treating the estate as alienable.

The second defendant pleaded that as he was let in as a tenant by the Bank and remained as a tenant of certain ryoti lands of the estate on the date of the passing of the Madras Estates Land Act, he acquired occupancy rights in the same.

The District Judge framed issues on every one of the contentions stated above and agreeing with all the allegations of the plaintiffs and of the second defendant, gave a decree to the first plaintiff who was entitled to the palayam in preference to the second.

The first defendant preferred this appeal.

Eardley Norton, T. R. Venkatarama Sastriyar and S. Varadachariyar for the appellants.

Hon. Mr. S. Srinivasa Ayyangar, the Advocate-General, and A. Krishnaswami Ayyar for the respondents Nos. 1 and 2.

D. M. Dorai Raja for the third respondent.

Eardley Norton referred to various portions of evidence in the case and to Nelson's Manual of the Madura country as establishing (a) that the palayagar was not required at any time in the history of the palayam to do any military or police service to the Government of the day as a condition of his holding the palayam, (b) that even if any such services had been required during the times of Haider and Tippu, such services were, according to the then policy of the British Government, abolished by various Proclamations of 1799 and 1801 and were as a fact never exacted from the year 1804 and (c) that the peshkash was intended by the Government to be fixed and was as a fact fixed at a certain figure in 1803 which was not altered even in 1905 when the permanent sanad was issued.

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Even if the palayam had been held on condition of doing any such services, neither the statute nor the common law of India disentitled the holder to alienate the same. *Chauki Gounden v. Venkataramanier*(1), *Lekkamani v. Puchaya Naikar*(2), *Oolagappa Chetty v. Arbuthnot*(3) and *Kalahasti Case*(4).

A palayam does not mean an estate held on military service. The above cases show that a palayam is like a permanently settled zamindari in every respect, that it descends hereditarily to the successors and that it is alienable. At any rate as a permanent sanad was issued in 1905, which did not impose upon the palayagar any military or police duties, it related back and made the previous alienation of 1895 good. Regulation XXV of 1802 is only *declaratory* of the existing rights of zamindars, palayagars and others as its preamble shows and it did not give or take away any rights which they till then had. The issue of a permanent sanad is not necessary to entitle an unsettled palayagar to alienate his estate. A permanent sanad is only evidence of what was previously obtaining as to the conditions of the tenure. An unsettled palayagar does not own the palayam only for his life but is as much a full owner as a permanently settled zamindar and like the latter is entitled to alienate. The estate being impartible it is alienable absolutely by the holder according to the decision in *Sartaj Kuari v. Deoraj Kuari*(5) and the alienation is binding upon his successors. The estate having rightly passed to the defendant before any right to sue accrued to the plaintiff, he cannot maintain the suit. As the military and police duties were, as a matter of fact, abolished in 1804, the alleged reason for inalienability vanished and the estate became alienable thereafter. *Radhabai and Ramachandra Konher v. Anantrav Bhagavant Deshapand*(6). Not only the police services, if any, were as a fact, abolished from 1804, but the exaction of police service from proprietors of estates was abolished before 1812 as stated in the Fifth Report, pages 51, 53, and any further vestiges thereof were done away with by Regulation XI of 1816, Act XXIV of 1859, Act XVII of 1862 and Madras Act III of 1895. The suit is also barred by limitation as the defendants have had adverse possession against plaintiffs'

(1) (1870) 5 M.H.C.R., 208. (2) (1870) 6 M. H.C.R., 208.

(3) (1874) 1 I.A., 315 at p. 330.

(4) Appeal No. 1 of 1897 (unreported). (5) (1838) I.L.R., 10 All., 272 (P.C.).

(6) (1835) I.L.R., 9 Bom., 198 at p. 202 (F.B.).

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grandfather and father for more than twelve years before the suit. See *Radhabai and Ramachandra Konher v. Anantrav Bhagavant Deshapande*(1). If according to the plaintiff the palayam had been held only for a military office and it is therefore inalienable, he is not entitled to succeed to the estate as the office for which alone the estate is said to have been given had been abolished in 1905 by the issue of the permanent sanad. Further the plaintiff who sues in ejectment and who ought to show a subsisting title at the time of suit shows none owing to the above reason and owing to long adverse possession of the defendants.

Though a custom of inalienability of the palayam was pleaded, it was abandoned and the conduct of the plaintiff's father, grandfather and their predecessors as evidenced by various leases, mortgages and sales effected for liquidating debts between 1841 to 1895, shows that they all considered the palayam to be alienable. The plea of inalienability by reason of military and police service was never set up before, in the history of this palayam and it is set up only now, as an afterthought for the purpose of this suit.

Hon. Mr. S. Srinivasa Ayyangar, the Advocate-General.—Reference was made to the evidence in the case to show (a) that the palayam was from its inception and up to 1905 held on condition of doing military and police services to the State, (b) that this condition was put an end to only by the issue of a permanent sanad in 1905 though there was a general policy to abolish military services in the country, and (c) that the revenue was fixed only in 1905. The two questions in the case are (1) whether the estate is inalienable by virtue of its being held for military and police services and (2) whether the suit is barred by limitation.

Lands held for public service are by the common law of India inalienable beyond the life-time of the alienor, though valid for the life-time of the alienor: Mayne's Hindu Law, page 452, paragraph 338, and paragraph 401 at page 547; *Papaya v. Ramana*(2), *Pakkiam Pillay v. Seetharama Vadhyar*(3), *Minakshi sundaram Pillai v. Chockalinga Royer*(4),

(1) (1885) I.L.R., 9 Bom., 198 at p. 202 (F.B.).
(2) (1884) I.L.R., 7 Mad., 85. (3) (1904) 14 M.L.J., 134.
(4) (1906) 15 M.L.J., 10.

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Chandrakantam v. Subbarayudu(1), *Kammara Peda Subbayya v. Kararha Chennappa*(2), *Nilmoni Singh Deo v. Bakranath Singh and the Secretary of State for India*(3), *Bukranath Singh v. Nilmoni Singh*(4), *Raja Lelanund Singh Bahadoor v. The Government of Bengal*(5), *Narain Mullick v. Badi Roy*(6), *Rani Keshabati Koeri v. Mohon Chandra Mondul*(7), *Durga Prasad Singh v. Braja Nath Bose*(8), *Binode Ram Sein v. The Deputy Commissioner of the Sonthal Pergunnahs on behalf of the Court of Wards*(9).

An estate which by reason of the tenure is impartible is also inalienable. It is the tenure that makes it so; see remarks in *Sartaj Kuari v. Deoraj Kuari*(10). See also *Beresford v. Ramasubha*(11), *The Court of Wards v. Venkata Surya Mahipati Ramakrishna Rao*(12), and *Sri Raja Rao Venkata Surya Rama Krishna Rao Bahadur v. The Court of Wards*(13).

This is one of the 72 palayams of the Dindigul territory and the history of these palayams as held on military and police services is given in the *Rāmṇād Case*(14), *The Collector of Trichinopoly v. Lekkamani*(15), Fifth Report, pages 87 and 88, Nelson's Madras Manual, pages 98 and 99. In *Vira Chinnammal v. Akkulu Ammal*(16), a neighbouring palayam, *Ersakka Nayakanur*, has been held to have been held on such tenure. Even during the times of Mussalman kings there were military chieftains holding for military and police services: *Lekkamani v. Puchaya Naikar*(17), Aitchison's Treatises, volume 8, page 47 at page 49, article 6, Nelson's Manual, Part 3, page 157. In *Lakshmiipathi v. Kandasami*(18), a neighbouring palayam (Edayakottai) was held to be impartible on account of military tenure. The military tenure existed even after the advent of the British Government. 'Palayam' means an armed camp. 'Palayagar' means a military chieftain (Wilson's Glossary, page 391). Palayagars are

(1) (1914) M.W.N., 746. (2) (1915) 28 M.L.J., 308.
(3) (1883) I.L.R., 9 Calc., 187 (P.C.).
(4) (1880) I.L.R., 5 Calc., 389 at p. 408. (5) (1855) 6 M.I.A., 101 at p. 125.
(6) (1902) I.L.R., 29 Calc., 227 at p. 229. (7) (1912) 16 C.W.N., 802.
(8) (1912) I.L.R., 39 Calc., 696 (P.C.). (9) (1887) 7 W.R., 178.
(10) (1888) I.L.R., 10 All., 272 (P.C.). (11) (1890) I.L.R., 13 Mad., 197.
(12) (1897) I.L.R., 20 Mad., 167 at p. 181. (13) (1899) I.L.R., 22 Mad., 383 (P.C.).
(14) (1901) I.L.R., 24 Mad., 613 at p. 618.
(15) (1874) 1 I.A., 282 at p. 294. (16) (1891) 1 M.L.J., 326.
(17) (1870) 6 M.H.C.R., 208 at pp. 220 and 221.
(18) (1893) I.L.R., 16 Mad., 54 at p. 56.

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military chieftains and they were hereditary public officers. *Gunnaiyan v. Kamakchi Ayyar*(1), and *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami*(2), Baden Powell, volume 3, page 133, *The Udayarpalayam Case*(3) and the *Rāmnād Case*(4). The last case, at pages 629 and 631, shows that until commutation by the issue of a permanent sanad the military service must be continued to be rendered by every palayagar. See also *Muthu Vadugunatha Tevar v. Dorai Singh Tevar*(5). Even when service becomes obsolete, the tenure is not changed and disability to alienate remains the same; *Forbes v. Meera Mahomed Tuquee*(6) and *Padapa v. Swami Rao*(7). A land which is burdened with public service is inalienable irrespective of any family custom. The abandonment of the plea of family custom of inalienability does not matter. In fact custom and law to the same effect cannot stand together. The decision in *Radhabai and Ramachandra Konher v. Anantrav Bhagavant Deshpande*(8) depends upon its special facts and it lays down no general rule that if the land is freed from service it is alienable. If it lays down any such general principle it is a mere *dictum* and it is wrong as observed in *Swamirao v. Padapa Bin Bhujangrav*(9). This last case shows that even if the Government renounces the services or even if the office becomes sinecure, the lands are still inalienable. See *Bhau v. Ramachandra Rao*(10). Even if the military service could be taken to have been abolished by the Proclamations, the *karal* or police service was not abolished. Section 5 of the Regulation XXV of 1802 and Regulation XI of 1816 did not put an end to police service, at least not until the sanad was issued. Section 38 of Regulation XI of 1816 rather preserved to the palayagar the police service. An unsettled palayagar becomes a proprietor under sections 2 and 3 of Regulation XXV

(1) (1903) I.L.R., 26 Mad., 339 at pp. 349 and 350.

(2) (1904) I.L.R., 27 Mad., 435 at p. 459.

(3) (1901) I.L.R., 24 Mad., 562 at pp. 598, 604 and 605.

(4) (1901) I.L.R., 24 Mad., 613 at pp. 622, 626, 629, 631 and 634.

(5) (1881) I.L.R., 3 Mad., 290 (P.C.).

(6) (1870) 13 M.I.A., 433 at pp. 464 and 465.

(7) (1900) I.L.R., 24 Bom., 556 at p. 559 (P.C.).

(8) (1885) I.L.R., 9 Bom., 198 at p. 212 (F.B.).

(9) (1894) I.L.R., 18 Bom., 22 at p. 31.

(10) (1896) I.L.R., 20 Bom., 423 (F.B.).

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of 1802 only when and after the sanad is issued. The word 'proprietor' in sections 2 and 3 is used in a technical sense; *The Collector of Trichinopoly v. Lekkamani*(1), *The Secretary of State for India v. Maharaja of Venktagiri*(2), *Muthu Vaduganatha Tevar v. Dora Singh Tevar*(3), *Kalu Narayan Kulkarni v. Hanmapa Bin Bhimapa*(4), *Narayana v. Chengalamma*(5) and *Ramachandra v. Appayya*(6). If the alienation is void when made, it does not become valid by subsequent enfranchisement. *Padapa v. Swamirao*(7), *Sannamma v. Radhabhai*(8). Regulation VI of 1831 is also a bar to alienation of service lands. As regards conduct of the successive holders, alienations for charitable and religious purposes are immaterial, being valid according to the custom and law of the country, see *Venkamma Row v. Raja Rajagopala Appa Row*(9) (unreported), *Buboo Gunesb Dutt Singh v. Maharaja Moheshur Singh*(10), *Mahadevi v. Vikrama*(11), and section 12 of Regulation XXV of 1802. There is no bar by limitation as each palayagar had only a life interest in the lands. The compromise decree was in 1898 to which both the plaintiffs' grandfather and father were parties. After the death of the grandfather in 1899, the mortgagee applied in 1900 for an order absolute for sale during the life-time of the plaintiffs' father; then the plaintiffs' father's vakil did not oppose the application; the effect of this was that the plaintiffs' father consented to the alienation of his interests, which consisted only of his life-interest. If the plaintiffs' father without estopping himself like this had simply kept quiet, limitation may run against the plaintiff also; see *Muthusamier v. Sree Sreemethanithi Swamiyar*(12), and *Ramasami Naick v. Ramasami Chetti*(13).

Eardley Norton in reply—What was ordered to be sold by the decree and what was actually sold as shown by the sale certificate was the zamindari itself and not any one particular person's life-interest. The alienation of the whole zamindari was

(1) (1874) 1 I.A., 282.

(2) (1916) 31 M.L.J., 97 at p. 113.

(3) (1881) I.L.R., 3 Mad., 290 at p. 307 (P.C.).

(4) (1881) I.L.R., 5 Bom., 405 at p. 436.

(5) (1887) I.L.R., 10 Mad., 1 at p. 7. (6) (1884) I.L.R., 7 Mad., 128.

(7) (1900) I.L.R., 24 Bom., 556 (P.C.). (8) (1918) I.L.R., 41 Mad., 418 (F.B.).

(9) Appeal No. 121 of 1877. (10) (1855) 6 M.I.A., 164 at p. 192.

(11) (1891) I.L.R., 14 Mad., 365.

(12) (1915) I.L.R., 38 Mad., 356 at pp. 362, 363 and 365.

(13) (1907) I.L.R., 30 Mad., 255.

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either void or valid. If void as is now contended by the plaintiff, more than twelve years having elapsed the sale is valid against the plaintiff also. The cases quoted for the respondent were distinguished. The cases from Calcutta deal with *ghatwals*. A *ghatwal* differs from a *palayagar* in several respects, e.g., a *ghatwal's* successor perfects his title only on approval by the Government; see *Mahbub Hussain v. Patasu Kumari*(1), and *Nilmoni Sing Deo v. Bakranath Singh and the Secretary of State for India*(2). The concurrence of the plaintiff's father in the mortgage of 1895 does not show that the plaintiff's grandfather had only a life-estate. The grandfather was a full owner and the concurrence of the plaintiffs' father who had only a contingent right is of no legal value. *Ramasami Naik v. Ramasami Chetti*(3) and *Amrit Narayan Singh v. Gaya Singh*(4).

THE JUDGMENT of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—This is an appeal from the decree of the District Judge of Madura in a suit brought by the plaintiff as heir of the late Zamindari of Kannivadi to recover the zamindari from the first defendant, the Midnapore Zamindari Company, and the second defendant claiming under it. The defendant company acquired the zamindari for more than thirteen lakhs of rupees from the Liquidator of the Commercial Bank of India, which in December 1895 had advanced money on a mortgage to which the plaintiff's grandfather the then zamindar and his son the plaintiff's father were parties, and had subsequently obtained a consent decree for sale, and brought the zamindari to sale and purchased it after the death of the plaintiff's grandfather and the succession of his father to the estate. At the date of the Court sale in 1900 the zamindari was an unsettled palayam, but in 1905 the Bank succeeded in obtaining a permanent sanad under Regulation XXV of 1802 at the same peshkash as had been paid without alteration for more than a hundred years.

The ground on which the plaintiff has succeeded in the lower Court in recovering the zamindari from the transferees of the auction purchaser is that, at the dates of the mortgage and the

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mortgage decree and of the sale thereunder, which were prior to the issue of the permanent sanad of 1905, the zamindari was held on the tenure of rendering military and police service as well as of paying the peshkash demanded; and that in these circumstances it was inalienable by the plaintiff's grandfather and his father after him for more than the terms of their respective lives. These contentions the District Judge has accepted. At the hearing of the appeal the learned Advocate-General raised the further contention that the zamindari was made inalienable by the provisions of Regulation VI of 1831.

The appellants did not admit that such services, if they existed, would render the zamindari inalienable, and contended that, even if this were so, this defect in the Bank's title was cured by the grant of the sanad to them in 1905 which admittedly put an end to such services if they were then in existence, and rendered the zamindari freely alienable. Their main case, however, was that in 1895 the date of the mortgage to the Bank and afterwards, the zamindari was not held on any conditions of military or police service. As regards military service they contended that, when after the cession of Dindigul to the Company by Tippoo in 1792, the then poligar who had been expelled by Tippoo for failure to pay the peshkash imposed upon him, was restored by the Company, the incident of military service was suppressed by the Company in accordance with its settled policy as a necessary preliminary to the introduction of settled government. As regards the police or kaval duties, they admitted that such duties were at first required of the palayagar by the annual sanads issued to him by the Collector of Dindigul, of which several from 1796 to 1804 have been exhibited, but they contended that in accordance with the provisions of section 5 of Regulation XXV of 1802 and the policy declared therein this police or kaval service was abolished before 1812 and referred to the Fifth Report and Regulation XI of 1816. They contended that the peshkash was permanently settled at the beginning of the last century, and that the delay in issuing permanent sanads in the case of this and some other palaiyams was due to other causes and without any idea of claiming military and police services from them. As regards the alienability of such unsettled palaiyams, they relied upon the decision of the Judicial Committee in the *Gandamanaikanur case*, *Olagappa Chetty*

(1) (1868) 1 B.L.R., 120 at p. 131.

(2) (1883) I.L.R., 9 Calo., 187 at pp. 206 and 257 (P.C.).

(3) (1907) I.L.R., 30 Mad., 255.

(4) (1917) 34 M.L.J., 298 (P.C.).

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v. Arbuthnot(1) not only that such palayams were hereditary but that debts incurred by the holder for the time being were binding on the palayam in the hands of his successors, which could not be the case if they were inalienable except for the lifetime of the holder for the time being. The present contention they contended was an afterthought. The zamindari after being held under Government management was restored to the zamindar in 1843 on payment of a sum of money for arrears which he had to borrow. To discharge this and other indebtedness of his predecessors one of the zamindars in 1861 granted a thirty-years' lease of the zamindari which was in the nature of a usufructuary mortgage. His successor obtained from this Court a decree in the nature of a redemption decree, and recovered the zamindari by paying off the sum payable to the lessees under the decree in respect of advances made by him to discharge the indebtedness of the estate. The mortgage to the Commercial Bank in 1895 was in respect of the indebtedness incurred by the zamindar in redeeming the zamindari. That it was regarded as binding on the zamindari was shown from the fact that the next heir, the plaintiff's father, joined in the mortgage and consented to the decree for sale.

As regards the inalienability of lands held on service tenure, it is held in India that, even apart from statute, they are inalienable beyond the lifetime of the holder; Mayne, section 338, *Papaya v. Ramana*(2), *Pakkiam Pillay v. Seetharama Vadhyar*(3) and we must so hold. The learned Advocate-General also relied upon the statutory prohibition against the alienation of service lands contained in Regulation VI of 1831, but as will be pointed out later, the general statutory prohibition was repealed before the date of the alienations now in question by Madras Act III of 1895, and the limited prohibition contained in that enactment does not affect the present case. The further contention that the subsequent enfranchisement of the land from service, as by the issue of the sanad of 1905 in this case, would validate alienations previously made is supported by certain observations of West, J., which appear to have been made *obiter* in *Radhabai and Ramachandra Konher v. Anantrav Bhagavant*

(1) (1874) 1 I.A., 268 at p. 315.

(2) (1864) I.L.R., 7 Mad., 85.

(3) (1904) 14 M.L.J., 134.

Deshapande(1) but is opposed to the recent decision of a Full Bench of this Court *Sannamma v. Radhabhai*(2) by which we are bound, and also to an express decision of the Privy Council in *Padapa v. Suami Rao*(3) to which our attention was drawn by the learned Advocate-General. This contention of the appellant must therefore be rejected.

The contention that, assuming the zamindari to have been held at first under the Company on service tenure, the abolition of these services would render it alienable is supported by the judgment of West, J., in *Radhabai and Ramachandra Konher v. Anantrav Bhagwant Deshapande*(4), the case already referred to, in which SARGENT, C.J., and two other learned Judges of the Bombay Court concurred. The learned Judge (West, J.) observed:

"So long as lands are assigned by the Sovereign to the support of a public office, or the land tax payable on lands is remitted in consideration of services to be performed by a particular family or line of holders, the lands are according to the principles of the Hindu Law and the customary law of the country, incapable of an alienation or disposal, such as to divert them or the proceeds of them, from the intended purpose—*Ravlojirav Bin Tamajirav v. Balvantrav Venkatesh*(5). This principle has been recognized in many decisions—*Mussamut Kustoora Koomaree v. Monohur Deo*(6). * * * *
"When an estate is freed from its connexion with a public office, the reason arising from that connexion for the preservation of the estate intact and unencumbered, necessarily fails. There is not in the lands themselves, according to Hindu Law, any inherent quality limiting them to special kinds of ownership and devolution. They become subject to the ordinary laws of descent and disposal, just as where a particular custom concerning them has been abandoned; or they have passed into a family not subject to the custom."

It has been held in some later cases that in this case the learned Judges were under a misapprehension as to the service in question in that case having been abolished, but the principle laid down in the above passage was not questioned in any of these cases, nor were we referred to any authority the other way. We entirely agree with the decision of the Bombay Court on this point and have decided to follow it. It is moreover the

(1) (1885) I.L.R., 9 Bom., 198 (F.B.). (2) (1918) I.L.R., 41 Mad., 418 (F.B.)

(3) (1900) I.L.R., 24 Bom., 558 (P.C.).

(4) (1885) I.L.R., 9 Bom., 198 (F.B.) at p. 212.

(5) (1881) I.L.R., 5 Bom., 437.

(6) (1864) W.R., 39.

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principle to which the Legislature has given effect in Section 8 of Regulation XXV of 1802.

In the *Narayunt Case*(1), the Judicial Committee accepted the description of palayagars in Wilson's Glossary as having been originally petty chieftains occupying usually tracts of hill or forest, subject to pay tribute and service to the paramount power, but seldom paying either, and more or less independent; but as having, at present, since the subjugation of the country, by the East India Company, subsided into peaceable land-holders. There can be no doubt that Kannivadi was a palayam of this nature. Dindigul, in which it is situated, had formed part of the dominions of Hyder and Tippoo for some time when it was ceded to the Company by the Treaty of Seringapatam in 1792. At that time the palayagar was not in possession, having been expelled by Tippoo for failure to pay the revenue demanded from him. The Company restored the palayam to him; and the first question for consideration is on what terms this was done. The report of the Board of Revenue, D16, of January 1795 shows that the precise terms on which the restored Dindigul palayagars were to hold their palayams had not then been settled, and that it was proposed to exact certain kaval or police services from them which were then necessary for the preservation of order. The Board transmitted a draft sanad defining the position of the restored palayagars. The annual sanads subsequently issued for some years no doubt follow this draft sanad; Exhibit E for 1796, E2 for 1797, E1 for 1800, E4 the corresponding muchilika for 1801, and E3 the muchilika for 1803. There can scarcely be any doubt that a similar sanad was issued for 1795 and the intervening years for which no sanad is forthcoming, and these sanads may be taken as containing the conditions which the restored palayagars were required to observe. Paragraphs 1 to 5 deal with the payment of tribute, and the rendering of kaval services. Paragraph 6 is important as showing that the Government was already impressed with the necessity of suppressing the military service of the palayagars as a first condition of the introduction of orderly government. It provides that the palayagar is to render an account of the number of armed men in the palayam and to abide by the orders of the

government as regards the dismissal of such of them as may appear unnecessary for the performance of the duties of the palayam, and proceeds: "Since it is the duty of the Circar to protect the country from foreign enemies you are only to take a few of the inhabitants of the palayam into your service." We have revised the translation as the result of the discussion during the argument. The palayagar was again enjoined not to take up arms "because the Company's troops have been specifically appointed for that purpose." Any breach of the conditions was to involve forfeiture. Except as to the amount of the peshkash the terms continued the same down to 1803 (Exhibit E3) after which there is no evidence of any exchange of sanads and muchilikas.

Exhibit XXVI of 2nd of October 1799 is a proclamation by Major Bannerman addressed to the inhabitants of the Tinnevely palayams after the rebellion of the Tinnevely palayagars, ordering the surrender of arms and threatening those who retained them with death. In their Revenue letter to Fort Saint George of 11th February 1801 (Fifth report, page 51, Edition of Higginbotham) the Court of Directors sanctioned the gradual introduction of the permanent settlement into Madras, but laid down, p. 53, that it was of first importance that "all subordinate military establishments should be annihilated within the limits subject to the dominion of the Company," and observed that this was so incontrovertible as to preclude all expectations to be derived from an attempt to introduce a permanent system of land revenue or the exercise of a regular judicial authority till this essential preliminary was secured. In conformity with these instructions, Lord Clive on 1st December 1801 issued a proclamation addressed to the palayagars, sherogars and inhabitants of the Southern Provinces announcing the determination of the Government to suppress the use and exercise of all weapons of offence without the authority of the British Government. The proclamation went on:—"The military service heretofore rendered by the palayagars and sherogars having been suppressed, and the Company having in consequence charged itself with the protection and defence of the palayagar countries, the possession of fire-arms and weapons of offence is manifestly become unnecessary to the safety of the people." General disarmament was therefore enjoined, but the palayagars and

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zamindars were permitted "to retain a certain number of persons carrying pikes for the purpose of maintaining the pomp and state heretofore attached to the persons of the palayagars," but the number was to be fixed and the pikes issued to them stamped and registered. The proclamation concluded by announcing to the palayagars, "the intention to establish a permanent assessment of revenue on the lands of the palayams upon the principles of zamindari tenure, which assessment being once fixed shall be liable to no change in any time to come, that the palayagars becoming by these means zamindars of their hereditary estates will be exempted from all military service, and that the possessions of their ancestors will be secured to them under the operation of limited and defined laws, etc." The District Judge has read the concluding paragraph, which was merely an announcement of the policy declared in the despatch from the Court of Directors, as limiting the announcement earlier in the proclamation that the military service hitherto rendered by the palayagars and sherogars had been suppressed; and he has held that the intention of the proclamation as a whole was that their military service was to continue until the issue to them of permanent sanads. Reading the proclamation as a whole and in the light of the despatch from the Court of Directors we think it is clear that the suppression of military service was intended to be unconditional.

It has however been contended that military service was exacted from the zamindar even after the proclamation, and as much importance was attached by the District Judge to the documents exhibited by the plaintiffs to show this, Exhibits D, E, F, G series, it is necessary to refer to them in some detail. Exhibits D to D3 (b) are extracts from the Dindigul Diary kept by successive Collectors. The other exhibits of importance in this connexion are letters written by or to this Palayagar of Kannivadi relating to the events mentioned in the diary. The District Judge relies on these to show that, after the British occupation, military services were being rendered. Most of these exhibits relate to the period anterior to 1801, and in many cases relate only to police duties. Among the latter duties may be instanced the attempts made to seize an outlaw named Tombu Gour for whose arrest a reward had been offered, referred to in Exhibit D3 (a) under dates September 25th, December 16th,

1796 and January 10th, 1797; and the Collector's warning on June 10th, 1795, to the palayagar in Exhibit D, which the palayagar acknowledged in D4 on July 4th, 1795, against harbouring a rebel named Gopaya Naick; and the Assistant Collector's *inayatnamah*, Exhibit D6, dated July 25th, 1799, to the palayagar directing him to seize some marauders named Pujari Naick and Alwar Pillay, whom the Tahsildar had been endeavouring to capture by placing a guard of peons at the entrance of the Kannivadi district, as appears from the entry of January 18th, 1799, in Exhibit D2. The Assistant Collector's order of July 25th was acknowledged next day by the palayagar in Exhibit D7, in which he repudiates the idea that he has been friendly with these marauders, and on January 19th in Exhibit D2 he promises the Collector not to assist them.

The Collector's directions to make good property stolen by thieves belonging to his estate in the entries in Exhibit D3 (a) of November 4th, 1796, of March 4th, and 7th, April 16th and September 6th, 1797, and in Exhibit D3 (b) under dates August 29th, September 18th and October 30th, 1797, and in Exhibit D1 under date of June 27th, 1796, merely indicate that the kaval system, according to which kavalgars or watchmen are held responsible for tracing the whereabouts of stolen jewels, etc., and, if they fail, are themselves required to make good the value of such articles, existed in those early times. In those days it appears from the entries of April 4th and 5th, 1797, of Exhibit D3 (a), from the entry of July 21st, 1798, of Exhibit D3, and from D16 that there was a kaval fund for remunerating kavalgars. This fund is stated in Exhibit D3 (a) to be quite unconnected with the peishoush or tribute payable in 'kists' (or instalments) by the palayagar for his palaiyam and it appears from Exhibit D16 that it was a fund raised by contributions of 'watching fees' paid by the subjects of the Crown into the hands of the palayagars who were held responsible for its administration. This resembles the present day system under which village 'kavalgars' or watchmen are appointed by the villagers to watch their crops and other property and every ryot contributes at the time of harvest a few measures of grain from his stock at the threshing floor for the remuneration of the kavalgars for the current year. If the zamindar held any lands on condition of rendering

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kaval service they must have been resumed before 1812, as will be shown later.

Again we find the Collector in Exhibit D2 on January 9th, 1799, instructing the palayagar to arrest any Europeans (presumably deserters from the East India Company's British troops) found straying more than two miles from camp without a passport. Again in Exhibit D17 in October 1797 the palayagar of Kannivadi is stated to have promised his assistance to the Collector against the palayagar of Komaravadi, a deposed palayagar who had escaped from confinement at Vellore. The nature of the assistance to be rendered is not mentioned in this Exhibit, but from Exhibit D3 (b) it appears that he and four or five other palayagars were to come with their respective men and act as an escort of "old Lucki (Lakshmana) Naick" in conducting him from Komaravadi as soon as the arrest of this escaped prisoner was effected.

So much for the records relating to the period before the formal abolition of military duty.

The District Judge has concluded from certain Exhibits of a later date than 1801 that military assistance was rendered by this palayagar during the fighting by the Company's army against Virupakshi Naick, and against the dumb boy called Panchalakurichi Oomayan who led an insurrection against Government, and also in the rebellion of Lakshmana Naicken, in the time of Collectors Hurdis and Parish in 1803 and 1804.

An account of the part played by the Kannivadi palayagar in connexion with the fighting that took place on those occasions is given in Exhibits F and G. Both of these records proceed from interested sources. Exhibit F is a petition signed by the Zamindar of Kannivadi in 1837 and presented to the Board of Revenue, in which he appealed for the restoration of his palaiyam which had been kept under the management of Government, and Exhibit G is a genealogical history of the family written by another member of the family. It was to the interest of the writers of these documents to magnify the meritorious services rendered by various palayagars of Kannivadi to Government from time to time. G1, G2, G4, G5, G6, G7 and G8 are records similar to G.

Exhibits G and G7 mention the fact that the palayagar's men were then in 1804 without arms (no doubt in pursuance of

Government's declared policy), and thus when they accompanied the Company's sepoys in pursuit of Lakshmana Naicken it was necessary for Mr. Parish to arm 20 of them before they could be of any assistance to him. At the same time the work that they were expected to perform seems to have been that of guarding roads and passes, acting as spies of the enemies' movements and as guides to the British troops through the forest tracks and hill passes. They could not fight because they had no arms. A more reliable account of what happened is to be found in the contemporary document, Exhibit E5 of July 1st, 1804, in which it is stated that 15 men from the Kannivadi palayagar people were sent as guides to Captain Hamilton's army "because they knew the different routes." In Exhibit D13 the palayagar of Kannivadi reports in June 1804 to Mr. Parish that he had despatched a spy to bring intelligence regarding the rebels. It would be absurd to treat this palaiyam as a feudal fief held on condition of rendering military service simply because the holder on one or two occasions assisted the intelligence branch of the Company's regular army.

The allusions in Exhibits D11 and D12 to "our troops" and "our detachment" in the account of the engagement with Lakshmana Naicken only show in our opinion that the Kannivadi men identified their cause with the cause of the Government, and we think that the description of fighting refers to the doings of the Company's soldiers, and does not mean that any military establishments of the palayagar were employed in the actual fighting.

Exhibits D10, E7, E8, E13, refer to the supply of bamboos to be paid for, for the use of the British troops (evidently in order to provide them and their officers with quarters). Exhibit E6 relates to the supply of cattle (probably for feeding the troops). It was regarded as the duty of the whole population to furnish the necessary supplies against payment to the officers of Government and still more to its armed forces in the field. The practice of making such requisitions for the supply of touring officers is not yet altogether obsolete. The fact that in the years 1803 and 1804 such requisitions were made and complied with in a few instances does not in our opinion show that the palaiyam continued to be held on condition of rendering military

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service and still less that it was so held at the time of the alienations now in question nearly a hundred years later.

We have next to deal with the well known Regulation XXV of 1802 on which the permanent settlement rests in this Presidency so far as it affects the present case. It was held by the Judicial Committee in *The Collector of Trichinopoly v. Lekkamani*(1) to be clear

"that the affirmative words of the second section that in consequence of the assessment the proprietary right of soil shall become vested in the zamindars, etc., did not either give or take away from the former owners of lands not permanently assessed any right which they then had. It merely vested in all zamindars an hereditary right at a fixed revenue upon the conclusion of the permanent settlement with them. It is a maxim that affirmative words in a statute without any negative expressed or implied do not take away an existing right."

This interpretation is strongly supported by the title of the Regulation which is

"for declaring the proprietary right of lands to be vested in individual persons, and for defining the rights of such persons, under a permanent assessment of the land revenue."

As regards the somewhat ambiguous preamble, their Lordships observed that it did not assert a right, on the part of Government to deprive or dispossess zamindars in their lifetime, or their heirs after their deaths, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of revenue. They then proceeded to explain the sweeping statement in the preamble to Regulation XXXI of 1802 that the ruling power had in conformity to the ancient usage of the country constantly reserved to itself and had exercised the actual proprietary right of lands of every description, and that consistently with this principle all alienations of land, except by the consent of the ruling power, are violations of that right, and observed that

"the words 'alienations of land' referred, not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue".

(1) (1874) 1 I.A., 282 at p. 306.

Finally their Lordships observed

"there is no difference in this respect (its hereditary character) between a palayam and an ordinary zamindari. The only difference between a palayam or zamindari which is permanently settled and one that is not, is that, in the former, the Government is precluded for ever from raising the revenue; and in the latter, the Government may or may not have that power".

The latter words appear to mean that Government may in a particular case have precluded itself from raising the revenue, even though it has not issued a permanent sanad.

Applying these principles, their Lordships proceeded to deal with the connected case *Oolagappa Chetty v. Arbuthnot*(1). The judgment is appended to the judgment in *Marungapuri* case, *The Collector of Trichinopoly v. Lekkamani*(2). In the former case a razinamah was entered into in the time of the late zamindar making the zamindari liable for debts incurred by him. It having been held that the razinamah could not be enforced except by suit, a suit was instituted but discontinued on the death of the zamindar by order of the Court which directed a fresh suit to be brought against the heir when nominated. A suit was accordingly brought against the minor zamindar in which it was claimed that the revenues and corpus were equally answerable (p. 270). The Civil Judge held the debt binding on the revenues of the zamindari in the hands of the successors and decreed the claim to that extent. The High Court reversed this decision, and held that, as the palayam in question was only held on life tenure, it could not be made liable in the hands of the son for the debts incurred by the father. The Judicial Committee held that *prima facie* the palayam was hereditary, and that being so apparently as a matter of course they held it liable in the hands of the son for the father's debts. If the revenues are liable in the hands of succeeding zamindars, that is equivalent to saying that the corpus is liable, and the decision would be conclusive of the present case but for the fact that the point that the palayam was inalienable by reason of its owing military and police service was not raised. It is however very significant that it was not raised in that case though the defendant on the record was Mr. Arbuthnot, the Collector of Madura,

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(1) (1874) 1 I.A., 268 at p. 315.

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who represented the minor zamindar as agent of the Court of Wards and would have been likely to know if the holders of unsettled palayams were liable to render any services such as to render their estates inalienable and an exception to the general rule as to the "free liberty" of proprietors of land to make alienations which is conferred by section 8 of the Regulation. This contention has not been raised in any other case before the present, and this consideration adds to the already heavy burden on the plaintiff of showing the existence of the bar to alienation on which he relies.

The question of the continuing liability of the palayagar for police service may now be dealt with in connexion with the provisions of section 5 of the Regulation. These provisions show a general intention to release land-holders from the performance of police services, except in special cases to be dealt with in the permanent sanad when issued, and to resume all lands and rusums granted for police service. The first part of section 5 provides as follows:—

"The Government having charged itself generally with the maintenance and support of such establishments as may be requisite in the several provinces, cities and towns for the better keeping of the police, no lands shall be considered, as heretofore, to be holden on the condition of performing police duties, unless the same shall be specially provided for in the sanad-i-milkiyat-i-istimrar."

With this must be read section 15, which provides that zamindars shall aid and assist the officers of Government in apprehending and securing offenders of all descriptions, and they shall inquire and give notice to the Magistrates of robbers or other disturbers of the public peace who may be found, or who may seek refuge, in their zamindaris, an obligation which was not regarded as incompatible with the power of alienation, and is very similar to that imposed on people generally and land-owners in particular by Chapter IV of the Code of Criminal Procedure. Read literally, section 5 operated to release all lands forthwith from the condition of rendering police service. If this be too strict a construction, it at least shows that it was the policy of the Government to release them, and there is nothing in the Regulation to prevent effect being given to that intention without the grant of a permanent sanad. Police services had been required in this case by the annual sanads of which E3

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for fasli 1213, 1803-4 is the last. The issue of these sanads appears to have been discontinued, and there is no evidence of any police service being demanded after 1804. Admittedly police service was as a rule abolished in all the palayams and zamindaris that received permanent sanads; and, as will be seen, the fact that no permanent sanad was issued in the case had nothing to do with the question of police service. It appears from the Fifth Report that the kaval lands or lands granted for the discharge of kaval duties, which were quite different from those which the officers of an organized police force are expected to perform, had been resumed before 1812; but as regards Madras, the Report does not deal with the question of police. A police force under officers called darogas has been introduced but did not work well; and, in accordance with the recommendations of Sir Thomas Munro, the Court of Directors issued instructions which were embodied in Regulation XI of 1816. By this measure recourse was had to the indigenous police system of the country. Under that system police as well as revenue duties had been imposed on the village headman, who was responsible as to both to the zamindar or palayagar where there was one. By the Regulation, the headman as regards police duties, was made responsible to the Tahsildar or Indian Magistrate of the locality, and zamindars were deprived of all police powers except in so far as any of the duties of the Tahsildar might be conferred upon particular zamindars by the Government under section 39. This the Court of Directors considered should only be done in particular cases of approved respectability and willingness to co-operate in promoting the views of the Government. Section 39 was repealed by Act XVII of 1862 as having become obsolete, and thus vanished the last trace of the police powers formerly vested in the zamindar as head of his district. The Police Act XXIV of 1859, which took away the control of the Police from the Tahsildars and created a separate Police Department, defined 'Police', in section 1 as including 'general' and village police, cuttoobadies, kavalgars, and all other persons who exercise any police functions throughout the Madras Presidency. This was before the repeal of section 39 of Regulation XI of 1816, and there is no suggestion that the Kannivadi zamindars were ever regarded as coming within this definition of Police. Be this as

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it may, this definition of 'Police' was repealed by section 2 (2) of Madras Act III of 1895, which substituted the following definition. "The word police shall include all persons appointed under this Act," thus excluding cuttoobadies, kavalgars, etc., whose police functions had become obsolete. The same enactment also repealed Regulation VI of 1831 which made lands held on service tenure inalienable and only re-enacted the provision against alienation as regards village officers, except in the Scheduled Districts. In the Scheduled Districts the prohibition against alienation was continued, not only as regards the emoluments of village officers, but also as regards

"other emoluments granted or continued in remuneration for the performance of duties connected with the collection of the revenue or the maintenance of order."

In the rest of the Presidency the legislature evidently thought that village offices were the only offices the *emoluments* of which required to be protected from alienation. This enactment, which came into force before the alienation now in question, goes far to show that at the date of that alienation, the services formerly required of the palayagars and others had become entirely obsolete and that there was no longer any sufficient reason for prohibiting the alienation of their lands on the grounds of public policy.

It is not questioned that the issue of permanent sanads under Regulation XXV in the terms in which they were issued released the grantees from conditions of police service, and there is no reason to suppose that the delay in issuing the sanads in this and other cases was due to any design of retaining the right to police services which were regarded as a thing to be got rid of as quickly as possible. In this connexion an observation in *Chauki Gounden v. Venkataramanier* (1) which was referred to with approval by SCOTLAND, C. J., in *Lekkamani v. Puchaya Naikar* (2) may be cited again, and with greater force now that the assumption that palayagars had only life estates has been displaced.

"The palayagar of an unsettled palyam may, according to the generally received theory as to his rights, have only an estate for life in his palayam; but for such an estate as he has, his relation to

(1) (1870) 5 M.H.C.R., 208.

(2) (1870) 6 M.H.C.R., 208.

the Government on the one side and to the occupiers of lands within his palayam on the other side, resembles that of a zemindar."

There is really no reason now why an unsettled palayam should be inalienable any more than a settled one.

As regards the revenue history of this particular palayam, in 1796 a commission reported that these poligars should be allowed personally to retain one-third of the computed value of their land. Mr. Hurdis, who was Collector from September 1796 to December 1803, was directed to carry out a field survey and to present to the Board of Revenue a detailed report such as would enable them to arrange a permanent settlement (Nelson's Manual, part 4, p. 31). Unfortunately, as Mr. Nelson observes, he overestimated the capabilities of the district and the permanent settlement of Dindigul introduced on the basis of this survey had to be abandoned. Exhibit XXVI (b1) shows the total beriz of the Kunnivadi palayam as estimated by Mr. Hurdis. Of this the palayagar was allowed as before provisionally to retain 30 per cent, leaving a peishcush of pagodas 10,897 or Rs. 38,139-14-2 payable to Government. This peishcush did not represent 30 per cent of the real income, or anything like it, and owing to the defective nature of Mr. Hurdis's assessment and possibly other reasons, a permanent sanad was not issued to this and other palayagars on the basis of his assessment. From 1816 to 1843 in consequence of the palayagar's inability to pay the peishcush, Government took the palayam under its own management and allowed him the 10 per cent on the net collections. In 1843 the palayam was restored to the palayagar. Exhibit XXVI (c), the muchilika which was then taken from him appears to proceed upon the footing that all he was liable to do was to pay the peishcush demanded of him and that in default of payment the palayam was liable to be sold. It certainly goes to show that no condition of military or police service was recognized as existing at that time. Exhibits XXIIg and XXIIh, dated 9th July 1843 are mortgages of the zemindari to pay previous debts and save the zemindari from annexation by Government. Exhibit XXIII is a lease for thirty years dated 20th July 1861 in discharge of debts which are stated to have been contracted by the zemindar himself, his father and his ancestors. Exhibit H series show that negotiations went on for some years after this

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as to the grant of a permanent sannad and that Government were prepared to grant a permanent sannad without increasing the peishcush, but that this intention was not carried into effect in the supposed interest of the zemindar himself. Exhibit H5. Nothing is to be found about any military or police service in this correspondence. In 1881 on the death of the zemindar Bangaru, who had executed the lease of 1861, his brother who succeeded brought a suit to recover the zemindari from the lessee. In his plaint he raised the contention that the alienations of his predecessors were not binding on the estate in his hands, and this was the subject of the fourth issue. It was not however suggested that the inalienability depended in any way on the duty of rendering military and police service. The District Judge held that the lease was not binding on the plaintiff as a lease but was binding on him as a mortgage, and gave a decree for redemption. Before the High Court the zemindar does not seem to have pressed the appeal on the ground that the alienations by his predecessors were not binding upon him. Probably the decision of the Privy Council in *The Collector of Trichinopoly v. Lekkamani*(1) was held conclusive on this question in the High Court where the controversy appears to have been as to the amount of the mortgage debt. In connexion with this litigation and the subsequent redemption the zemindar contracted usufructuary mortgages Exhibits 7, 3, 5, 9, 6, 7a, 4, 22 series 8 and 10, and lastly a consolidating mortgage Exhibit 2 on 14th December 1895 and a supplementary mortgage Exhibit 18, dated 10th February 1898. Exhibit 2, to which the then zemindar and his son the father of the present plaintiff were parties, was for upwards of ten lakhs of rupees.

The Bank brought O.S. 23 of 1897 on this mortgage and obtained a consent decree for sale against the zemindar and his son on 16th August 1898, Exhibit XVd, by which the defendants were to pay Rs. 13,15,000 on or before 15th August 1900 and the estate was to be sold in default. The Plaintiff's grand-father died on 16th July 1899. On 14th March 1900 the Bank applied for an order absolute for sale under section 89 of the Transfer of Property Act, and on 21st March 1900 the Court made the order as follows. "Defendant by Mr. Subramania Ayyar does

(1) (1874) 1 I.A., 282.

not put forward any objection. Decree made absolute". The estate was subsequently sold and purchased by the Bank, who obtained a sannad in 1905, and then sold it to the present first defendant. The plaintiff's father died on 24th May 1911, and it was in the present suit instituted on 23rd July 1914 that the contention that the zemindari was inalienable on account of the zemindar's liability to render military and police services was raised for the first time.

In our opinion this contention is only an ingenious after-thought. The liability of these unsettled palayams for ancestral debts was treated by the Privy Council in the *Gandamanaickanur case*(1) as necessarily following from the establishment of the hereditary nature of the estate. There are now no police or military services to be rendered. In this particular estate there have been continued alienations by way of mortgage which have been treated as binding by succeeding zemindars. Though the contention that they were not binding was raised in the litigation of 1881, this was not on the ground of any military or police service, and the contention was not pressed in the High Court. Lastly the fact that the plaintiff's father was a party to the mortgage of 1895 and to the consent decree and did not object to the sale shows that the alienable character of the zemindari was fully recognized.

The learned Advocate-General has relied on certain decisions such as the *Udayarpalayam case*(2) and the *Rāmnād case*(3) in which it was held that certain zemindaris restored by the British Government to the heirs of the former zemindars were restored with the incident of impartibility which had originally attached to them in their character of petty chieftains rendering service to the paramount power, but these cases did not decide or proceed on the footing that any such services were still to be rendered; and, as those were cases in which a permanent sannad had been issued, it is clear that there were no such services in existence at the date of suit. He also relied on certain decisions as to Ghatwal tenures in Northern India, but in these cases the succession is not purely hereditary, and Government by the exercise of the right to choose the successor from and among

(1) (1874) 1 I.A., 282 at p. 315.

(2) (1901) I.L.R., 24 Mad., 582.

(3) (1901) I.L.R., 24 Mad., 613.

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SEC. 80—*Public Officer acting mala fide—Suit against Public Officer—Notice of suit, whether necessary—Purporting to be done in section 80, meaning of.*] A Public Officer is entitled to notice of suit under section 80 of the Civil Procedure Code even if, in the discharge of his duty, he has acted *mala fide*. Meaning of 'purporting to be done' discussed. *Shahebadde Shahunshah Begam v. Fergusson* (1881) I.L.R., 7 Cal., 499, and *Muhammad Sadiq Ahmad v. Panna Lal* (1904) I.L.R., 26 All., 220, not followed. *Jogendra Nath Roy Bahadur v. Price* (1897) I.L.R., 24 Cal., 584, and *Jugul Kishore v. Jugul Kishore* (1911) I.L.R., 33 All., 540, followed.

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CONTRACT ACT, INDIAN (IX OF 1872), SE. 239, 247 AND 248—*Hindu Law—*

Joint Hindu family—Family business, started during minority of undivided son—Business continued after son became major—Debts incurred in business—Son, whether partner and personally liable and for what debts—Adjudication as insolvent—Son, whether liable to adjudication—Partner, whether son becomes by helping during minority or taking part in business after majority—Admission of minor to benefits of partnership, meaning of.] A Hindu father, of the Nattukottai Chetti caste, started a business during the minority of his undivided son; it was continued after the son became a major; no public notice of repudiation of partnership (if the son were a partner) was given by the son on his becoming a major; it was found that the son was helping in the business during his minority and was taking an active part in the business after attaining majority. In respect of the debts incurred in the business, both the father and the son were adjudicated insolvents; the son applied to set aside the order of adjudication passed against him, contending that he was not liable to adjudication: *Held* (by the Court) that the business should be held to be joint family business of the father and the son; *Held* (by WALLIS, C.J. and SPENCER, J., SADASIVA AYYAR, J., dissenting), that the members of a joint Hindu family on attaining majority do not necessarily by virtue of sections 247 and 248 of the Contract Act or otherwise become personally liable for, and liable to adjudication in respect of, debts contracted in the joint family business during their minority. Meaning of "admitted to the benefits of the partnership" in section

247 considered. The fact that the minor helped in the joint family business is not enough to show admission within the meaning of the section. *Samal-bhai Nathubhai v. Someshwar* (1881) I.L.R., 5 Bom., 38; *In the matter of Haroon Muhammad* (1890) I.L.R., 14 Bom., 189, and other cases considered. *Lutchmanan Chetty v. Sivapragasa Mudaliyar* (1899) I.L.R., 26 Cal., 849, followed. *Per* SADASIVA AYYAR, J.—Both by the rules of Hindu Law and by section 248 of the Contract Act (which also applies to this case), the son was personally liable for all the debts in respect of non-payment of which he was adjudicated an insolvent. Partnership in a family business does not depend upon the consent of the partners in many cases but upon the family being a trading family and the business being conducted for the benefit of the family, persons born into the family from time to time becoming partners as a matter of course.

The Official Assignee of Madras v. Palaniappa Chetty, (1918) I.L.R., 41 Mad., 824
CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 195, CL. 1 (B) AND 7—*Sanction for*

perjury—Appellate Court to which appeals do not ordinarily lie, hearing appeal by transfer—Jurisdiction of, to grant sanction for perjury, whether as original or as appellate Court.] The offence of perjury is complete when the false statement is made in the Court of first instance and it is not re-committed in the appellate Court by the production of the record or otherwise in appeal, so as to entitle the appellate Court to grant sanction as an original Court. And a Joint Magistrate to whose Court appeals from convictions by a Third-class Magistrate do not ordinarily lie but who hears an appeal from such Court by transfer from the District Magistrate cannot grant sanction for perjury committed before the Third-class Magistrate either as a Court of first instance or as an appellate Court. *Broma Varier v. Emperor* (1903) I.L.R., 26 Mad., 658, referred to. *Bhaagesar Tiwari v. Kamta Prasad* (1918) I.L.R., 35 All., 90, not followed.

Anantharamayya v. Tukkadu ... (1918) I.L.R., 41 Mad., 787

GRANT, CONSTRUCTION OF—*Grant of land by Government as bounded by a non-navigable river—Right of grantee to half the bed of the river, presumption as to—Onus of proving contrary on grantor.*] *Held* by the Full Bench:—(1) that in the case of a grant of land by Government described as bounded by a non-navigable river, the presumption (which may be strong or weak according to circumstances of each case) is that the grant passes to the grantee the bed of the river *ad medium filum aquae*, and (2) that the onus of showing the contrary is on the grantor.

Venkata Lakshminarasamma v. The Secretary of State ... (1918) I.L.R., 41, Mad. (F.B.), 840

HINDU LAW—FAMILY BUSINESS—INSOLVENCY—LIABILITY OF SON:—*See* CONTRACT ACT, SEC. 239.

Joint family—*Impartible zamindari—Right of junior members of family to maintenance—Custom of impartibility—No co-parcenary in impartible estate—Exceptions are subjects of special texts in Mitakshara—Custom or usage brought so repeatedly before the Courts as to be recognised becoming law without necessity of proof.*] In the absence of special custom the grandsons of a deceased zamindar are not entitled to maintenance out of the impartible estate in the hands of his successor. *This follows from*

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the fact that in an impartible zamindari there is no co-parcenary. *Saraj Kuari v. Deoraj Kuari* (1888) I.L.R., 10 All., 272; L.R., 15 I.A., 15; and *Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards* (1899) I.L.R., 22 Mad., 393; L.R., 26 I.A., 83, followed. *Bachoo v. Mankorebai* (1904) I.L.R., 29 Bom., 51 (58), approved. The view taken in the Madras Courts prior to the cases above cited that there was joint property in an impartible zamindari which only fell short of co-parcenary because by custom there was no right to partition is no longer tenable. The right of sons to maintenance in an impartible zamindari had been so often recognized that it is not necessary in each case to prove a custom. There are other persons entitled to maintenance either by reason of their exclusion from the succession owing to personal disqualification or by reason of personal relationship to one of the line of zamindars, but the latter class does not include grandsons. *Yarlagadda Maikarjuna Prasada Nayudu v. Yarlagadda Durga Prasada Nayudu* (1900) I.L.R., 21 Mad., 147 (155); L.R., 27 I.A., 151 (157) and *Nilmoy Singh Deo v. Hingoo Lall Singh Deo* (1870) I.L.R., 5 Cal., 256 (259), approved. In the present case no special custom had been proved or even alleged; and the claim was not based on personal relationship.

Rama Rao v. Rajah of Pittapur ... (1918) I.L.R., 41 Mad. (P.O.), 778

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss. 26, 27 AND 28—*Agent, meaning of—Hundi or promissory note drawn or made by a trustee of a charity—Personal liability of trustee—Liability of charity property and other members of the family—Signature of trustee with vilasam of charity prefixed, effect of—Liability of non-executants.* A person drawing a hundi or bill of exchange or making a promissory note as trustee of a temple or of a charity is personally liable on such bill or note. Rule of English Law as to bills drawn or notes made by churchwardens, overseers and others who describe themselves in their official capacities, applied. English and Indian cases reviewed. 'Agent' referred to in sections 27 and 28 of the Indian Negotiable Instruments Act, means the agent of a person capable of contracting within the meaning of section 26, and when the agent is not liable, the principal is. A person drawing a bill or making a note as trustee of a temple or charity is not acting on behalf of such a principal and cannot claim the benefit of section 28. When the agent of a Chetti firm in executing a negotiable instrument prefixes the firm's vilasam, this is a well understood indication that he is acting only as an agent and has been so recognized by the Courts; but when a man signs as trustee prefixing the charity vilasam, there is on the face of the document no clear indication that he contracts for any one else but himself.

Pulaniappa Chettiar v. Shunniyugam Chettiar ... (1918) I.L.R., 41 Mad., 815

PUBLIC OFFICER, notice of suit:—See CIVIL PROCEDURE CODE (ACT V OF 1908), sec. 80.

RIVER—Boundary—Right to bed:—See GRANT.

TRUSTEE, liability of, on hundi or promissory note:—See NEGOTIABLE INSTRUMENTS ACT, ss. 26, 27 AND 28.

ZAMINDARI, IMPARTIBLE—Right of junior members to maintenance:—See HINDU LAW, p. 778.

Narayana Singh v. Gaya Singh(1). At the date, however, of the application for the order for sale, which he did not oppose, the plaintiff's father had succeeded to the estate, and his life interest in the zamindari was liable to be attached and sold in execution of the consent decree in so far as it made him personally liable. If the consent decree had been for sale only, it may be that the sale would not have passed his life interest even though he did not oppose the order for sale, but he was also personally liable on the decree and at the date of the application for the order for sale he had no answer to an application for the attachment and sale of his life interest in execution of the decree against him personally. In these circumstances it may be that the sale was binding on his life interest; and, if so, it is argued he was not in a position to sue for possession and that his successor had a fresh starting point. The starting point under article 142 is the date of the dispossession or discontinuance. To avoid the bar it would apparently be necessary to hold that the fact that the plaintiff's father had debarred himself from suing for possession took the case, not only out of article 142, but also out of article 144, as the present plaintiff's father would appear to come within the word 'plaintiff' as used in that article, and to make article 120 applicable to the case. The starting point in that article is, when the right to sue accrues, and there would be no difficulty in holding that the right to sue does not accrue until there is some one who can sue successfully. See *Murray v. East India Company*(2), *Musurus Bey v. Gadban*(3) and the recent decision of the Privy Council in *Meyappa Chetty v. Subramanian Chetty*(4). In the view we take of the other question it is unnecessary to discuss or decide the point. In the result the appeal must be allowed and the suit dismissed with costs throughout.

N.R.

(1) (1918) 34 M.L.J., 298.

(2) (1821) 5 B. & A., 204.

(3) (1894) 2 Q.B., 352.

(4) (1910) 42 I.A., 120.

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March 11, 12
and May 2.

PRIVY COUNCIL.*

RAMA RAO (PLAINTIFF),

v.

RAJAH OF PITTAPUR (DEFENDANT).

[On appeal from the High Court of Judicature
at Madras.]

Hindu Law—Joint family—Impartible zamindari—Right of junior members of family to maintenance—Custom of impartibility—No coparcenary in impartible estate—Exceptions are subjects of special texts in Mitakshara—Custom or usage brought so repeatedly before the Courts as to be recognized becoming law without necessity of proof.

In the absence of special custom, the grandsons of a deceased zamindar are not entitled to maintenance out of the impartible estate in the hands of his successor.

This follows from the fact that in an impartible zamindari there is no coparcenary.

Sartaj Kuari v. Deoraj Kuari (1888) I.L.R., 10 All., 272; s.c., L.R., 15 I.A., 51; and *Venkata Surya Mahipati Ramakrishna Rao v. Court of Wards* (1899) I.L.R., 22 Mad., 383; s.c., L.R., 26 I.A., 83, followed. *Bachoo v. Mankorebat* (1904) I.L.R., 29 Bom., 51 (58), approved.

The view taken in the Madras Courts prior to the cases above cited that there was joint property in an impartible zamindari which only fell short of coparcenary because by custom there was no right to partition is no longer tenable.

The right of sons to maintenance in an impartible zamindari had been so often recognized that it is not necessary in each case to prove a custom.

There are other persons entitled to maintenance either by reason of their exclusion from the possession owing to personal disqualifications, or by reason of personal relationship to one of the line of zamindars, but the latter class does not include grandsons.

Yarlagadda Malikarjuna Prasada Nayudu v. Yarlagadda Durga Prasada Nayudu (1900) I.L.R., 24 Mad., 147 (155); s.c., L.R., 27 I.A., 151 (157) and

* Present:—Viscount BALDANE, Lord DUNEDIN, Lord SUMNER, Sir JOHN EDGE and Mr. AMEER ALI.

Nilmony Singh Deo v. Hingoo Lall Singh Deo (1879) I.L.R., 5 Calc., 256 (259), approved.

In the present case no special custom had been proved or even alleged; and the claim was not based on personal relationship.

APPEAL No. 110 of 1916 from a judgment and decree (19th March 1915) of the High Court at Madras, which reversed a decree (22nd December 1911) of the Subordinate Judge of Rajahmundry.

The only questions for determination on this appeal were as to whether the appellant as a junior member of the family of the late Rajah of Pittapur was entitled to maintenance out of the estate, and if so, for what amount.

For the purpose of this report the facts are sufficiently stated in the judgment of the Judicial Committee. They will also be found in the report of the case in the High Court (SANKARAN NAIR and OLDFIELD, JJ.) in *Sri Rajah Rama Row v. Rajah of Pittapur*(1).

On this appeal—

Upjohn, K.C. and *A. M. Dunne, K.C.*, for the appellant contended that the appellant was entitled to suitable maintenance, out of the ancestral impartible estate; and that his right was not dependent on his admitting relationship to the present possessor of the Raj estate. The right to maintenance became vested in him on the death of the late Raja; and the devise to the respondent, it was submitted, was, as a matter of law, made subject to the appellant's right. By the decisions of the Board before the case of *Sartaj Kuari v. Deoraj Kuari*(2), it was established that the junior members of an impartible family had a right to maintenance, and that the same right existed whether the family property was partible or impartible. Reference was made to *Naraguntty Lutchmeedevamma v. Vengamma Naidu*(3); *Beer Pertab Sahee v. Rajender Pertab Sahee*(4); *Muttuswamy Jagavera Yettappa v. Vencataswara Yettappa*(5); *Kachi Kaliyana Rungappa v. Kachi Vijaya Rungappa*(6); and *Periasami v. Periasami*(7).

(1) (1916) I.L.R., 39 Mad., 396.

(2) (1888) I.L.R., 10 All., 272; s.c., L.R., 15 I.A., 51.

(3) (1861) 9 M.I.A., 66 (85, 86). (4) (1867) 12 M.I.A., 1 (15).

(5) (1868) 12 M.I.A. 203; s.c., 2 B.R.P.C., 15.

(6) (1869) 12 M.I.A. 495 (505).

(7) (1878) I.L.R., 1 Mad., 312; s.c., L.R., 5 I.A., 61.

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The right to maintenance was not affected by the decision of the Board in *Sartaj Kuari v. Deoraj Kuari*(1), and the judgment shows that was expressly recognized. It also shows that it is the inability of the members to partition which gives them a right to maintenance. Reference was made to *Himmat Singh Bechar Singh v. Ganpat Singh*(2); *Ramchandra Sakharan v. Sukharangopal*(3); and Mayne's Hindu Law, eighth edition, pages 634, 638, paragraphs 454, 458, as authorities supporting that proposition. Since the case of *Sartaj Kuari v. Deoraj Kuari*(1) the right to maintenance of the junior members of a family whose estate is impartible has been recognized in *Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards*(4); *Yarlagadda Mallikarjuna Prasada Nayudu v. Yarlagadda Durga Prasada Nayudu*(5); and *Kachi Kaliyana Rengappa v. Kachi Yuva Rengappa*(6). Such a right is a right in immovable property, and is enforceable against the estate in the hands of a devisee: *Golab Kunwas v. Collector of Benares*(7); and *Janki v. Naudram*(8). This principle is upheld in the Transfer of Property Act (IV of 1882), section 39; the Hindu Wills Act (XXI of 1870), section 3; and the Probate and Administration Act (V of 1881), section 149.

De Gruyther, K.C., and *Kenworthy Brown* for the respondent contended that the appellant had no right to maintenance against the respondent, or the estate in his hands. He was not a coparcener with the late Raja in the estate, and had no enforceable claim against it: nor has he any such claim against the respondent with whom he does not allege relationship in blood or co-ownership. He sets up no custom by which he is entitled to maintenance. The only other right to maintenance was founded on certain special texts of the Mitakshara, and was given on personal grounds: *Stoke's Hindu Law Books*, page 426; *Mitakshara*, Chapter I, section 12, verse 3 and Mayne's Hindu Law, eighth edition, page 626, paragraphs 451, 454. The decisions of the Board prior to *Sartaj Kuari v. Deoraj Kuari*(1) were

- (1) (1888) I.L.R., 10 All., 272; s.c., L.R., 15 I.A., 51.
(2) (1875) 12 Bom. H.C., 94 (96). (3) (1877) I.L.R., 2 Bom., 346.
(4) (1899) I.L.R., 22 Mad., 383; s.c., L.R., 26 I.A., 83.
(5) (1900) I.L.R., 24 Mad., 147; s.c., L.R., 27 I.A., 151.
(6) (1905) I.L.R., 28 Mad., 508; s.c., L.R., 32 I.A., 261.
(7) (1847) 4 M. I.A., 246. (8) (1888) I.L.R., 11 All., 194.

based on the assumption that a coparcenary interest existed in an impartible estate. But no text of the Mitakshara supports such a claim. Impartible property is not the joint property of a joint family: Mayne's Hindu Law, eighth edition, page 340, paragraph 275. Right to maintenance of the junior members arises by reason of co-ownership: the widow's right to maintenance is provided for by special texts which would not be applicable to the male members of the family: see *Muttuswamy Jagavera Yettappa v. Venkataswara Yettappa*(1). Only the sons of the Raja are entitled to maintenance as junior members of the family. The cases relied on for the appellant are cases of sons against father, or a brother against brother; there is no case that extends the right to a grandson, or a nephew. After citing the cases referred to for the appellant reference was made to *Kattama Nachiar v. Rajah of Shivagunga*(2). Cases based on impartible property being joint property are not now applicable, such basis having been taken away by the later decisions in *Sartaj Kuari v. Deoraj Kuari*(3); and *Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards*(4). If the recognition of the right to maintenance is not based on community of interest, it is based upon custom; but no judicial recognition has been given to an invariable right by custom except in the case of a son or daughter of the holder of an impartible estate: see *Nilmoney Singh Deo v. Hingoo Lall Singh Deo*(5). The claim of the father of the appellant was satisfied. The appellant is a grandson of the late Raja and has no right unless he establishes a custom, but he has not even alleged such a custom. A right to maintenance of every descendant of a holder would not be consistent with the latter's right of alienation. The proposition laid down in Mayne's Hindu Law, eighth edition, page 634, paragraph 454, that as on of the holder is entitled to maintenance, "as that is the only mode in which he can benefit by the ancestral estate," is based solely in the note to *Himmat Singh Behar Singh v. Ganpat Singh*(6),

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- (1) (1868) 12 M.I.A., 203; s.c., 2 B.L.R., P.C., 15.
(2) (1864) 9 M.I.A., 203.
(3) (1888) I.L.R., 10 All., 272; s.c., L.R., 15 I.A., 51.
(4) (1899) I.L.R., 22 Mad., 358; s.c., L.R., 26 I.A., 83.
(5) (1879) I.L.R., 5 Calc., 256; (259).
(6) (1875) 12 Bom. H.C., 94 (96).

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and, it was submitted, is erroneous. Reference was also made to *Abdul Aziz-Khan v. Appayasami Naicker*(1).

Upjohn, K. C., replied.

The judgment of their Lordships was delivered by

LORD DUNEDIN.—The plaintiff is the son of an adopted son of the late Rajah of Pittapur, and he sues the defendant, the present Raja of Pittapur, for maintenance. At the time that the suit was raised the father of the plaintiff was alive, but pending the suit he died. The Raj of Pittapur is an impartible zamindari, and was devised by will to the defendant, who was described in the will as the *aurasa* son of the late Raja born of one of his wives, three years after the adoption of the plaintiff's father. The plaintiff's father contested the right of the defendant to the Raj, and alleged that he was not the legitimate son of the late Raja. In that suit the Subordinate Judge decided that the defendant was not legitimate and that the Raj was inalienable. The judgment was reversed and the case decided in favour of the defendant by the Court of Appeal and by this Board, who, without deciding as to the legitimacy of the defendant, held that in accordance with what had been laid down by this Board in the case of *Sartaj Kuari v. Deoraj Kuari*(2) the zamindari of Pittapur, being impartible, there was no right in the plaintiff to quarrel with the alienation made by the will of the late Raja.

The defendant in the present case resists the claim on the ground that no legal basis for the claim is alleged. The plaintiff did not attempt to prove that there was any custom affecting this particular zamindari which enjoined the making of grants of maintenance to any persons, nor did he put his case on any claim resting on relationship, a relationship which, following his father's allegation, he did not allow existed, but he rested his case on what he alleged was the general law, viz., that by birth he had a right to maintenance out of the property constituting the Raj, which right followed the property into the hands of a third party. The learned Judge of the Subordinate Court gave judgment in favour of the plaintiff for maintenance

(1) (1903) I.L.R., 27 Mad. 131; s.c., L.R., 31 I.A., 1.
(2) (1888) I.L.R., 10 All., 272; s.c., L.R., 15 I.A., 51.

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and arrears. This judgment was reversed by the Court of Appeal, who dismissed the case. The ground on which the learned Subordinate Judge proceeded was shortly this: He considered that the zamindari was joint family property, only with the peculiar quality that it was impartible. Being joint family property, the right which accrues to every junior member (and a grandson is such a junior member) in the case of the ordinary joint family under the *Mita-shara* law exists also in this case. The learned Judges of the Court of Appeal held that after the decisions in *Sartaj Kuari v. Deoraj Kuari*(1) and *Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards*(2) it was impossible to base the plaintiff's right to maintenance on any right of coparcenary accruing by birth, and that the case as put was based on no other ground.

It is beyond doubt that the decisions in the Madras Courts prior to the case of *Sartaj Kuari v. Deoraj Kuari*(1) embodied the theory that there was joint property in an impartible zamindari, which only fell short of coparcenary because, by custom, partition was inadmissible. It is needless to cite or examine the authorities, as their Lordships do not apprehend that there is any doubt as to this statement being correct. It will be sufficient to quote a fragment of the decision of the Court of Appeal in that case itself:—

"It must be conceded that the complete rights of ordinary coparcenaryship in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in—or perhaps, to use a more correct term, subordinated to—the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership."

But the decision of the Board which binds their Lordships made that view no longer tenable. It settled that in an impartible zamindari there is no coparcenary, and consequently no person existed who as coparcener could object to alienation of the whole subject by the *de facto* and *de jure* holder. That judgment was followed and applied to this very Raj in the

(1) (1888) I.L.R., 10 All., 272; s.c., L.R., 15 I.A., 51.
(2) (1899) I.L.R., 22 Mad., 383; s.c., L.R., 26 I.A., 83.

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Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards(1). The import of these decisions was, in their Lordships' view, correctly stated by Sir L. JENKINS in the case of *Bachoo v. Mankorebai*(2): "It has now been definitely decided that in impartible properties there is no coparcenary."

It was admitted on both sides of the Bar that in an ordinary joint family ruled by the Mitakshara law the junior members, down to three generations from the head of the family, have a coparcenary interest accruing by birth in the ancestral property; that this coparcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is *de facto* accomplished these same persons have a right to maintenance. It seems clear that this right is an inherent quality of the right of coparcenary—that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide, to be maintained out of the property which is common to them, who are excluded from the management, and to the head of the family who is invested with the management. As it is expressed by the late Mr. Mayne in his work:—"Those who would be entitled to share in the bulk of the property are entitled to have all their necessary expenses paid out of its income." It follows that the right to maintenance, so far as founded on or inseparable from the right of coparcenary, begins where coparcenary begins and ceases where coparcenary ceases.

There are, however, certain persons who, as is explained by express texts of the Mitakshara, while not entitled to succeed as co-owners, are given rights of maintenance. There is the category of persons who by reason of personal disqualification are not allowed to inherit. Such are the idiot, the blind from birth, the mad man, etc. Such persons are debarred from the rights of coparcenary, but are given maintenance in lieu. That this is owing not to a denial of their birth status, but to a personal disqualification preventing enjoyment, is clear by the fact that the children of such persons, being within the allowed degrees and not themselves stigmatised with the personal defect, get by their birth the full status of coparcenary.

(1) (1899) I.L.R., 22 Mad., 383; s.c., L.R., 26 I.A., 83.
(2) (1904) I.L.R., 29 Bom., 51 at p. 58.

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There must also be added another class, equally the subject of special texts. The right of this class to maintenance lies in personal relationship, but is limited to the widow, the parent, and the infant child. It does not include the grandson. It is obvious that so far as certain individuals are concerned this category overlaps the first. But it is an obligation which is independent of the fact of there being ancestral or joint family property. It is an obligation attaching to the individual. These categories exhaust the classes of persons who have such a right to maintenance under the Mitakshara law.

Their Lordships will now revert to the position of an impartible zamindari as it has been fixed by the decisions before referred to. An impartible zamindari is the creature of custom, and it is of its essence that no coparcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the zamindari were not impartible, would be entitled as of right to maintenance. There is no claim based on personal relationship.

This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to maintenance in the case of an impartible zamindari. Just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain members of the family. No attempt has been, as already stated, made by the plaintiff to prove any special custom in this zamindari. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading. Analogy may be found in instances in the law merchant or in certain customs in copyhold tenure. In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible zamindari has been so often recognized that it would not be necessary to prove the custom in each case. It is this which will explain the reference to rights of maintenance in cases decided subsequent to the decision in the case of *Sartaj Kuari v. Deoraj Kuari*(1). For example, in

(1) (1888) I.L.R., 10 All., 272; s.c., L.R., 15 I.A., 51.

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the case of *Yarlagadda Mallikarjuna Prasada Nayudu v. Yarlagadda Durga Prasada Nayudu*(1). The judgment says:—

“As to the zamindari estate, the Board held that it was impartible, and the consequence is that the plaintiffs as the younger brothers of the zamindar retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir.”

But their Lordships may agree here with what was said by the Court in the case of *Nilmony Singh Deo v. Hingoo Lall Singh Deo*(2)

“We can find no invariable or certain custom that any below the first generation from the last raja can claim maintenance as of right.”

Apart from custom, what is left? The matter is tersely put by SANKARAN NAIR, J., in the Court of Appeal:—

“The plaintiff does not advance any claim based on relationship. He refuses to admit any relationship . . . As there was no community of interest the property is not burdened with his claim in the hands of a donee.”

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitor for the appellant: *John Josselyn.*

Solicitor for the respondent: *Douglas Grant.*

J.V.W.

(1) (1900) I.L.R., 24 Mad., 147 (155); s.c., L.R., 27 I.A., 151 (157).
(2) (1879) I.L.R., 5 Cal., 256 (259).

APPELLATE CRIMINAL.

Before Mr. Justice Abdur Rahim and Mr. Justice Napier.

KOMPELIA ANANTHARAMAYYA (PETITIONER),

t.

CHIKATLA TUKKADU (RESPONDENTS).*

Criminal Procedure Code (V of 1898), sec. 195, cl. 1 (b) and 7—Sanction for perjury—Appellate Court to which appeals do not ordinarily lie, hearing appeal by transfer—Jurisdiction of, to grant sanction for perjury, whether as original or as appellate Court.

The offence of perjury is complete when the false statement is made in the Court of first instance and it is not recommitted in the appellate Court by the production of the record or otherwise in appeal, so as to entitle the appellate Court to grant sanction as an original Court. And a Joint Magistrate to whose Court appeals from convictions by a Third Class Magistrate do not ordinarily lie but who hears an appeal from such Court by transfer from the District Magistrate cannot grant sanction for perjury committed before the Third-class Magistrate either as a Court of first instance or as an appellate Court.

Eroma Variar v. Emperor (1903) I.L.R., 26 Mad., 656, referred to.

Bhadesar Tiwari v. Kanta Prasad (1913) I.L.R., 35 All., 90, not followed.

PETITION under section 195 of the Code of Criminal Procedure praying the High Court to revise the order of T. VABADARAJULU NAYUDU Garu, acting Sessions Judge of Gōdāvari at Rajahmundry, in Criminal Miscellaneous Petition No. 23 of 1917, preferred against the order granting sanction of A. FOTHERINGHAM, Joint Magistrate of Rajahmundry, in Criminal Miscellaneous Petition No. 1 of 1917.

On a complaint of theft and wrongful restraint, a Third-class Magistrate convicted the accused of criminal misappropriation and wrongful restraint. An appeal filed by the accused to the District Magistrate, was transferred by him to a First-class Magistrate who acquitted him of wrongful restraint, but convicted him on the same facts, of criminal trespass. The complainant in the case filed a petition before the Third-class

* Criminal Miscellaneous Petition No. 466 of 1917.

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Magistrate for sanction for perjury alleged to have been committed by a witness in respect of two statements made by him. The Magistrate granted sanction in respect of one, and did not pass any order as to the other. On a complaint launched on the sanction given, the accused (the witness) was discharged by the First-class Magistrate on the ground that the statement alleged to be false and in respect of which, sanction was given, was indefinite and vague. Thereupon a petition was presented to the same First-class Magistrate for sanction to prosecute the witness for perjury in respect of the other statement, not disposed of by the Third-class Magistrate. The sanction applied for was given and was confirmed by the Sessions Judge. The petitioner (the witness) filed this petition to the High Court to revise the order of the lower Courts granting the sanction.

G. Venkataramayya, Vakil for the petitioner.

K. Ramanatha Shenai for E. R. Osborne, acting Public Prosecutor for the Crown.

ORDER.

ABDUR
RAHIM, J.

ABDUR RAHIM, J.—It is unnecessary in this matter to repeat the entire history. When the application for sanction for perjury was made to the Sub-Magistrate before whom the petitioners had given evidence he granted the sanction with reference to a particular statement made by the petitioner. That order was set aside by the Joint Magistrate, as in his opinion the order granting sanction was wanting in definiteness. But he granted sanction with reference to another statement made by the petitioner before the same Sub-Magistrate. It appears that the respondent had applied for sanction with reference to the very statement with respect to which sanction was ultimately granted by the Joint Magistrate, Mr. Fotheringham, but the Sub-Magistrate, instead of granting sanction with reference to the statement granted sanction with reference to another statement and Mr. Fotheringham as already stated set aside that order on the ground that it was vague. The question of law arises whether the Joint Magistrate had jurisdiction to grant sanction when he did not try the case himself and whether his Court was a superior Court within the meaning of section 195 of the Criminal Procedure Code. It has been ruled

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in this Court that a Sub-Magistrate is subordinate to the District Magistrate and is not subordinate to a Joint Magistrate who hears appeals from orders of Sub-Magistrates only in such cases as are made over to him by the District Magistrate, *Eroma Variar v. Emperor*(1). The Joint Magistrate in this case no doubt heard the appeal. The question for decision, however, is whether it could be said that the offence of perjury was committed in his Court or in relation to a proceeding in his Court, for section 195, clause (b), Criminal Procedure Code, says :—

“No Court shall take cognisance of any offence punishable under sections 193, 194, etc., of the Penal Code when such offence is committed in, or in relation to any proceeding in any Court except with the previous sanction, or on the complaint of such Court or of some other Court to which such Court is subordinate.”

The Joint Magistrate argues that the application was not made to him as an appellate authority for evidence given before the Sub-Magistrate, but as the original authority for evidence in the appeal before his Court. That is practically the view of the law which has been taken by BANERJI, J., of the Allahabad High Court in *Bhadesar Tiwari v. Kamta Prasad*(2). But with all respect to that learned Judge I am absolutely unable to agree with him. The case before him was not under clause (b) but under clause (c) which deals with offences of forgery and using forged documents but its language so far as the present question is concerned is not substantially different from that of clause (b). BANERJI, J., argues that though it could not be said that the document with respect to which sanction was applied for was produced in the Appellate Court, i.e., of the Additional Judge of Basti, it was given in evidence in the proceedings, that is, the appeal before that Judge. If this interpretation was correct, then the offence of perjury or using a forged document would be committed first in the original Court and thereafter again though the deponent or the party concerned did nothing fresh excepting that appeal was filed against the judgment of the Lower Court before the Appellate Court, in the Appellate Court and again in second appeal supposing that a second appeal was preferred in the case. *Prima facie*, dealing with clause (b) it seems to me to be straining the

(1) (1903) I.L.R., 26 Mad., 656. (2) (1918) I.L.R., 35 All., 90.

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language of the Code too far to say that a witness commits perjury not only in the Court where he gives his evidence but also in the appellate Court where he did not give any evidence, and where all that could be said was that the evidence given by him was relied upon by the party interested. Neither he nor the party who called him might even use that evidence but might impeach the decree of the Lower Court on other grounds.

As regards the words "in relation to any proceeding in any Court" a man giving evidence cannot be said to have any proceeding other than the one in which he is giving evidence in contemplation. When a man gives evidence in a suit or in a criminal case that evidence is given with reference to the original trial of that suit or criminal case. Then as is pointed out by the learned pleader for the petitioner if the intention of the legislature were that any Court hearing the appeal whether it is a superior Court or not could grant sanction because of the words "when such offence is committed in or in relation to any proceeding in any Court" then it would have been superfluous on the part of the legislature to add the words "or of some other Court to which such Court is subordinate."

It seems to me that it would be going much further than the language of the section warrants to say that an offence like that of perjury or using false evidence is committed once in the Court of trial and afterwards in appeal with reference to that very evidence. The offence is completed when the evidence is given or the document is produced or put in evidence. It cannot be said to be repeated afterwards because there has been an appeal. It may be that the person who committed the offence does not appeal at all. It is difficult to see how an offence committed in the Court of first instance can be said to be multiplied with the number of appeals that are filed. I would therefore dissent from the judgment in *Bhadesar Tiwari v. Kamta Prasad*(1).

In this case the Magistrate's Court before which the offence is alleged to have been committed was not a Court subordinate to that of the Joint Magistrate although the latter Court heard the appeal. For these reasons, I set aside the order of the Joint Magistrate, dated 2nd June 1917, granting sanction.

NAPIER, J.

NAPIER, J.—I agree. I think that BANERJI, J., in the case of *Bhadesar Tiwari v. Kamta Prasad*(1) has been misled owing to

(1) (1913) I.L.R., 35 All. 90.

his not having given due weight to the language of the section. His reasoning is as follows :

"Similarly the false evidence was given in a proceeding which was pending, in the stage of appeal in the Additional Judge's Court,"

In a broad sense of the words this is true, because at the hearing of the appeal the false evidence would be read. But this is not what is required by the section. That section requires that such offence should be committed in, or in relation to, any proceeding in any Court and that the sanction should be granted by that Court or some other Court to which that Court is subordinate, so that what is to be ascertained is not whether false evidence was *given* in a proceeding but whether the offence was *committed* in a proceeding. Now as my learned brother has pointed out the offence of giving false evidence is complete by the statements on oath or affirmation in a Court of facts which the Court finds to be false. And the fact that subsequently such statement having become part of the record comes before an Appellate Court cannot make this a second offence. The offence is complete when the evidence has been given and it seems to me impossible to say that however the proceedings come before the Appellate Court, whether by the appeal of the party who had himself given false evidence or by the appeal of a person in whose favour he gave false evidence or by the appeal of the opposite party or whether the person who gave false evidence in his appeal expresses through his counsel or it might possibly be himself, his desire to withdraw that story, however it comes, whatever his attitude before the Appellate Court, the offence is re-committed in that Court. It seems to me that this contention must fail on the language of the section and that therefore the objection raised by the learned Vakil before us must prevail.

For these reasons I agree with the order proposed by my learned brother.

(N.R.)

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NAPIER, J.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice
Sadasiva Ayyar and Mr. Justice Spencer.

. KOTI REDDI (FIRST DEFENDANT), APPELLANT,

v.

P. SUBBIAH AND THREE OTHERS (PLAINTIFFS NOS. 1 TO 3
AND SECOND DEFENDANT), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), s. 80—Public Officer acting mala fide—
Suit against Public Officer—Notice of suit, whether necessary—‘Purporting to
be done’ in section 80, meaning of.*

A Public Officer is entitled to notice of suit under section 80 of the Civil
Procedure Code even, if in the discharge of his duty, he has acted *mala fide*.
Meaning of ‘purporting to be done’ discussed.

Shahebzadee Shahunshah Begam v. Fergusson (1881) I.L.R., 7 Cal., 400, and
Muhammad Saddiq Ahmad v. Panna Lal (1904) I.L.R., 26 All., 220, not
followed. *Jogendra Nath Roy Bahadur v. Price* (1897) I.L.R., 24 Cal., 584,
and *Jugul Kishore v. Jugul Kishore* (1911) I.L.R., 33 Ali., 540, followed.

SECOND APPEAL against the decree of T. A. NARASIMHA ACHARIYAR,
the Temporary Subordinate Judge of Nellore, in Appeal No. 13
of 1915, preferred against the decree of T. RAJAGOPALA ACHARIYAR,
the District Munsif of Kanigiri, in Original Suit No. 480 of
1912.

The first defendant against whom a decree was given for
Rs. 153 by the Subordinate Judge, who held that notice of suit
under section 80, Civil Procedure Code, was not necessary, pre-
ferred this appeal.

The material facts appear from the first two paragraphs of the
ORDER OF REFERENCE to the Full Bench, of SESHAGIRI AYYAR, J.

T. V. Venkatarama Ayyar and R. Rajagopala Ayyar for the
appellant.

P. Chenchayya for T. Prakasam for the respondent.

V. Ramesam, acting Government Pleader, *amicus curiæ* for
Government.

* Second Appeal No. 1601 of 1916.

This Second Appeal came on for hearing in the first instance
before SESHAGIRI AYYAR and NAPIER, JJ., who made the follow-
ing ORDERS OF REFERENCE TO A FULL BENCH:—

SESHAGIRI AYYAR, J.—Plaintiffs had lent money on a mort-
gage to one Sankariah. Apprehending that this man was about
to dispose of his property they filed a suit in the District
Munsif's Court and obtained an order for attachment of certain
moveable properties belonging to him. In the meantime a
distrain upon the properties had been effected for arrears of
revenue. The village munsif sold them and after remitting to
the taluk treasury the amount recoverable from Sankariah,
paid the balance over to him. This was after the attachment
by the District Munsif. The plaintiffs sue the village munsif
who is the first defendant in this suit for damages alleging that
the first defendant colluded with Sankariah and paid the balance
of the sale-proceeds to him. The District Munsif was of opinion
that the first defendant was not aware of the attachment by the
Civil Court and dismissed the suit. The Subordinate Judge
has found that the first defendant was aware of the attachment
by the Civil Court and that he fraudulently paid over the balance
of the sale-proceeds to Sankariah. An attempt was made in this
Court to question the correctness of this finding. But I see no
reason for not accepting the conclusion of the Subordinate
Judge.

The first additional issue in the case was whether the first
defendant was entitled to notice as required by section 80 of the
Civil Procedure Code before action was brought. The Subor-
dinate Judge has come to the conclusion that as the village
munsif acted fraudulently section 80 has no application.

It is not disputed that the action of the first defendant was
within his powers as village munsif. The proclamation for the
arrears, the sale of the property and the payment of the balance
to the defaulter were all acts which as village munsif he was
competent to do, but, on the finding of the lower Appellate
Court, there can be no doubt that, in performing these duties,
the first defendant was acting with malice. The point for
decision is whether in consequence of this want of *bona fides*, the
first defendant has forfeited his right to notice before action.
Although the case was very fully argued on both sides, as we
thought that this was a matter in which Government was

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interested, we requested Mr. Ramesam, the Government Pleader, to assist us as *amicus curiae* and we are very much indebted to him for his assistance.

Section 80 of the present Code which corresponds to section 424 of the old Code of Civil Procedure provides for notice in suits in respect of any act *purporting to be done* by a public officer in his official capacity. The language on the face of it does not import that unless the act is *bona fide* the public officer will not be entitled to notice. There may be cases in which the public officer does acts which are not within his sphere of duties. In regard to them, he is not entitled to notice. But, when the acts are *intra vires* the language of the Code does not suggest that there must be also *bona fides*, if the protection afforded by section 80 is to be availed of. But there are decisions which have held that the section is not applicable to persons who act maliciously. There are apparently two conflicting views regarding the meaning to be attached to the words '*purporting to act.*' One set of authorities inclines to the view that where a public servant does the act knowingly and dishonestly for purposes which are not within the intent, although they may be within the letter of the powers he is clothed with, he cannot be said to be acting or purporting to act as a public servant. The other view puts a literal construction on the words. In that view, any one who performs his functions within the letter of the law whatever may be his motives or ulterior intentions must be regarded as having acted or purported to have acted as a public servant.

Now I shall examine the authorities. The earliest case in which the principle of *bona fides* was enunciated was in *Saheb-zadee Shahunshah Begum v. Fergusson*(1); CUNNINGHAM, J., in that case says that a public officer is entitled to notice only in those cases in which some inadvertent act was committed by him in the discharge of his official duty. The learned Judge relies upon the English cases in support of this proposition. *Theobald v. Crichmore*(2), the first case relied on, was not a case in which any question of notice arose. The point considered by Lord ELLENBOROUGH, C.J., in that case was whether a constable forfeited

(1) (1881) I.L.R., 7 Cal., 499.

(2) (1818) 1 B. & A., 227.

his right to the shorter period of limitation because he acted illegally in the discharge of his duties. The learned CHIEF JUSTICE points out referring to the statute he was construing that it was only intended to protect persons acting illegally but with a *bona fide* intention of discharging their duty. The other case is *Attorney-General v. Hackney Local Board*(1). That was a case relating to injunction. The Vice-Chancellor pointed out that in cases of injunctions a notice was not necessary because the object of the suit will be frustrated if an injunction cannot at once be obtained against the contemplated misfeasance by the public authority. Then he says:—

"The policy of the law is that if these public bodies entrusted with powers for public purposes, in the course of executing those powers shall happen to commit any inadvertence, irregularity, or wrong, then before anybody has a right to require payment from them in respect of that wrong they shall have an opportunity of setting themselves right; they shall have the period of a month for the purpose of making amends, or for restoring if they have taken away anything, and for paying for, if they have done, any damage."

It is on these two decisions that CUNNINGHAM, J., bases his conclusion that where any inadvertence or *bona fides* has not been proved the public officer is not entitled to any notice. This decision has been sought to be distinguished in *Jogendra Nath Roy Bahadur v. Price*(2), but I think the learned Judges in the latter case were not satisfied that the earlier decision was right. In *Ganoda Sundary Chaudhurani v. Nalini Ranjan Raha*(3) MR. JUSTICE WOODROFFE, says that the section can apply only to defendants who are sued in an admitted official capacity, but not as individual trespassers. This view will have the effect of placing defendants whether they act honestly or dishonestly at the mercy of the plaintiff on the question of notice. I may also refer to *Raghubans Sahai v. Phool Kumari*(4) which was relied on by Mr. Chenchiah on behalf of the respondent. MUKERJEE, J., therein points out that no notice need have been given to the Secretary of State as there was no relief claimed against him on the ground of fraud. Then he refers to *Saheb-zadee Shahunshah Begum v. Fergusson*(5) and apparently agrees

(1) (1875) L.R., 20 Eq., 626.

(2) (1897) I.L.R., 24 Cal., 584.

(3) (1909) I.L.R., 36 Cal., 23.

(4) (1905) I.L.R., 32 Cal., 1130.

(5) (1881) I.L.R., 7 Cal., 492.

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with the view taken by CUNNINGHAM, J., in that case. The observations were *obiter*. In *Peary Mohan Das v. D. Weston*(1), FLETCHER, J., quotes *Shahebzadee Shahunshah Begum v. Fergusson*(2) and *Raghubans Sahai v. Phool Kumari*(3) and lays down the proposition that a public officer sued in respect of an act done in bad faith is not entitled to notice under section 80. The matter was taken up in appeal in *Weston v. Peary Mohan Das*(4). The decision of FLETCHER, J., was reversed; and I find nothing in that judgment on the question of notice.

In *Muhammad Saddiq Ahamad v. Panna Lal*(5), BANERJI, J., apparently acted upon the principle stated in *Shahebzadee Shahunshah Begum v. Fergusson*(2). The same learned Judge in *Baktwar Mall v. Abdul Latif*(6), distinguishes his earlier decision. In *The Collector of Bijnor, Manager of the Estate of Chandrhi Ranjit Singh v. Munuvar*(7), the acts charged against the Collector were certainly not done by him *bona fide*. Still the Full Bench in that case held that the Collector was entitled to notice when he wrongfully attached and sold property as agent to the Court of Wards. In *Bachcha Singh v. Jufar Beg*(8), where a Police Inspector was the defendant and the complaint against him was that at the instigation of certain persons he illegally arrested the plaintiff and sent him for trial, TUDBALL, J., held that notice under section 424 was necessary. The learned Judge does not examine the earlier cases upon the question of notice. But it is clear that this judgment cannot be reconciled with the judgment of BANERJI, J., in *Muhammad Saddiq Ahamad v. Panna Lal*(5).

As regards Bombay, in *Ranchhod Varajbhai v. The Municipality of Dakor*(9), SARGEANT, C.J., says that the object of the provision about notice would appear to be to give protection to municipal bodies or other officers who in the *bona fide* discharge of public duties have committed illegal acts by their conduct. In *Cecil Gray v. The Cantonment Committee of Poona*(10), the learned Judges say that in all actions of tort the public officer is entitled to notice. In *Chhaganlal Kishoreilal v. The Collector of*

(1) (1906) 16 C.W.N., 145.

(3) (1905) I.L.R., 32 Cal., 1130.

(5) (1904) I.L.R., 26 All., 220.

(7) (1880) I.L.R., 3 All., 20.

(9) (1884) I.L.R., 8 Bom., 421.

(2) (1881) I.L.R., 7 Cal., 499.

(4) (1913) I.L.R., 40 Cal., 898.

(6) (1907) I.L.R., 29 All., 587.

(8) (1915) 13 A.L.J., 788.

(10) (1910) I.L.R., 34 Bom., 583.

Kaira(1), CHANDAVARKAR, J., says that the true test of an action for the purpose of section 424 is

"Whether the wrong complained of as having been done by the public officer sued amounts, first to a distinct act on his part, and secondly, whether the act purported to have been done by him in his official capacity. All these elements must combine to render necessary the giving of notice under section 424 as a condition precedent to it."

I find that *Shahebzadee Shahunshah Begum v. Fergusson*(2) was quoted before the learned Judge, yet, he does not say that a further condition of the applicability of section 424 is that the act should have been done *bona fide*. There are no Madras reported cases. Mr. Ramesam has referred us to an unreported judgment in *Vadapalli Ramayya v. Taragu Venkata Narayana-murthi*(3) which is certainly opposed to the view taken in *Shahebzadee Shahunshah Begum v. Fergusson*(2).

I shall now refer to the English Law on this subject.

Before 56 & 57 Vic. Ch. 61 known as the Public Authorities Protection Act of 1893, there were various enactments which contained provisions for giving notice to public officers before action was brought against them. Most of them were repealed and a comprehensive enactment was passed by Parliament. The first section enunciates a uniform rule of limitation by providing that

"the action must be commenced within six months next after the act, neglect or default complained of or in case of a continuing injury or a damage within six months next after the ceasing thereof."

The same section provides further that if before action was brought there was a tender of amends, ordinarily costs shall not be awarded against the public servant; and that if in the opinion of the Court the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding the Court may award to the defendant costs against the plaintiff. Section 2 repealed all the sections in the various Acts which provided that notice of action must be given before action was brought. Therefore after 1893 the only question in England would be whether the public servant was given

(1) (1911) I.L.R., 35 Bom., 42.

(2) (1881) I.L.R., 7 Cal., 449.

(3) Second Appeal No. 1545 of 1901.

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sufficient opportunity to tender amends and also whether the action had been commenced within six months of the acts complained of. The failure to afford opportunity to make amends would not entail the dismissal of the suit as in the case of failure to give notice, but may result in the plaintiff being mulcted in costs even if he succeeds in the action. This was the state of the law when the new Civil Procedure Code was enacted in this country. If I may say so with respect, the precedent set by Parliament in repealing provisions for notice and in enacting a uniform rule of limitation might well have been adopted in this country. But that has not been done. We have various local Acts in which a shorter period of limitation is prescribed in respect of acts done under colour of a Statute and we have also the general Procedure Code which makes it a condition precedent to an action against a public servant that he should have notice. Therefore the English decisions subsequent to 1893 can afford no assistance in the construction of section 80 of the Civil Procedure Code. The earlier decisions are all quoted in Bullen and Leake's Precedents and Pleadings (seventh edition) at page 814. The established rule seems to be to the effect that the public officer is entitled to the statutory privilege of notice only

"where he had grounds for believing, and *bona fide* believed, in the existence of facts which, if existing, would have justified him in doing the acts complained of under the Statute or in the execution of his office."

In *Downing v. Capel*(1), the learned Judges held that unless the wrongdoer believed he was acting in pursuance of the Statute he was not entitled to notice. In *Selmes v. Judge*(2), BLACKBURN, J., says

"I agree that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out the statute."

LUSH, J., said

"It is clear that they *bona fide* believed they were doing what the law allowed, and that is all that is needed to entitle them to the protection of the statute."

(1) (1867) L.R., 2 C.P.C., 461.

(2) (1874) L.R., 6 Q.B., 724.

HANNAN, J., said

"The question is: did the defendants *bona fide* intend to make a rate as surveyors of highways? If they did, they were entitled to notice of action."

Although this judgment of the learned Judges does not express it in so many words, it seems clear from it that if a public servant acted with a malicious intent, he would not be entitled to any notice; see also *Norris v. Smith*(1), and *Agnew v. Jobson*(2).

The result of the above discussion may be stated thus:—

(a) In England notice of action after 1893 is immaterial. All that is required is that sufficient opportunity should be given to the public servant to make amends. Failure in this behalf will not entail the dismissal of the suit, but will render the successful plaintiff liable to pay the costs of the public servant.

(b) Before the Act of 1893 the public servant would not have been entitled to notice if he exceeded the powers given to him by the statute.

(c) He would not have been entitled to notice unless he believed he was acting within the statute although he was not justified in so acting.

(d) He would have been entitled to notice in all cases where he acted *bona fide* although he was mistaken in his view of the law which authorized him to do the act.

(e) Lastly any semblance of acting within the statute would be enough.

In India the preponderance of authority is in favour of holding that unless the public servant acted *bona fide* he is not entitled to notice. Most of the judgments which have taken this view were by single Judges. *Jogendranath Roy Bahadur v. Price*(3) holds that the question of *bona fides* is not a matter for consideration on the question of notice. In Bombay CHANDAYARKAR, J., at any rate, seems to take the same view. But, it must be conceded that there is not a single case in which it has been held that notice is necessary where it was found that the defendant acted maliciously. There is no such case in the English Reports or in the Indian Law Reports. When the

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(1) (1839) I.L.R., 10 A. & E., 188.

(2) (1877) 13 Cox. C.O., 625.

(3) (1897) I.L.R., 24 Calc., 584.

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Legislature re-enacted section 424 of the Old Code in the Act of 1908 it did not think it desirable to reconcile the conflicting views held on this question. On principle it seems to me that to hold that notice should be given only where *bona fides* have been established would be to leave it to the discretion of the plaintiff whether he should give notice or not. It may be suggested in answer to this, that if the allegation as to *mala fides* is not proved the suit might be dismissed. But it would certainly lead to an enquiry into the merits before the question of notice is considered.

In this state of authorities and having regard to the importance of the question, I propose to refer the following question for the consideration of the Full Bench:—

“Where a public officer in the discharge of his duties acts *mala fide* whether he is not entitled to notice before action under section 80 of Act V of 1908.”

NAPIER, J.

NAPIER, J.—The question raised in this second appeal is whether the defendant is entitled to notice under section 80 of the Civil Procedure Code, no notice having been given. The suit was one against a village munsif, the cause of action alleged being that the defendant fraudulently attached certain casuarina wood and sold the same in a clandestine manner, although it had been already attached by the plaintiffs. The facts found by the Appellate Court are that certain casuarina wood belonging to a third party, a judgment-debtor, had been attached in Original Suit No. 387 of 1911 by the plaintiffs, that the village munsif sold the wood for arrears of revenue due, that there was some irregularity in this sale, that there was no necessity to sell the whole quantity and that after selling the wood the village munsif handed over the balance of purchase money to the judgment-debtor, although he had knowledge of the attachment. He sums up his view of the case as follows:—The first defendant attached *excessively* all the wood belonging to the judgment-debtor so as to get it sold for revenue dues and handed over the balance secretly to the debtor for the purpose of getting rid of the two Court attachments, all of which was in abuse of his powers as village munsif. Section 80 is as follows:—

“No suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months after notice in writing

has been delivered to him stating the cause of action and the relief which is claimed.”

This section was 424 in the Old Code, the only important alteration being the substitution of the words ‘any act’ for ‘an act’. The finding of the lower Appellate Court is clear that the Munsif was acting in his official capacity when he sold the wood, and as the selling is alleged as part of the cause of action, it is to my mind immaterial whether the subsequent paying over of the balance was done in an official capacity or not.

It is not disputed that revenue was due, and the finding of the Court is clear that it is in the excessive attachment of all the wood, that part at all events of the abuse of his powers occurred. On the plain words of the section, it would seem clear that notice was required. But it is suggested that there is strong authority for the proposition that where the officer acts maliciously, no notice is required. In examining the cases it seems to me necessary to eliminate those in which it was found that the officer was only pretending to act in an official capacity he having no right to do the act in connexion with which the complaint arose at all. There remain two classes (1) where he has purported to act in his official capacity but has been guilty of malice in the exercise of his powers, and (2) cases in which he has caused some wrong inadvertently in the discharge of his duty. In *Shahebzadee Shahunshah Begum v. Fergusson*(1), it was held by CUNNINGHAM, J., sitting on the Original Side, that the cases in which notice is necessary are invariably cases in which a public officer is sued for damages for some wrong inadvertently committed by him in the discharge of his duties. The case was however one in which the plaintiff claimed to be entitled to a share in a certain trust fund, of which the Official Trustee of Bengal was the trustee, and the decision was that no notice was necessary. The point did not arise for decision, and could not on the facts, whether, if he had acted maliciously, he would have been entitled to notice. The *obiter dictum* in this case was expressly negatived in a decision of a Bench of the same Court in *Jogendranath Roy Bahadur v. Price*(2). There the plaintiff sued a District Magistrate for damages for illegal and malicious arrest under a warrant. The point was taken that as the act was said to be done maliciously section 424 did not apply, and

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(1) (1881) I.L.R., 7 Calc., 499. (2) (1897) I.L.R., 24 Calc., 584.

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(1) (1881) I.L.B., 7 Cal., 499. (2) (1897) I.L.B., 24 Cal., 581.

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reliance was placed on the decision above referred to. The Court pointed out that the question did not arise in that case and stated the law as follows:—

"The section does not seem to us to warrant the drawing of any distinction between acts of this kind done inadvertently or otherwise,"

In a later case, *Ganoda Sundary Chaudhurani v. Nalini Ranjan Raha*(1). WOODROFFEE, J., sitting on the Original Side held that where a public officer took possession of property which he had no authority to seize and was sued for trespass, the suit is not against him in his official capacity, but as a private individual and therefore no notice is necessary. This case, although relied on by the appellant has in my opinion no bearing on the question, it being of the class first referred to, namely, those where the officer is not discharging a duty. The next case was a decision of FLETCHER, J., on the Original Side of the High Court [*Peary Mohan Das v. Weston*(2)] in which he held that a suit against a District Magistrate and two officers of police for conspiracy and malicious arrest and search, was one in which the Public Officer was sued in respect of an act done in bad faith, and therefore no notice under section 80 was required. He relied on the *obiter dictum* in *Shahebzadee Shahunshah Begum v. Fergusson*(3) and also on a decision in *Raghubans Sahai v. Phool Kumari*(4). The latter case has in my opinion no bearing on the question at all. It simply decides that where no relief is claimed against the Secretary of State, no notice is required as it would be impossible to serve a notice fulfilling the requirements of the section. He also relied on a case in *Muhammad Saddiq Ahamad v. Panna Lal*(5) to which I shall refer. The learned Judge does not appear to have been aware of the decision in *Jogendranath Roy Bahadur v. Price*(6) which was binding on him. His decision was subsequently reversed by the Court of Appeal on the merits [see *Weston v. Peary Mohan Das* (7)] and so no ruling was given on this point. So far as the High Court of Calcutta is concerned, the view that no notice is required where the Public Officer acts maliciously has been directly negatived.

(1) (1909) I.L.R., 36 Calc., 28.

(3) (1881) I.L.R., 7 Calc., 499.

(5) (1904) I.L.R., 26 All., 220.

(2) (1906) 16 C.W.N., 145.

(4) (1905) I.L.R., 32 Calc., 1130.

(6) (1897) I.L.R., 24 Calc., 584.

(7) (1913) I.L.R., 40 Calc., 838.

Four decisions of single Judges of the Allahabad High Court were referred to. The first is one of BANERJI, J., *Muhammad Saddiq Ahamad v. Panna Lal*(1). In that case the Court found that the defendant, a Police Officer, did not purport to act in good faith in pursuance of the law, but took advantage of his position as a Police Officer to commit illegal and tortious acts maliciously and without cause, the action complained of being that he searched the house of the plaintiff, dragged him to the thana, detained and kept him in confinement for several hours. The learned Judge following the decision in *Shahebzadee Shahunshah Begum v. Fergusson*(2), held that no notice was required. The next case *Bhatwar Mall v. Abdul Latif*(3), is one decided by the same learned Judge. That was a suit against a Police Officer to recover certain books seized by him in a search, the seizure of which was denied. The learned Judge held that notice was necessary and distinguished his prior decision as being one in which the defendant had acted not in his capacity as a Public Officer, but illegally and in bad faith. He based his decision on the ruling of the Calcutta Bench in *Jogendra Nath Roy Bahadur v. Price*(4). The third case is *Mumtaz Hussain v. Lewis*(5), the suit being one for damages for assault, the allegation being that the plaintiff, a sub-overseer was assaulted by his superior officer in a fit of anger. The Judge held that the acts complained of were not acts purporting to be done by the defendant in his official capacity. The fourth case, *Bachchu Singh v. Jafer Beg*(6), was a suit brought to recover damages against a Police Officer for malicious arrest. The learned Judge held that as the officer purported to act in his official capacity, notice was necessary. Putting aside the third of these cases as belonging to the first class, viz., cases where the act does not purport to have been done, we have two decisions of BANERJI, J., which with all respect, in my opinion, are not reconcilable; and another decision in which it was held that notice was required.

Turning to Bombay, there are several decisions in which the section was construed, namely, *Babu Balapa v. Nana*(7), *Sardar*

(1) (1904) I.L.R., 26 All., 220.

(3) (1907) I.L.R., 29 All., 567.

(5) (1910) 7 A.L.J., 301.

(2) (1881) I.L.R., 7 Calc., 499.

(4) (1897) I.L.R., 24 Calc., 584.

(6) (1915) 13 A.L.J., 788.

(7) (1889) I.L.R., 13 Bom., 343.

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Singji v. Ganapat Singji(1), *Rajmal Manick Chand v. Hanmant Anyaba*(2), *Cecil Gray v. The Cantonment Committee of Poona*(3) and *Ohhaganlal Kishoredas v. The Collector of Kaira*(4). These however dealt with the questions whether notice is required in suits against Public Officers arising *ex contractu* and in suits in which no tortious act was alleged but the Public Officer was a necessary party for the determination of the rights of the parties. The extreme view was taken in the last mentioned case in which it was held that even though no tortious act was alleged against the Collector, still as he had been acting in his official capacity in declaring the plaintiff's mortgages illegal in exercise of the power conferred upon him by section 3 of the Bombay Act V of 1862, which declaration had enabled the mortgagors to take possession of the land, notice was necessary. The Court lays down that the true test of an action for the purpose of section 424 is, whether the wrong complained of as having been done by the Public Officer sued, amounts to a distinct act on his part and whether that act purported to have been done by him in his official capacity. This, it may be pointed out, is the test applied by the only decision of a Bench in Calcutta, viz., *Jogendra Nath Roy Bahadur v. Price*(5).

Turning to the Madras cases, *Anantharaman v. Ramasami*(6), was a suit to recover money due on a promissory note from a minor under the Court of Wards. The Collector being a party as guardian *ad litem*, pleaded that he was entitled to notice. The Court simply stated that no notice is required unless the suit is brought against a Public Officer in respect of an act done by him purporting to be in discharge of his duty, and that clearly this suit was not of that class. There is however one decision *Vadapalli Ramayya v. Taraguvengkata Narayanamurthi*(7), which directly decides the point. That was a suit against a karnam for damages for malicious prosecution. The karnam had sold certain trees by public auction which were purchased by the plaintiff and cut by him. The defendant reported to the Tahsildar that the plaintiff had cut down more trees than he had purchased and put in a complaint

(1) (1890) I.L.R., 14 Bom., 395. (2) (1896) I.L.R., 20 Bom., 697.
(3) (1911) I.L.R., 34 Bom., 583. (4) (1911) I.L.R., 35 Bom., 42.
(5) (1897) I.L.R., 24 Cal., 584. (6) (1888) I.L.R., 11 Mad., 317.
(7) Second Appeal No. 1545 of 1901.

against the plaintiff. The Magistrate tried the case and found that the defendant's story was false. The plaintiff brought this suit, and the issues framed were whether the defendant prosecuted the plaintiff maliciously and without reasonable and probable cause, and whether the suit was not maintainable without notice. It was found by the District Munsif that the defendant was actuated with vindictive spirit and personal motives and did not act *bona fide*. The District Judge returned no finding on the first issue, but found that the acts complained of were done in his official capacity and that therefore notice was necessary. In Second Appeal it was urged that no notice was necessary and the Bench held that the decision of the District Judge was right.

There are in all the Courts a large number of decisions on other statutes where the words "purporting to act" and "official capacity" are construed. I have not thought it necessary to deal with these because the finding of the lower Appellate Court is clear that the act was one purported to be done, etc., and the only question raised before us was whether malicious action took the case out of the section.

Our attention has been drawn to several English cases in which the words "act done in pursuance of the Act" have been construed for the purpose of ascertaining whether the suit had been brought within a certain time after the act committed. But for the same reasons that I have not thought it necessary to examine the Indian cases other than those on this particular section, I do not propose to deal with them.

The result is that there is a distinct ruling that notice is necessary even where the action is malicious, in *Jogendra Nath Roy Bahadur v. Price*(1) and another one in our own Court, and there is no decision of a Bench the other way. This being so, I see no reason why we should not give the construction to the language of the section which it naturally bears. I am therefore of opinion that this suit is bad for want of notice. But as my learned brother has doubts in the matter, I agree to the Reference to a Full Bench in the terms suggested by him.

On this Reference:—

T. V. Venkata-ma Ayyar for the appellant.—I adopt the reasoning of NAPIER, J. (vide pages 800 to 805 supra).

(1) (1914) I.L.R., 24. Calc., 584.

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SUBBIAH. Section 80 of the Civil Procedure Code makes no mention of malice. Hence notice is necessary in all cases. Otherwise the plaintiff will have an advantage of having an option to give notice or not. [He was stopped.]

T. Prakasam for respondent.—When the officer acts *mala fide* notice is not necessary. ‘Purporting’ in section 80 means ‘having the purpose of’ or ‘intending.’ See Century English Dictionary. It should not be construed as ‘affecting’ or ‘pretending’. *Shahebzadee Shahunshah Begum v. Fergusson*(1), *Raghubans Sahai v. Phool Kumari*(2), *Peary Mohan Das v. D. Weston*(3), *Ganoda Sundary Chaudharani v. Nalini Ranjam Raha*(4), *The Collector of Bijnor, Manager of the Estate of Chaudhri Ranjit Singh v. Munuvar*(5), *Muhammad Saddiq Ahmad v. Pannal Lal*(6), and *Anantharaman v. Ramasami*(7). The cases which seem to be against this position, *viz.*, *Jogendra Nath Roy Bahadur v. Price*(8), *Jugul Kishore v. Jugul Kishore*(9), and *Baktawar Lal v. Abdul Latiff*(10), are distinguishable. English cases which turn upon construction of words like ‘anything done or intended to be done in execution of office’ have decided that notice is not necessary if the officer acts *mala fide* or does not believe that he is acting in his official capacity; see *Hermann v. Seneschal*(11), *Roberts v. Orchard*(12), *Wedge v. Berkely*(13), *Chamberlain v. King*(14), *Downing v. Capel*(15), *Selmes v. Judge*(16), *Hughes v. Buckland*(17), *A. G. V. Hackney v. Buckland*(18), *Parton v. Williams*(19), Clerk and Lindsell, pages 130 and 131, Halsbury’s Laws of England, Vol. I, page 25.

T. V. Venkatarama Ayyar.—The question is whether the person ‘purports’ to act in his official capacity. If he does so, even with malice, notice is necessary. If his act cannot by any stretch of law or imagination be considered, an act which he could be required to do in virtue of his office, the act would be one done in his private capacity; in such cases notice is not

- (1) (1881) I.L.R., 7 Cal., 449 at p. 503. (2) (1905) I.L.R., 32 Cal., 1130.
(3) (1906) 16 C.W.N., 145 at p. 214. (4) (1909) I.L.R., 36 Cal., 28 at p. 38.
(5) (1880) I.L.R., 3 All., 20 at p. 23. (6) (1904) I.L.R., 26 All., 220.
(7) (1888) I.L.R., 11 Mad., 317. (8) (1897) I.L.R., 24 Cal., 584 at p. 587.
(9) (1911) I.L.R., 33 All., 540. (10) (1907) I.L.R., 29 All., 567.
(11) (1862) 32 L.J.C.P., 83. (12) (1863) 33 L.J.Ex., 65.
(13) (1837) 6 Ad. & Ell., 663. (14) (1871) L.R., 6 C.P., 474.
(15) (1867) L.R., 2 C.P.C., 322. (16) (1871) L.R., 6 Q.B., 724.
(17) (1846) 15 M. & W., 346. (18) (1875) 20 Eq., 626.
(19) (1820) 3 B. & A., 380.

necessary. Reliance was placed on *Jugul Kishore v. Jugul Kishore*(1). Section 80, Civil Procedure Code, was introduced only in 1879. Reference was made to *Venkata v. Chengadu*(2), *Kirby v. Simpson*(3), *Royal Aquarium and Summer and Winter Guardian Society v. Parkinson*(4). The English decisions quoted turn upon the wording of particular statutes and hence are not strictly applicable, but can be taken only as guides. See *The Secretary of State for India in Council v. Rajlucky Debi*(5). ‘Purport’ means ‘profess’ see the Oxford Dictionary. Even if there is a semblance of acting in an official capacity notice is necessary; *Norris v. Smith*(6), *Reeves v. Lambert*(7), *Cook v. Leonord*(8). In this case the act was done by the first defendant in his official capacity.

T. Prakasam replied.

This Second Appeal on this reference again coming on for hearing the Court expressed the following Opinions:—

WALLIS, C.J.—As observed by SESHAGIRI AYYAR, J., in his ORDER OF REFERENCE, the point for decision is whether in consequence of his want of *bona fides* the first defendant forfeited his right to notice before suit under section 80 of the Code of Civil Procedure. Both the referring Judges were of opinion that the act done by the defendant came within the words “any act purporting to be done by such public officer in his official capacity”. These words were introduced into section 424 of the Code of 1877 by Act XII of 1879, and the corresponding section 80 of the present Code was further amended by substituting “any” for “an” and “such public officer” for “him”. According to the concise Oxford Dictionary recently published at the Clarendon Press, to “purport” in this context means to “be intended to seem”. There can be no doubt that the act of the Village Munsif in handing over the surplus proceeds of the revenue sale to the defaulting owner was an act “intended to seem” to be done by him in his official capacity so as to render notice of suit necessary, if effect is to be given to the language of the section according to the

- (1) (1911) I.L.R., 33 All., 540. (2) (1889) I.L.R., 12 Mad., 168 at p. 175.
(3) (1854) 10 Exch., 358. (4) (1892) 1 Q.B., 431.
(5) (1898) I.L.R., 25 Cal., 239 at p. 244. (6) (1839) 10 A. & E., 188.
(7) (1825) 4 B. & C., 214. (8) (1827) 6 B. & C. 351.

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natural meaning of the words used. The legislature may well have considered it desirable to require notice of suit to be given in all such cases, and I see no reason for putting a restrictive construction upon the section. It is significant that the words "purporting to be done" are wider than "done or intended to be done under the provisions of this Act," in section 264 of the Public Health Act, which appear to be the most comprehensive words used in any of the corresponding statutory provisions in England, seeing that they also include "acts intended to seem to be done in his official capacity;" and it is quite probable that they were chosen on that very ground and for the purpose of making the English decisions inapplicable. As observed in *Booth v. Olive*(1), it is not very easy to reconcile all the observations that are to be found in the English cases, and they must be read with reference to the circumstances of each particular case. Further, the current of English decisions does not in my opinion support the view taken in *Shahebzadee Shahunshah Begum v. Fergusson*(2), that notice is only requisite in the case of inadvertent acts and cannot be required where there is a want of *bona fides*. On the contrary in *Kirby v. Simpson*(3), it was expressly laid down by PARKE, B. and the Court of Exchequer that "a person may act maliciously and yet act in the execution of his office as a justice of the peace," and that in such a case notice must be given to him. Similarly in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*(4) in the Court of Appeal, where *Kirby v. Simpson*(3) was cited for the appellants, it was not even contended on the other side that the finding of malice against the defendant disentitled him to notice if he was otherwise entitled to it. In the third and most authoritative edition of Bullen and Leake's Precedents of Pleadings, 1868, the learned authors sum up the effect of the decisions on the various English statutes at page 759 as follows:—

"A person is entitled to notice of action as acting under or in pursuance of a statute or in execution of his office, where he *bona fide* believes in the existence of facts which, if existing, would justify his acting in pursuance of the statute or in execution of his office."

(1) (1851) 10 C.B., 827.

(3) (1854) L.R., 10 Ex., 358.

(2) (1881) I.L.R., 7 Calc., 499.

(4) (1892) 1 Q. B., 431.

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In the present case there were facts justifying the village munsif in acting in his official capacity, and there was no occasion for him to resort to the defence that he *bona fide*, though erroneously, believed in the existence of such facts. In so far as *Shahebzadee Shahunshah Begum v. Fergusson*(1), and the cases which follow it lay down that the section only applies to acts done inadvertently in the course of official duty, I am unable, with great respect, to follow them, as they appear to me to be inconsistent with the plain language of the section, unsupported by the English decisions on the more restricted provisions of the English Acts, and opposed to the later decision of the same Court in *Jogendra Nath Roy Bahadur v. Price*(2) and to the other decisions mentioned in the ORDER of REFERENCE. My answer is that notice is necessary in the circumstances stated.

SADASIVA AYYAR, J.—The verb 'purport' is defined in the concise Oxford Dictionary as 'convey,' 'state,' 'profess,' 'be intended to seem'; and the Latin root signifies 'carry forth.' The synonym 'profess' has as two of its definitions 'pretend' and 'openly declare.'

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I therefore think that the expression "any act purporting to be done by such public officer in his official capacity" found in section 80 of the Civil Procedure Code means "any act of a public officer which is intended by him to carry forth or convey to the minds of all persons who become aware of that act the impression that he did the act in his official capacity and not as an ordinary private individual and which has the effect of conveying such an impression by its seeming or appearance." The usual way in which such an intention is conveyed to the minds of others is by the officer openly declaring at or about the time of the doing of that act that he was acting in his official capacity, and by the 'act' being in its nature such as is done by a person in such an official position and not by a mere private individual. In most cases, his conduct and declarations at or about the time of the doing of the act and the nature of the act would be conclusive as to their conveying to the minds of those who become cognisant of the act that it was done in his official capacity. An act done by a public officer would 'purport' to

(1) (1891) I.L.R., 7 Calc., 499,

(2) (1897) I.L.R., 24 Calc., 584,

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be an act done in his official capacity, not only if it was properly and rightly done by him in such capacity and within his powers but also if it has such a reasonable resemblance (though a false or pretended resemblance) to a proper and right act that ordinary persons could reasonably conclude from the character of the acts and from the nature of his official powers and duties that it was done in his official capacity.

But if the act done is so outrageous and extraordinary that no reasonable man could detect in it any resemblance to any act which the powers of such an officer could allow him to do on the facts as represented and declared by such officer, his mere allegation that he did the act in his official capacity would not suffice.

I shall, with diffidence, attempt two illustrations. A Sub-Registrar carries off by force his neighbour's plough-bullocks to plough the Sub-Registrar's own lands, making at the time the loudest declaration that he was acting as Sub-Registrar and was entitled as such officer to carry off his neighbour's plough-bullocks to cultivate his (the Sub-Registrar's) lands. As there is no resemblance whatever between the Sub-Registrar's duties and the ploughing of the Sub-Registrar's lands or the carrying off of his neighbour's cattle, I do not think that it could be said that his act 'purported' to be done in his official capacity whatever he might have professed. (The line of demarcation may of course become thin in many cases.) In *Muhammad Saddiq Ahmad v. Panna Lal*(1), BANERJI, J., held that a Sub-Inspector of Police who took advantage of his position as a Police Officer to wrongfully search the plaintiff's house, to keep him for some hours in a Thana and to publicly abuse him owing to his private enmity against the plaintiff could not be said to have purported to act in the discharge of his official duty and was therefore not entitled to notice under section 424 of the old Civil Procedure Code corresponding to the present section 80. I am doubtful about the soundness of this decision so far as it relates to the acts of house-search and confinement in the Thana though as regards the act of public abuse, the decision seems to be right as such public abuse is never the duty of a Police officer. II. My other illustration may be stated thus : A,

(1) (1904) I.L.R., 26 All., 220.

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a Police Inspector, was told by his friend B that B's stolen property was in C's house. A, to help his friend B, forges a magisterial warrant, goes to C's house, and makes a search in his official uniform declaring that he does so as a Police Officer on the strength of the magisterial warrant. As every ordinary on-looker will take it that A is making his search in his capacity as a Police Officer, I think that his act was one purporting to be done in his official capacity, and he is entitled to notice if sued for such an act. [See *Jogendra Nath Roy Bahadur v. Price*(1) (MACPHERSON and AMER ALI, JJ.) and *Jugal Kishore v. Jugal Kishore*(2), though this latter case turned upon section 49 of the Allahabad Municipalities Act (which, however, uses the same expression "purporting to be done" as section 80 of the Civil Procedure Code.)]

The English decisions construing expressions like "done in pursuance of" or "done under the authority of" or "an act in execution of a public office" or "done in execution or intended execution of his office" and so on are not only of very little use but only tend in my opinion to confuse the mind in the interpretation of the expression "purported to be done" used in section 80 of the Civil Procedure Code.

In the present case, the appellant's act in paying over the balance of the revenue sale-proceeds to the defaulter was an act falling within the ordinary duties of his office as village munsif and he clearly professed to do it in execution of that duty and it would be quite reasonable on the part of an ordinary third person who becomes aware of the village munsif's act in so returning the balance to the defaulter to receive the impression that the act was done by the village munsif in his official capacity.

I think the question of the good faith or the bad faith of the public officer either as regards his belief in the legality or propriety of his act or the limit of his powers or the existence of facts justifying the exercise of such powers is irrelevant in the consideration of the question whether the officer is entitled to notice under section 80 of the Civil Procedure Code.

I therefore agree with my Lord in the answer given to the reference.

(1) (1897) I.L.R., 24 Cal., 584.

(2) (1911) I.L.R., 33 All., 540.

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SPENCER, J.—I agree with the two judgments just pronounced and with the opinion of the Calcutta High Court in *Jogendra Nath Roy Bahadur v. Price*(1) that whether the public officer's act complained of is legal or illegal, deliberate or inadvertent, notice under section 80, Civil Procedure Code, is necessary before a suit is instituted. I think, with due respect, that the decisions of the single Judges in *Shahabzadee Shahun-shah Begum v. Fergusson*(2), and *Muhammad Saddiq Ahmad v. Panna Lal*(3) were wrong.

We have been asked to construe the words 'any act purporting to be done by such public officer in his official capacity' as signifying 'any act done by such public officer in the honest belief that he was acting in his official capacity.'

'Purporting' literally means 'holding out', and neither 'profess' nor 'pretend' is an exact synonym for it. 'Profess', as its derivation suggests, generally implies an open declaration in words. 'Pretend', more often than not, is used where that which is held out is not what it really is. I think that the word 'purporting' covers a profession by acts or by words or by appearance of what is true as well as of what is not true.

A private individual who personated a Police Officer by wearing a police uniform and carrying a forged search warrant proceeded to search a house, would be 'purporting' to act as a Police Officer, though not being a Police Officer, he would not be entitled to notice under this section. A real Police Officer who acted similarly would equally be doing an act 'purporting to be done in his official capacity', and would be entitled to notice, even though his motives were malicious.

When it is the intention of Government to protect official and judicial acts done by public servants in good faith, the legislature makes use of the words 'good faith', as may be seen from sections 76 to 79 and 99 of the Indian Penal Code, section 156, clause 4 of the Local Boards Act and section 1 of the Judicial Officer's Protection Act. But in section 80, Civil Procedure Code, there is no qualification that the act must be one done in good faith to entitle the officer concerned to notice. In practice it would not always be easy at the stage of issuing

(1) (1897) I.L.R., 24 Calc., 584. (2) (1881) I.L.R., 7 Calc., 499.
(3) (1904) I.L.R., 26 All., 220.

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notice to determine whether good faith existed before that question had been decided at the trial. Government undertakes the defence of their servants in actions brought against them personally for official acts done by them in cases where those acts are deemed defensible. The issue of notice gives time to the public officer to make amends for his act or to report the case to Government and get himself defended at the public cost. So notice is made compulsory in all suits against public servants for acts done officially.

A number of English cases have been cited in the arguments and Mr. Justice SESHAGIRI AYYAR has referred to some of them in his ORDER OF REFERENCE. I find that little assistance is to be derived from them, as they are all pronouncements as to the meaning of the language used in particular English statutes, which is not identical with the language of the Civil Procedure Code which we have to consider.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

LAKSHMANAN CHETTY AND TWO OTHERS (PETITIONERS),

v.

P. P. V. PALANIAPPA CHETTY AND TWO OTHERS
(RESPONDENTS).*

1918,
March 18.

Civil Procedure Code (V of 1908), O. XLI, r. 5—Whether applicable to stay execution not of the decree appealed against, but of some other decree—Petition to stay sale of immoveable properties—Jurisdiction of Appellate Court to grant.

An application under Order XLI, rule 5 to stay the sale of immoveable property in execution of a decree pending an appeal therefrom can be made not only to the Court which passed the decree but also to the Appellate Court, both of which have concurrent jurisdiction.

The rule however did not authorize an application to the Appellate Court for stay of execution in another suit.

* Civil Miscellaneous Petition No. 248 of 1918.

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Kanniappan Chetty v Manickavasagam Chetty (1912) 23 M.L.J., 677, dissented from; *Triboni Sahu v. Bhagwat Bux* (1907) I.L.R., 34 Calc., 1037 and *Rama Prosad v. Anukul Chandra* (1914) 20 C.L.J., 512, referred to.

PETITION praying the High Court to stay further proceedings by way of confirmation of sale in execution of the decree in O.S. No. 75 of 1914 on the file of the Temporary Subordinate Judge of Rāmnād at Madura pending the disposal of Appeal No. 350 of 1917 preferred to the High Court against the decree in Original Suit No. 102 of 1916 on the file of the Temporary Subordinate Judge of Rāmnād at Madura.

The petitioners in the above petition to the High Court brought Original Suit No. 102 of 1916 in the Subordinate Judge's Court of Rāmnād to restrain the defendants by an injunction from executing the decree in Original Suit No. 75 of 1914 on the file of the said Court. The suit having been dismissed the petitioners filed therefrom an appeal (Appeal No. 350 of 1917) to the High Court. In the meanwhile the defendants obtained an order for sale of immoveable properties in execution of the decree in Original Suit No. 75 of 1914 and got the properties sold in execution. The petitioners then filed this petition under Order XLI, rule 5, Civil Procedure Code, in the High Court for an order not to confirm the sale.

K. V. Krishnaswami Ayyar for petitioners.

K. Bashyam Ayyangar for respondents.

The ORDER of the Court was delivered by

SADASIYA
AYYAR, J.

SADASIYA AYYAR, J.—As regards the preliminary objection that no petition under Order XLI, rule 5, of the Code of Civil Procedure lies in this Court, in respect of stay of sale of immoveable property, WALLIS, C.J., and HANNAY, J., doubted in Civil Miscellaneous Petition No. 1595 of 1914 (in Appeal Against Order No. 173 of 1914) the soundness of the decision in *Kanniappan Chetty v. Manikavasagam Chetty*(1) which was quoted in support of the objection. We are inclined to go further and dissent (with great respect) from the decision in *Kanniappan Chetty v. Manikavasagam Chetty*(1). The inherent powers of the appellate Court clearly recognized by Order XLI, rule 5, cannot be held to have been cut down or limited by the special and exceptional power conferred on the executing Court by Order

(1) (1912) 23 M.L.J., 677.

XLI, rule 6, which rule seems to have been clearly intended in order that the executing Court might be compelled to exercise it in emergent cases for the benefit of the judgment-debtor (see also the pertinent observations of MOOKERJEE, J., in *Triboni Sahu v. Bhagwat Bux*(1) and *Rama Prosad v. Anukul Chandra* (2). We overrule the preliminary objection.

On the merits it is not the decree under appeal that is sought to be executed by the sale of immoveable property but another decree against the execution of which the decree under appeal refused to grant an injunction. The present petition is not for a temporary injunction but it is for stay of execution of the decree under appeal. The decree appealed against not being under execution, Order XLI, rule 5, does not apply and this petition is misconceived.

It is therefore dismissed with costs.

N.B.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Spencer.

PALANIAPPA CHETTIAR AND THREE OTHERS

(DEFENDANTS NOS. 3, 5 TO 7), APPELLANTS,

v.

SHANMUGAM CHETTIAR AND TEN OTHERS (PLAINTIFF,
DEFENDANTS NOS. 2, 4 AND 8 TO 15), RESPONDENTS.*

Negotiable Instruments Act (XXVI of 1881), ss 26, 27 and 28—Agent, meaning of—Hundi or promissory note drawn or made by a trustee of a charity—Personal liability of trustee—Liability of charity property and other members of the family—Signature of trustee with vilasam of charity prefixed, effect of—Liability of non-executants.

A person drawing a hundi or bill of exchange or making a promissory note as trustee of a temple or of a charity is personally liable on such bill or note.

(1) (1907) I.L.R., 34 Calc., 1037. (2) (1914) 20 C.L.J., 512.

* Original Side Appeal No. 61 of 1915.

1918,
March 28 and
1917,
April 2.

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Rule of English Law as to bills drawn or notes made by churchwardens, overseers and others who describe themselves in their official capacities, applied. English and Indian cases, reviewed.

'Agent' referred to in sections 27 and 28 of the Indian Negotiable Instruments Act, means the agent of a person capable of contracting within the meaning of section 26, and when the agent is not liable, the principal is. A person drawing a bill or making a note as trustee of a temple or charity is not acting on behalf of such a principal and cannot claim the benefit of section 28.

When the agent of a Chetti firm in executing a negotiable instrument prefixes the firm's vilasam, this is a well understood indication that he is acting only as an agent and has been so recognized by the Courts; but when a man signs as trustee prefixing the charity vilasam, there is on the face of the document no clear indication that he contracts for any one else but himself.

APPEAL against the judgment and decree of KUMARASWAMI SASTRIYAR, J., in Civil Suit No. 217 of 1909.

The plaintiff sued to recover a sum of money due on a hundi, dated 31st July 1906, executed by the first defendant in plaintiff's favour and drawn on a certain firm called P.L.R.M. Firm at Madras. The first defendant was the hukdar of a chatram which was a family charity of the family of the defendants Nos. 2 to 15 and was constituted in 1887 pursuant to a letter (Exhibit K) addressed to P.L.R.M. Firm which stated *inter alia* as follows:—

"As soon as this letter is received, on this date take Rs. 50,000, credit it separately under the style of P.R.P.L.S. for the choultry and carry on dealings separately under the said style for the said choultry. Maintain ledger and day book separately therefor. As it is arranged that our P. L. Palaniappan should supervise the said chatram work and building work, pay money to the hundis drawn by the said person for the said matters and enter it in account. For the matters connected with this, write to brother Palaniappan." The plaintiff was to give a release of his claims to a certain village which was part of the endowment of the choultry, and in consideration of such release, obtained the suit hundi drawn by the first defendant on the P.L.R.M. Firm. The Hundi ran thus:—

a. Rs. 17,000.

Siva is everywhere.

Sathirasangarakottai P.R.P.L.S.

Thirty-first July 1906—16 Audi Parabhava year. Chinnayya Chetty should pay at P.L. P.L. Shop in Madras, the amount of rupees seventeen thousand only with nadappu interest from this

date to Murayur P.L.S.S.'s order in respect of having left Seerserutamangalam village as belonging to chatram and debit it in P.R.P.L.S.'s account getting the payment endorsed.

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The plaintiff, not having been paid the amount of the hundi sued to recover the amount with interest personally from the drawyer, who was originally the only defendant impleaded in the suit. The defendant contended that the hundi was not supported by consideration and was not intended to be operative, and also that in any event he was not personally liable but that the plaintiff should proceed only against the charity properties, that the suit was bad for non-joinder of necessary parties inasmuch as the other members of the defendant's family who were also hukdars in respect of the family charity were not impleaded in the suit. The original defendant died pending the suit, and thereupon the legal representatives of the deceased first defendant and the other members of the family were joined as defendants in the suit. The learned Trial Judge passed a decree in favour of the plaintiff for the amount claimed but held that the defendants were not personally liable and that the decree amount should be realized out of the charity properties. The defendants Nos. 2 to 7, who were the legal representatives of the first defendant, preferred an appeal against the decree, contending that the suit hundi was not supported by consideration and was not intended to be operative, while the plaintiff preferred a memorandum of objections, claiming that the first defendant was personally liable on the suit hundi and that the plaintiff was entitled to a decree against the first defendant's sons and grandsons, to be realized out of the joint family and other assets of the first defendant in their hands. At the hearing of the appeal, the vakil for the plaintiff-respondent stated that, if a personal decree against the first defendant were granted to him, he did not want a decree against the charity properties.

T. Narasimha Ayyangar for the appellant.

Hon. Mr. S. Srinivasa Ayyangar and K. Bashyam Ayyangar for the first respondent.

S. E. Sankara Ayyar for the second respondent.

K. Rajah Ayyar for the respondents Nos. 7, 8 and 11.

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M. Pathanjali Sastri for the respondents Nos. 4 to 6.

The Court delivered the following JUDGMENTS:—

WALLIS, C.J.—This is an appeal from a decree of KUMARASWAMI SASTRI, J., in a suit brought by the plaintiff on a promissory note executed by the first defendant describing himself as 'P.R.P.L.S. Hukdar,' plaintiff sought to make the first defendant personally liable on the note. The first defendant pleaded that the suit was bad for non-joinder of the other members of the family who as he alleged were also hukdars of the charity, that it was without consideration and that he was not personally liable. He died after the settlement of issues and the plaintiff then brought on the record not only his legal representatives but also the other members of the family to meet the objection of non-joinder and additional issues were settled as to their liability.

The learned Judge found on the first issue that the promissory note was not without consideration or intended to be inoperative, and we see no reason to differ from that finding.

The subsequent correspondence clearly shows the note was not intended to be inoperative. As regards consideration the note appears to have been given in consideration of the plaintiff's relinquishment of his claim to a certain village in favour of the family charity. The village was not one of those expressly dedicated to charity by the family. The plaintiff's father had claimed it and the plaintiff himself had been enforcing his claim to it with some success in the years preceding the execution of the promissory note. The appeal of defendants Nos. 3 and 5 to 7 therefore fails and is dismissed with costs of the plaintiff.

The learned Judge has given to plaintiff a decree against the charity properties in the hands of the defendants Nos. 2 to 15 and the plaintiff in his memorandum of objections claimed that the first defendant was personally liable on the suit note and that he was entitled to a decree against his sons and grandsons. He asked in the plaint for a personal decree against the first defendant and at the hearing of the appeal his vakil stated that if this were granted him, he did not want a decree against the charity properties; defendant No. 3 and the representatives of the deceased first defendant contended that the charity properties alone were liable, and that if this were not so, the other members of the family who had been joined as defendants were equally liable with them. The family charity was constituted

in 1887 pursuant to exhibit K a letter addressed to the P.L.R.M. firm at Madras in which it was stated that the family had set apart the three villages named and Rs. 50,000 for charity and the P.L.R.M. firm were directed to credit Rs. 50,000 separately under the style of P.R.P.L.S. for the charity and carry on dealings separately for the choultry under that style. The letter went on to say that only P. L. Palaniappa the first defendant was to supervise the chatram and buildings and that the P.L.R.M. firm were to honour the hundis drawn by the said person for the said matters and debit the accounts and to correspond with him.

The first defendant was accordingly provided with a book of blank hundis like a cheque book on one of which he executed the suit hundi on 31st July 1906, "In consideration of his abandoning his claim to the Seersenthamangalam village in favour of the chatram pay to Murayur P.L.S.S.'s (the plaintiff's) order Rs. 17,000 with Nadappu interest from this date and debit it in P.R.P.L.S.'s account entering the payment." The words 'P.R.P.L.S. Hukdar' were printed at the place for signature which the first defendant completed by signing his name Palaniappa Chetti.

The instrument satisfies the definition of a bill of exchange in section 5, and of a cheque in section 6 of the Negotiable Instruments Act and the first question is whether the learned Judge was right in holding that the first defendant, the drawer, was not personally liable.

Under sections 26 and 27 the drawer binds himself by drawing the bill himself or by his agent, and under section 28 an agent who signs a bill without indicating therein that he acts as an agent or that he does not intend to incur personal responsibility is liable personally. 'Agent' however in these sections means the agent of a person capable of contracting within the meaning of section 26 and when the agent is not liable the principal is: A person drawing a bill or making a note as trustee of a temple or charity is not acting on behalf of such a principal and cannot claim the benefit of section 28. Accordingly such trustees have been held personally liable by SUBRAHMANYA AYYAR, J., in *Pasupati Pillai v. Sundarappier*(1), by KRISHNASWAMI

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AYYAR, J., in *Aiyathurai Aiyar v. Dharmasena Aiyar*(1) and in *Kasivasi Somasundra Thambiran v. Venkata Narayana Pillai*(2) to which I was a party with SESHAGIRI AYYAR, J., and in *Swaminatha Aiyar v. Srinivasa Aiyar*(3) where the personal liability of the temple trustee on the promissory note was not questioned. The decision of SADASIVA AYYAR, J., in *Sundresa Gurukul v. Sambasiva Aiyar*(4) which the learned Judge has followed is opposed to these rulings and is not in my opinion supported by *Koneti Naicker v. Gopala Aiyar*(5) or by *Chapman v. Smethurst*(6) on which it was based, as in those cases the question was whether the agent or the principal was personally liable on the bill. *Sundresa Gurukul v. Sambasiva Aiyar*(4) was no doubt referred to with approval by KUMARASWAMI SASTRI, J., sitting with SADASIVA AYYAR, J., in *Ammalu Ammal v. Namagiri Ammal*(7) where Robinson's settlement *In re Gant v. Hobbs*(8) was referred to as supporting it. That case, however, like the case from which it differed was not a case of a negotiable instrument but of a covenant in a deed as to which other considerations are applicable. Moreover the observations in *Ammalu Ammal v. Namagiri Ammal*(7) were *obiter*, the only question there being the right of recourse against the deceased's estate on a promissory note executed by his executrix as to which the executrix's personal liability was not questioned. We have also been referred to *Krishna Chettiar v. Nagamalli Ammal*(9). That was a case in which the estate of a minor was held liable on a promissory note executed by his mother who was also his guardian but did not describe herself as such. The correctness of the decision in so far as it holds the minor's estate directly liable has been questioned by SADASIVA AYYAR, J., in *Ammalu Ammal v. Namagiri Ammal*(7). It does not, as I understand it, decide that the mother was not personally liable. The view I have taken is entirely in accordance with the English decisions. In *Byles on Bills*, 16th Edn., page 86, the learned author says:

"If persons who fill official situations as Churchwardens, Overseers, Surveyors, Commissioners, Managers of Joint stock banks,

(1) (1911) M.W.N., 143.

(3) (1917) 32 M.L.J., 259.

(5) (1913) 25 M.L.J., 425 (F.B.)

(7) (1917) 33 M.L.J., 634.

(2) (1915) 26 I.C., 356.

(4) (1915) 2 L.W., 188.

(6) (1904) K.B., 1927.

(8) (1912) L.R., 1 Ch., 717.

(9) (1916) 1 L.R., 39 Mad., 915.

and Agents and Secretaries to Companies give bills or notes on which they describe themselves in their official capacity they are nevertheless personally liable"

citing *Rew. v. Petlet*(1) the case of Churchwardens and other cases. Here the first defendant described himself as P.R.P.L.S. hukdar. 'P.R.P.L.' was the vilasam of the whole family. 'S' admittedly signifies chatram so that he described himself as hukdar of the P.R.P.L. chatram, a description which would not affect his personal liability on the note.

A further contention has however been raised that the use of the vilasam P.R.P.L.S. sufficiently indicated that he was acting as an agent within the meaning of section 28 for the whole family who are hereditary hukdars including himself. This would merely render the other members of the family liable as well as himself.

I do not however think that any clear indication can be gathered from this signature of an intention to make any one liable but himself. When the agent of a Chetti firm in executing a negotiable instrument prefixes the firm's *vilasam*, this is a well-understood indication that he is acting only as an agent and has been so recognized by the Courts. But when a man signs as hukdar prefixing the charity *vilasam* it appears to me that on the face of the document there is no clear indication that he contracts for any one but himself. If it were otherwise, it would be necessary to find whether the other hukdars had authorized him to draw hundis on their behalf. There is not even on the facts of the case any reason to find that he intended to draw the hundi on behalf of any one else. He was supervising the chatram and in charge of its funds, and it was *prima facie* for him to arrange for the payment of the money which the chatram had to pay to secure its title to the village.

The plaintiff does not desire to have recourse to the trust property and there is no need to consider whether it could properly be made liable in the present suit. The memorandum must be allowed and the decree varied by releasing the charity properties and making defendants Nos. 3 to 10 liable to the extent of the joint family properties in their hands with costs of the

(1) (1834) 1 Ad. & E., 196.

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plaintiff, first respondent. Time for tender and execution of sale-deed is extended by three months from this date.

SPENCER, J.—I entirely agree. I have no doubt that the first defendant made himself personally liable under the hundi (Exhibit A) and that the decree must be amended by releasing the charity properties and making the joint family assets in the hands of defendants Nos. 3 to 10 liable. To the authorities of *Pasupathi Pillai v. Sundra Aiyer*(1), *Aiyathurai Aiyer v. Sharmasiva Aiyer*(2), *Koneti Naicker v. Gopala Aiyer*(3), I would add that of *Sri Yerruganti Chinna Venkatanarayanan v. Kotagiri Venkata Narasimha*(4). I do not think that *Sundaresa Gurukkal v. Sambasiva Aiyer*(5) was correctly decided. The learned Judge, who decided it in quoting *Koneti Naicker v. Gopala Aiyer*(3), may have been misled by the clerical error consisting in the accidental omission of the 'not' between the words 'intention' and 'to incur personal responsibility' in the judgment of OLDFIELD, J., as reported both in the Law Journal and in the authorized reports.

I am prepared to follow *Krishna Chettiar v. Nagamani Ammal*(6) which does not appear to me to be inconsistent with *Sanka Krishnamurthi v. The Bank of Burma*(7) as it decided upon principles of Hindu Law, that a mother could make her minor son's estate liable for a debt incurred for purposes binding upon him but that there could be no personal decree against the defendant who, in that case, was the minor. I think that cases of guardians and managers of joint Hindu families signing promissory notes on behalf of minors should be distinguished from cases of agents, trustees and executors who sign on behalf of principals, trusts, or estates of deceased persons. The observations of the Judicial Committee in *Konwar Doorganath Roy v. Ram Chunder Sen*(8) to the effect that the manager of a debutter estate had an analogous right to that of the manager of an infant heir was not made with reference to a negotiable instrument.

The signature of the guardian of a minor or of the manager of an infant's estate to a contract is a substitute for the

(1) (1907) 17 M.L.J., 615.

(3) (1915) I.L.R., 38 Mad., 482.

(5) (1915) 2 L.W., 188.

(7) (1912) I.L.R., 35 Mad., 692.

(2) (1911) (1) M.W.N., 143.

(4) (1913) M.W.N., 1005.

(6) (1916) I.L.R., 39 Mad., 915.

(8) (1877) I.L.R., 2 Calc., 341 (P.C.).

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signature of the ward or infant who is himself incapable of contracting and it has the effect of making the minor's estate liable when the contract is made for necessary purposes but the minor cannot be made personally liable thereby; See *Sanka Krishnamurthi v. The Bank of Burma*(1). I do not understand *Krishna Chettiar v. Nagamani Ammal*(2) as going beyond this.

The case of agents signing negotiable instruments is especially provided for in section 23 of the Negotiable Instruments Act (XXVI of 1881). Cases of trustees, executors, churchwardens, etc., who sign promissory notes on behalf of inanimate objects such as trusts, temples, estates of deceased persons and parish vestries, etc., fall into a different class. In such cases there is a very strong presumption that the trustee, executor or churchwarden intended to incur an individual responsibility because he does not represent any other person in law. An incorporated company is however both in England and in India a distinct person and therefore the case of a Director of a company signing a promissory note in the name of the company is on a different footing again. So we find section 89 of the Indian Companies Act VII of 1913 raising a presumption that a person acting under the authority of a company and signing a promissory note in the name of the company means to make the company liable. In the present case not only is there no indication in the hundi that Palaniappa Chetty (first defendant) did not intend to incur personal responsibility but the fact that he signed as hukdar to the chatram makes it clear that he must be liable for the chatram debt, as the chatram, itself has no personal liability. First defendant's legal representatives are also liable to the extent of the family properties in their possession.

K.R.

(1) (1912) 35 Mad., 692.

(2) (1916) I.L.R., 39 Mad., 915.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice
Sadasiva Ayyar and Mr. Justice Spencer.*

1918,
March 6 and
April 4.

THE OFFICIAL ASSIGNEE OF MADRAS AND MESSRS.
WILSON AND COMPANY, APPELLANTS (RESPONDENTS IN
O.S.A. No. 79 OF 1915)

v.

V. P. L. R. M. PALANIAPPA CHETTY, RESPONDENT (APPELLANT
IN O.S.A. No. 79 OF 1915).*

Indian Contract Act (IX of 1872), ss. 239, 247 and 248—Hindu Law—Joint Hindu family—Family business, started during minority of undivided son—Business continued after son became major—Debts incurred in business—Son, whether partner and personally liable and for what debts—Adjudication as insolvent—Son, whether liable to adjudication—Partner, whether son becomes, by helping during minority or taking part in business after majority—Admission of minor to benefits of partnership, meaning of.

A Hindu father, of the Nattukottai Chetti caste, started a business during the minority of his undivided son; it was continued after the son became a major; no public notice of repudiation of partnership (if the son were a partner) was given by the son on his becoming a major: it was found that the son was helping in the business during his minority and was taking an active part in the business after attaining majority. In respect of the debts incurred in the business, both the father and the son were adjudicated insolvents; the son applied to set aside the order of adjudication passed against him, contending that he was not liable to adjudication:

Held (by the Court) that the business should be held to be joint family business of the father and the son;

Held (by WALLIS, C.J., and SPENCER, J., SADASIVA AYYAR, J., dissenting), that the members of a joint Hindu family on attaining majority do not necessarily, by virtue of sections 247 and 248 of the Contract Act or otherwise, become personally liable for, and liable to adjudication in respect of, debts contracted in the joint family business during their minority.

Meaning of "admitted to the benefits of the partnership" in section 247 considered. The fact that the minor helped in the joint family business is not enough to show admission within the meaning of the section.

Samalbhai Nathubhai v. Someshwar (1881) I.L.R., 5 Bom., 38; *In the matter of Haroon Mahomed* (1890) I.L.R., 14 Bom., 189, and other cases considered.

* Letters Patent Appeal No. 267 of 1916.

Lutchumanen Chetty v. Sivaprakasa Mudaliar (1899) I.L.R., 26 Cal., 349, followed.

Per SADASIVA AYYAR, J.—Both by the rules of Hindu Law and by section 248 of the Contract Act (which also applies to this case), the son was personally liable for all the debts in respect of non-payment of which he was adjudicated an insolvent.

Partnership in a family business does not depend upon the consent of the partners in many cases but upon the family being a trading family and the business being conducted for the benefit of the family, persons born into the family from time to time becoming partners as a matter of course.

APPEAL under clause 15 of the Letters Patent against the judgment of ABDUR RAHIM, Offg. C.J., in *Palaniappa Chetty v. The Official Assignee of Madras* (1).

The respondent in this Letters Patent appeal applied before the Judge sitting in Insolvency, Madras, to set aside the order, dated 28th January 1915, adjudicating him an insolvent on the petition of the appellants who were certain creditors and obtained the order adjudicating both the respondent and his father as insolvents. The respondent and his father, who belonged to the Nattukottai Chetti community, were members of an undivided Hindu family; the father started a business in cloth trade in 1910, during the minority of his son (the respondent); the business was continued after the latter became a major in 1914; it appeared that during his minority, the son was helping in the business and continued to take an active part in the business after he attained majority; the family owned a house in Devakottai while the business was carried on in Madras. In respect of debts and obligations which were all incurred during the son's minority the appellants (Messrs. Wilson and Company) who were some of the creditors, applied to the Judge in Insolvency to get both the father and son declared insolvents. The learned Judge passed an order adjudicating both of them insolvents. The respondent applied to the learned Judge to set aside the order adjudicating him an insolvent. The petition being dismissed, the respondent (the son) preferred an appeal to the High Court, which was heard by ABDUR RAHIM, Offg. C.J., and PHILLIPS, J. ABDUR RAHIM, Offg. C.J., held that the respondent was not a partner or personally liable for the debts and was not

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therefore liable to be adjudicated an insolvent, and set aside the order of adjudication passed against him by the Judge in Insolvency. PHILLIPS, J., held that the respondent was liable to be adjudicated an insolvent and that the appeal should be dismissed. The appeal was allowed in pursuance of the judgment of ABDUR RAHIM, Offg. C.J. Against the latter judgment, the Official Assignee of Madras and the creditors (Messrs. Wilson and Company) preferred this Letters Patent appeal.

D. Chamier for the appellant.

K. Ramanatha Shenai for the respondent.

WALLIS, C.J.

WALLIS, C. J.—I agree with my learned brothers that on the facts of this case the business must be taken to have been started by the first defendant as the joint family business of himself and his minor son, the second defendant who subsequently attained majority before the date of the insolvency. This raises the important question whether the second defendant was liable to be adjudicated an insolvent in respect of debts incurred for the purposes of the business during his minority and after he attained majority. As regards debts incurred during his minority, the first question is, can he be made liable under section 248 of the Indian Contract Act, which makes a minor, who has been admitted to the benefits of a partnership within the meaning of section 247, liable on attaining majority for all obligations incurred by the partnership since he was so admitted unless he gives public notice within a reasonable time of his repudiation of the partnership. It has often been pointed out that this section goes much further than the English Law which does not make a partner admitted during minority personally liable after attaining majority except for obligations incurred after that date, but I have not come across any discussion of the reasons which actuated the legislature in enacting this more stringent rule. All the minor members of the family who are in existence when a joint family business is started, and all minors who are subsequently born into it, may in one sense be said to be admitted to the benefits of the partnership; and, if this is the sense in which these words are used in the Act, then on attaining majority they all become personally liable for all the outstanding obligations of the partnership incurred since the foundation of the business or dates of their birth as the case may be. The

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words 'admitted to the benefits of a partnership' appear to have been used owing to the incapacity of minors under the Contract Act to enter into the agreement of partnership described in section 239. On a careful examination of the authorities I do not find any case in which they have been held applicable to the minor members of a Hindu trading family. In *Samalbhai Nathubhai v. Someshwar*(1), the learned Judges observed, in a somewhat similar case, that it was not a case of an ordinary partnership arising out of contract, but a case of joint ownership in a trading business created through the operation of Hindu Law between members of an undivided Hindu family, and that the rights and obligations arising out of such a relationship could not be determined by exclusive reference to the Indian Contract Act. They, also, observed that the partnership created by the descent of an ancestral trade upon the members of a Hindu undivided family has many but not all of the elements existing in an ordinary partnership, and they considered it unnecessary to determine 'whether a Hindu who becomes entitled to a share in a trading business is *ipso facto* and without his own consent involved in all the liabilities of a partner.'

Instead of resting their decision on the provisions of sections 247 and 248 of the Contract Act they decided, as I read their judgment, independently of those provisions that an adult member of a Hindu trading family who left the business to be managed by his elder brother and never repudiated his interest in it must be held personally liable for the debts properly incurred by the brother in the course of the business. The debts so far as appears were incurred after the appellant had attained majority. In *In the matter of Haroon Mahomed*(2) Sir CHARLES SARGENT, C.J., and SCOTT, J., decided that an adult Hindu who had taken some part in a joint family business and allowed it to be carried on without repudiating his interest in it was a partner and personally liable. No reference was made to the Indian Contract Act. In *Vadilal v. Shah Khushal*(3), CHANDAVARKAR, J., observed that "from the mere fact that certain persons are members of a joint family, it does not necessarily follow that they are partners in a firm which only one of them says is his, unless

(1) (1881) I.L.R., 5 Bom., 38.

(2) (1890) I.L.R., 14 Bom., 189.

(3) (1903) I.L.R., 27 Bom., 157 at p. 159.

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it was set up with the help of family funds." But in *Gokal Kastur v. Amarchand*(1), the same learned Judge is reported to have observed during the course of the argument that it had been held in *Samalbhai Nathubhai v. Someshwar*(2) that the Indian Contract Act does not apply to Hindu family business debts; but, in that case as already observed, the learned Judges do not appear to have gone quite so far though they no doubt preferred to dispose of the case independently of the Contract Act. In the course of his judgment CHANDAVARKAR, J., who delivered the judgment of the Court, dealt with the question how far the managing member's contracts made the other adult members personally liable, and decided that they did on grounds altogether independently of the provisions of sections 247 and 248 which were apparently held to be inapplicable. He also questioned the decision in *Chalamayya v. Varadayya*(3), which will be referred to later. Again in *Raghunathji Tarachand v. The Bank of Bombay*(4), CHANDAVARKAR, J., in holding that the minor's share in a joint family business was liable for a debt incurred for the purposes of the business, rested his decision on the principles of Hindu Law, and stated that it was unnecessary to rely on section 247 of the Contract Act. BATCHELOR, J., in his judgment in the same case no doubt was disposed to regard section 247 as applicable, but he was only dealing with the question whether the minor's share was liable, and had not to consider the question whether, if section 247 were held applicable, the minor would not necessarily be made liable under section 248 on attaining majority for all the outstanding obligations of the firm contracted since he acquired an interest by birth.

As regards Calcutta, *Johurra Bibee v. Sreegopal Misser*(5) was decided without reference to the Contract Act. In *Joykisto Cowar v. Nittyanund Nundy*(6), a Bench of three Judges consisting of GARTH, C.J., MARKBY, J., and MITTER, J., decided that the minor's share was liable on the analogy of section 247 of the Indian Contract Act, but did not apparently consider that the minor had by birth been "admitted to the benefits of the

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partnership," within the meaning of section 247 so as to make that section and section 248 applicable. In *Bemola Dossee v. Mohun Dossee*(1) the question was, whether a mortgage of joint family property for the purposes of the joint family business was binding on the joint family, and it was held that it was without reference to the Contract Act.

Lastly in *Lutchumanen Chetty v. Sivaprakasa Mudaliar*(2) SALE, J., held that a Hindu infant who by birth and inheritance acquired an interest in a joint family business did not necessarily become a partner, and could only become a member of the partnership by a consentient act on the part of himself and his partners. The observations in *Sanyasi Charan Mandal v. Ashutosh Ghose*(3) do not refer to the question of personal liability after attaining majority for debts contracted during minority. *Anant Ram v. Channu Lal*(4) was a case of a member of a joint Hindu family entering into a partnership with strangers, and has no bearing on the present question. In *Bishambhar Nath v. Fateh Lal*(5) it was held that a member of a joint Hindu trading family who after attaining majority never took any active part in the business or had any concern with its management directly or indirectly after he attained majority could not be held personally liable for debts incurred by the managing member of the business after he attained majority. Distinguishing *Samalbhai Nathubhai v. Someshwar Mangal*(6) and *In the matter of Haroon Mahomed*(7) and approving *Chalamayya v. Varadayya*(8) STANLEY, C.J., held that the managing member of such a business could not pledge the separate estate which another member might acquire "unless it be that by some consentient act on the part of the latter he has accepted the position of a partner and ratified the transactions out of which the obligation to the creditors arose," citing with approval the observations of SUBRAHMANYA AYYAR, J., in *Chalamayya v. Varadayya*(8).

The position of the minor members of a joint Hindu trading family is described in paragraph 300 of Mr. Mayne's Hindu Law where it is pointed out that, where the business is carried

(1) (1885) 9 Bom. L.R., 1289 at p. 1290.

(3) (1899) I.L.R., 22 Mad., 168.

(5) (1876) I.L.R., 1 Cal., 470.

(2) (1881) I.L.R., 5 Bom., 38.

(4) (1910) I.L.R., 34 Bom., 72.

(6) (1878) I.L.R., 3 Cal., 738.

(1) (1880) I.L.R., 5 Cal., 792.

(3) (1915) I.L.R., 42 Cal., 225, 233.

(5) (1907) I.L.R., 29 All., 176.

(7) (1890) I.L.R., 14 Bom., 189.

(2) (1899) I.L.R., 26 Cal., 349.

(4) (1903) I.L.R., 25 All., 378.

(6) (1881) I.L.R., 5 Bom., 38.

(8) (1899) I.L.R., 22 Mad., 166.

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on in partnership with strangers, there can be no question of the minor members of the family becoming members of such a partnership by birth. This view has been affirmed in the recent Full Bench decision in *Gangayya v. Venkataramiah*(1). He then goes on to consider the case of the business being carried on wholly by members of the family, and takes the view that the minor members do not become partners by birth even in these cases.

The interest of a minor in a joint Hindu family business, whether existing at the date of his birth or founded during his minority, is acquired by virtue of his belonging to the family and does not depend on any agreement on his part or on his admission by the other members of the family to the benefits of the partnership. Consequently I think that such minors are not governed by sections 247 and 248 of the Contract Act. This, I think, is in accordance with the weight of authority and there is no direct authority the other way. Further, I think that the fact of a minor helping in the family business as in the present case does not constitute admission to the benefits of the partnership within the meaning of section 247 of the Indian Contract Act, but may be referred to his position as a minor member of the family.

Dealing with the present case independently of the Contract Act, I think that the second defendant by taking an active part in the business after attaining majority has made himself personally liable for obligations of the business contracted after attaining majority. It is therefore unnecessary to consider what would have been the extent of the managing member's authority to pledge his personal credit if after attaining majority he had taken no part in the management, a point as to which the decisions I have quoted are not easy to reconcile.

As regards obligations contracted during the minority, there is no case in the reports in which it has been attempted to make a member of a Hindu trading family personally liable for such obligations, and to adjudicate him an insolvent merely on the ground that he took an active part in the business after attaining majority or both before and after attaining it. No such result follows in England where a minor partner after attaining majority continues in the partnership. If such an obligation is

(1) (1918) 84 M.L.J., 271.

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to be enforced in India, it can only be on the analogy of section 248 of the Contract Act which as I have shown is inapplicable. I am not prepared to extend the operation of that section beyond the cases which directly fall within it so as to impose for the first time apparently on the members of a Hindu family a personal obligation for debts contracted in the family business during their minority. In this connection I may refer to the observation of SAUSSE, C.J., in *Ramlal Thakursidas v. Lakhmichand Muniram*(1), which was cited with approval by STANLEY, C.J., in *Bishambhar Nath v. Fateh Lal*(2) that "the recognition of a trade as inheritable property renders it necessary for the general benefit of the family that the protection which the Hindu law generally extends to the interests of a minor should be so far trenced upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of that family property; but that infringement is not to be carried beyond the actual necessity of the case." It is in my opinion going beyond the actual necessity of the case to hold members of a Hindu trading family personally liable for debts contracted during their minority, and I am therefore of opinion that the second defendant is only personally answerable for and liable to be adjudicated an insolvent in respect of debts incurred since he attained majority. As there were no such debts, the appeal fails and must, in my opinion, be dismissed with costs.

SADASIVA AYYAR, J.—This Letters Patent Appeal was argued with reference to the following questions:—

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(1) Did the first insolvent debtor V. P. L. R. M. Ramasami Chetty when he started his Madras business in 1910 intend it to be an individual business of his own in which the gains were to be his self-acquisitions and the liabilities were to be his personal liabilities or did he intend it to be a family business in which his minor son V. P. L. R. M. Palaniappa Chetty, the second insolvent, was to be a sharer as the undivided member of the joint Hindu family consisting then of the father and son?

(2) Is a Hindu father of the Nattukottai Chetty caste entitled to begin a trade business in such a manner that it

(1) (1861) 1 Bom. H.C.R., App. LI. (2) (1907) I.L.R., 29 All., 176, 181.

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becomes an undivided family partnership business in which his minor son gets an interest along with his father?

(3) Taking it as the law that a *minor* member of a trading joint family is not liable for the trade debts beyond the extent of his interest in the family property (in other words, that the property which belongs to the minor by collateral inheritance, etc., as his separate property is not liable for such debts) does that same limitation on liability apply also in favour of the adult male members of the family partnership provided they do not take active part in the conduct of the business?

(4) Does section 248 of the Contract Act (or, at any rate, the principle of that section) apply to a member of a joint family who got an interest in the joint family trade when he was a minor and who after attaining majority did not give public notice within reasonable time of his repudiation of his membership in the partnership?

(5) Has the second insolvent petitioner by his conduct after he attained majority and by his non-repudiation of the partnership by public notice become personally liable for all the obligations incurred in the family trade by his father during his (second insolvent's) minority.

Both the father and the son, the two respondents, were adjudicated insolvents on 23rd January 1915 on the petition of a trade creditor about 9 months after the second insolvent attained majority. The second insolvent applied in September 1915 to have the adjudication so far as he was concerned cancelled on the ground that he was not personally liable for the debts incurred by his father in the cloth trade business began in 1910 when he was a minor, and that he was willing that his share in the ancestral family house might also be taken possession of by the Official Assignee for satisfying the creditors.

Mr. Justice BAKEWELL held that, having regard to the customs and manners of Nattukottai Chettis and their usually initiating their minor sons into the family business even before they attain majority, to the father and the son using the same Chetti Vilasam of 4 or 5 initials before their respective names, to the business having been carried on under that Chetti Vilasam and to the second insolvent-debtor's having failed to give notice of the repudiation referred to in section 248 of the Contract Act, the second insolvent was taken in as a member of a family firm by his

father and continued to be such till he was adjudicated insolvent after he attained majority and that he was therefore personally liable for the debts of the firm and that he was properly adjudicated insolvent. On this view, he refused to cancel the second insolvent's adjudication. The question whether section 248 of the Contract Act directly applied or whether the principle of that section could be applied to Hindu family trading firms or whether there should be active carrying on of trade even as regards an adult member of the firm in order to make him personally liable and whether the second respondent did actively carry on such trade after he became an adult have not expressly been dealt with in the learned Judge's judgment. On appeal by the second respondent, the learned senior Judge (against whose judgment this Letters Patent Appeal is filed) held that as the Madras business was not an ancestral business inherited by the father and son, but was started by the father newly in 1910 and as the second respondent who was then a minor could not give his consent to his (father's) treating it as a joint family business and as no definite act (such as "allotment of a share or distribution of profits or something of an analogous character") has been proved to have been done by the father, the evidence was insufficient to show that the second respondent was admitted to the benefits of his father's business as a partner when he was a minor. The learned Judge further held that even if the business was a joint family business, the appellant would not be personally liable; but only his share in the property acquired out of the proceeds of the trade and in the ancestral property would under the Hindu Law be liable for the debts. He relied for this conclusion on the decisions in *Chalamayya v. Varadayya*(1) and in *Sanka Krishnamurthi v. The Bank of Burma*. The other learned Judge (PHILLIPS, J.) held on a consideration of the fact that there was a nucleus of ancestral property on whose credit presumably the business at Madras was launched and on a consideration of the conduct of the father and son, that the business was a joint family business and that under section 248 of the Contract Act the second respondent became fully liable as a partner for the debts incurred during his minority.

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(1) (1899) I.L.R., 22 Mad., 166. (2) (1912) I.L.R., 35 Mad., 692.

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On the questions of fact involved in the case, I am, after the best consideration which I have been able to give to them, inclined to agree with the trial Judge and with PHILLIPS, J., that the father intended it from the very beginning to be a joint family business belonging to himself and his son and that the son accepted the position after he attained majority. The evidence required to arrive at such a conclusion need not be so strong in the case of Nattukottai Chettis whose ancestral properties even are presumed to be involved in all the trade businesses carried on by them [see *Chidambaram Chetti v. Ramaswami Chettiar*(1) and *Arunachalam Chetty v. Velliappa Chetty*(2), *The Bank of Bengal v. K. P. Ramanadhan Chetty*(3) and *The Bank of Bengal v. Ramnatham Chetty*(4)] as in the case of Hindus belonging to a community whose family business is not trade. It appears from one of the affidavits on record that the father and son raised Rs. 3,000 on the mortgage of their ancestral house in respect of certain debts connected with the Madras business and it is significant that his allegation in the affidavit on the other side has not been sought to be denied by the respondents in the evidence given before the court by them. Though a partnership under section 239 of the Contract Act is based on "agreement" and though a minor cannot enter into a valid agreement as regards other matters, section 247 of the Contract Act allows the admission of a minor partner into a business, thus creating an exception to the usual rule as to agreements being valid only as between majors. Further, partnership in a family business does not depend upon the consent of the partners in many cases (see *Anant Ram v. Mansa Ram*(5)) but upon the family being a trading family and the business being conducted for the benefit of the family, persons born into the family from time to time becoming partners as a matter of course. While the acts of a son who assists his father in the latter's separate business may not be evidence of partnership in a case where the father does not belong to a trading community [See *Narasimhappa v. Chinna Kenchappa*(6)], the fact that a Nattukottai Chetti's son assists his father in the trade business carried on under the family Vilasam, both while he was a minor and

(1) (1914) 27 M.L.J., 631.

(3) (1915) M.W.N., 80.

(5) (1916) 32 I.C., 780.

(2) (1914) 27 M.L.J., 654.

(4) A.A.O. No. 319 of 1914.

(6) (1917) 38 I.C., 244.

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after he became a major raises a reasonable inference that he was always a partner with his father in a family business. I think that the right of a Hindu father belonging to a trading community to begin a lawful and ordinary trade business as a joint family business in which himself and his minor sons were to be partners cannot be disputed.

On the above conclusions I think section 248 of the Contract Act applies and the second respondent had become liable (on the date of the creditor's petition) equally with his father for the trade debts contracted by his father from the very beginning of the business.

As regards *Chalamayya v. Varadaya*(1) it was not a case of a debt due by a partnership family business to which section 248 of the Contract Act could be applied but an ordinary family debt incurred by the manager for a family purpose. Though that case could be distinguished on that ground, I wish to state that, in my opinion, the adult junior members of a joint Hindu family and the minor members after they attain majority are *personally* liable and to the extent of their separate properties also (that is, not merely to the extent of their interests in joint family properties) for debts incurred for family necessities by the managing member who is the agent of the family entitled to pledge the credit of all the family for debts incurred for family necessity—I think the texts quoted by SUBRAHMANYA AYYAR, J., at pages 170 and 171 clearly imply such personal and extended liability. I am, with great respect, unable to agree with the learned Judge in his interpretation of those texts. In *Gokal Kastur v. Amarchand*(2) CHANDAVARKAR, J., in considering *Chalamayya v. Varadaya*(1) says at page 1292: "whether that decision laying down that principle was correct according to Hindu Law or not, it is unnecessary to decide in the present case. It is sufficient however to say that we have serious doubts about the correctness of the principle." I am further inclined to doubt the correctness of the decisions quoted to us that the personal liability of the adult male members in a joint family partnership depends on their being proved to have taken an active part in the business. As regards *Sanka Krishnamurthi v. The Bank of Burma*(3) the defendant in that case was a

(1) (1899) I.L.R., 22 Mad., 166.

(2) (1907) 9 Bom. L.R., 1280.

(3) (1912) I.L.R., 35 Mad., 692.

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minor even on the date of the suit and the direct question involved was the right of the minor's mother acting as his guardian to give a power-of-attorney to an agent of such a wide character as to make the minor personally liable for debts incurred by such agent even in fraud of the minor and whether when the guardian herself cannot claim the benefit of indemnity against the minor's property, the creditor can claim any right of subrogation to that benefit. As regards the observations in *Waghela Rajasanji v. Shekh Mashudin*(1) all that they amount to is that the covenant of a mere guardian cannot impose a personal liability on the minor ward. But the personal liability of a minor partner for a family partnership debt is created not by the contract made for him by his guardian as such but by the rules of Hindu Law and of partnership law by which the debt incurred by a major manager of Hindu family partnership business has to be paid personally by the minor members also.

In the result, I would hold that both independently of the Contract Act, that is, by the rules of Hindu Law and by section 248 of the Contract Act also (as I think that that section too applies though it is not necessary to rely on it) the second respondent was personally liable for all the debts in respect of the non-payment of which he was adjudicated an insolvent and I would restore the judgment of BAKEWELL, J., allowing the appeal.

SPENCER, J. SPENCER, J.—The question for our decision is whether the respondent, who belongs to a Nattukottai Chetti trading family is personally liable for the trade debts of that family incurred before he attained majority, or whether he is not liable at all personally. The respondent attained majority in April 1914 and was adjudicated insolvent in January 1915.

If he was a partner, it will follow from section 249 of the Contract Act that he is personally liable for the ordinary debts of the firm incurred while he was a partner.

Persons, who by their words or conduct lead others to believe them to be partners and persons who get credit by allowing themselves to be represented as partners incur all the responsibility of partners under sections 245 and 246.

Minors in this country are incapable of becoming partners in their own right, as by section 11 of the Contract Act they are

(1) (1887) I.L.R., 11 Bom., 551.

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declared to be not competent to contract. But they may be admitted under section 247 to the benefits of partnership, upon which their share becomes liable although they incur no personal liability. Such persons on attaining majority become *ipso facto* liable under section 248 for all obligations incurred by the partnership from the date of their admission to the benefits, unless they publicly repudiate the partnership.

Such being the general effect of the Contract Act on the question, I will first consider the respondent's liability for the firm's debts incurred during his majority. In Nattukottai Chetti families there is ordinarily no distinction made between the trade assets and the family property (vide *Chidambaram Chetti v. Ramaswami Chettiyar*(1), and *Arunachalam Chetti v. Velliappa Chetti*(2). It has not been shown that in this particular family any family fund was kept apart from the trading capital. No attempt has been made to prove that the respondent at any time repudiated the partnership. There is evidence that the respondent both when a minor and when adult, took an active part in the business of the shop, sitting by the safe, looking after the accounts, collecting money, and signing receipts for the delivery of bales of piece-goods. There were 4 or 5 gumastahs in the shop, but the respondent, unlike them, received no salary for the work he did in his father's business.

The practice of Nattukottai Chetti firms trading under trade initials has been frequently recognised in decisions of this court. One of such decisions is that of *Mungumal Jessa Singh v. A. L. V. R. C. T.*(3). The initials under which this family traded appear to have been V. P. L. R. M. The affidavit presented by the respondent to the Insolvency Court commenced thus:—

"I, V. P. L. R. M. Palaniyappa Chetti, son of V. P. L. R. M. Ramaswami Chetti, a Hindu of the Nattukottai Chetti caste, aged about 19 years, * * * do hereby solemnly and sincerely affirm, and say as follows," and was signed in Tamil by the respondent, "V. P. L. R. M. Palaniyappa Chetti," thus denoting his consciousness that he belonged to the V. P. L. R. M. firm of which his father, who prefixed the same initials to his name, was a partner.

(1) (1914) 27 M.L.J., 631.

(2) (1914) 27 M.L.J., 654.

(3) (1908) 4 M.L.T., 309.

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I think that the respondent's conduct in taking an active part in the business after becoming a major was such as to lead others to act on the belief that he was a partner. He was also in the words of MELVILLE, J., in *Samalbhai Nathubai v. Someshwar*(1), a "joint owner of a trading business created through the operation of Hindu Law between the members of an undivided Hindu family." I accept the principle laid down by CHANDAVARKAR, J., in *Vadilal v. Shah Khushal*(2), that mere co-parcenership does not give rise to a presumption that a business carried on by one of the co-parceners in a joint family is a family business. It must also be shown that the business was set up with the aid of family funds. This follows in the present case from the fact that the respondent belongs to a Nattukottai Chetty trading family and that in such families the decisions in *Chidambaram Chetty v. Ramaswami Chettiyar* and in *Arunachalam Chettiyar v. Velliappa Chetty*(3), quoted above recognise the existence of a certain custom. It has further been shown that the respondent took an active part in his father's business. The onus therefore would lie on him of proving that he was not a partner during his majority. I think that both under Hindu Law and under the Contract Act the respondent would be personally liable for partnership debts incurred after he came of age. It is however conceded that all the debts concerned in this adjudication were debts incurred during the respondent's minority.

The question of the respondent's personal liability for debts incurred during his minority is a more difficult one. His share is no doubt liable under Hindu Law. (*Vide Raghunathji Tarachand v. The Bank of Bombay*(4). If he was not a co-parcener in a trading family, his share would still be liable if he was admitted while a minor to the benefits of partnership (section 247 of the Contract Act), but not otherwise.

But as I observed in *Gangayya v. Venkatramayya*(5), a definite and conscious act on the part of the other partners is needed for admitting a minor to the benefits of partnership. I do not find that it has been anywhere defined what are the acts which

(1) (1881) I.L.R., 5 Bom., 33.

(2) (1903) I.L.R., 27 Bom., 157.

(3) (1914) 27 M.L.J., at pp. 631, 654.

(4) (1910) I.L.R., 34 Bom., 72.

(5) (1918) 34 M.L.J., 271.

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would constitute admission to the benefits of partnership. Mr. Justice ABHUR RAHIM considers that it implies some definite act such as the allotment of a share or the distribution of a part of the profits or something of an analogous character. In *Anant Ram v. Channu Lal*(1), there is an observation that admission to partnership can only be with the unanimous consent of those who are already partners. I am clearly of opinion that admission to the benefits of partnership means something more than the mere incident of birth in a particular family. The equivocal acts of the respondent during his minority would not have the effect of investing him with the responsibility of a partner. I think that sections 245 and 246 of the Contract Act can be applied only to the conduct of persons who are competent to contract and not to minors. Mr. Mayne in his Hindu Law says that one of the principles of partnership in England, which is that a partner must be a person to whom the other partners are willing to delegate their authority and capable of binding them by their acts, is the same in India. This would naturally exclude minors. Also no new persons can be introduced into the management without special agreement. A manager is chosen for his special aptitude for business. So also it would appear that not every minor born in a trading family would, as a matter of course, be admitted to the benefits of partnership, but that there must be some agreement on the part of the partners to admit him, some "consentient act" as Mr. Justice SALE calls it in *Latchumanan Chetty v. Sivaprakasa Mudaliar*(2).

In the present case, there being no proof of the respondent's admission to the benefits of partnership during his minority, he is not personally liable under section 248 of the Contract Act for debts incurred by the firm during his minority now that he has attained majority.

Equally he is not personally liable under Hindu Law for debts contracted by the manager of the firm during his minority for it is settled law that a personal liability cannot be imposed on a minor by the covenant of his guardian and manager, *vide Waghela Rajsanji v. Sheikh Masludin*(3), *Maharana Shri Ranmal*

(1) (1903) I.L.R., 25 All., 378.

(2) (1889) I.L.R., 26 Calc., 349.

(3) (1887) I.L.R., 11 Bom., 551.

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Singji v. Vadilal Vakhat Chand(1) and *Sankakrishnamurthi v. The Bank of Burma*(2).

In the result, I agree with the learned Chief Justice that the respondent could have been declared insolvent in respect of debts, if any, incurred during his majority, but that debts incurred before that event should not be taken into account in the adjudication proceedings.

King and Partridge, Solicitors for appellant.

P. Kandasami, Solicitor for respondent.

K.B.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield,
Mr. Justice Sadasiva Ayyar, Mr. Justice Spencer and
Mr. Justice Bakewell.*

VENKATA LASHMINARASAMMA (PLAINTIFF), APPELLANT

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), RESPONDENT.*

Grant, construction of—Grant of land by Government as bounded by a non-navigable river—Right of grantee to half the bed of the river, presumption as to—Onus of proving contrary, on grantor.

Held by the Full Bench:—(1) that in the case of a grant of land by Government described as bounded by a non-navigable river, the presumption (which may be strong or weak according to circumstances of each case) is that the grant passes to the grantee the bed of the river *ad medium filum aquae*, and

(2) that the onus of showing the contrary is on the grantor.

SECOND APPEAL against the decree of A. SAMBAMURTI AYYAR, the Temporary Subordinate Judge of Guntur, in Appeal No. 187 of 1915, preferred against the decree of V. PURNAIYA, the Additional District Munsif of Bapatla, in Original Suit No. 10 of 1913.

In this suit the plaintiff, a trustee of a certain temple, alleged that the defendant, viz., the Government, granted to the temple, as inam, the lands in dispute, on both the banks of the river

(1) (1896) I.L.R., 20 Bom., 61

(2) (1912) I.L.R., 35 Mad., 692.

* Second Appeal No. 1924 of 1916.

Tungabhadra, that he had possession of the same for a long time, including the entire bed of the river, by rearing babool trees, grass, etc., thereon, and that the defendant unlawfully trespassed upon the bed of the river alleging that it belonged to Government. The plaintiff prayed for a declaration of his ownership as to the entire bed of the river within the limit of his inam lands, for the possession of the same and for injunction. The defendant denied the plaintiff's right to the bed of the river and pleaded that the inam title-deed did not convey to the plaintiff the bed of the river and that the same was always owned and enjoyed by the Government. Both the lower Courts dismissed the plaintiff's suit. The plaintiff preferred this second appeal.

T. V. Venkatarama Ayyar and *R. Rajagopala Ayyar* for appellant.

V. Ramesam, the acting Government Pleader, for respondent.

This second appeal coming on for hearing in the first instance before SESHAGIRI AYYAR and NAPIER, JJ., the following Order of Reference to a Full Bench was made by:—

SESHAGIRI AYYAR, J.—This is a suit by the trustee of a temple for a declaration that the lands belong to him and that the Secretary of State is not entitled to put up the grass thereon to auction or to interfere in any manner with the rights of the plaintiff. The plaint as originally instituted contained the statement that the inam granted to the temple comprised lands on both sides of the Tungabhadra river and that consequently the entire bed of the river belonged to the temple. It has been found by the Subordinate Judge, and we see no reason for not accepting that finding, that the boundary of the inam village is the river itself and that no lands on the other side of the river were granted to the temple. On this finding it has been argued before us that the plaint temple is entitled to half the bed of the river. The learned Government Pleader took exception to this change of case on the part of the plaintiff; but we think that in the circumstances of the case the plaintiff should not be refused relief because he put his case too high.

The point for consideration therefore is where a grant is made fixing one of the boundaries of the lands granted as a river, whether the grantee is entitled to half the bed of that river. The decisions of the English Courts seem to be uniform in this

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respect. *Lord v. The Commissioners for the City of Sidney*(1), *David Maclaren v. Attorney-General of Canada*(2), and other cases referred to in these two decisions have accepted the principle that where the lands are bounded by a river the grantee is entitled to lauds *ad medium filum aquae*. In *City of London Land Tax Commissioners v. Central London Railway*(3), the House of Lords applied this principle to the case of highways. All the learned Lords who took part in the decision affirm that it is an established principle of law that the

"ownership of frontages on either side of the street extended *ad medium filum viae*, just as, had the division or boundary between two subjects been a stream, the ownership of the riparian proprietors would have extended *ad medium filum fluminis*."

In *Whitmores (Edenbridge) Limited v. Stanford*(4), this rule was extended to artificial channels. In this country, *Balbir Singh v. The Secretary of State for India in Council*(5) accepts the principle of the English decisions. *Powel v. Powell*(6) is to the same effect. In *Secretary of State for India v. Kadirikutti*(7) the learned Judges say that the rule that riparian proprietors are entitled to the bed of the river *ad medium filum* is not applicable to navigable rivers. That is an indication that if it is a non-navigable river the principle of English Law would be applied in this country. In *S. Sundaram Ayyar v. The Municipal Council of Madura and The Secretary of State for India in Council*(8) BASHYAM AYYANGAR, J., extended the doctrine to highways. The matter was recently discussed by three Judges of this Court in *The Secretary of State for India v. Janakiramaaya*(9). Mr. Justice OLDFIELD seems to doubt whether the principle referred to is applicable to India. Mr. Justice SADASIVA AYYAR, on the other hand, apparently sees no objection to the applicability of that doctrine to India. Mr. Justice BAKEWELL expressed no opinion on that question. The learned Government Pleader referred us to two cases decided by the Judicial Committee as throwing some doubt upon the applicability of a similar principle to Indian conditions. In *Sri Balusu*

Ramalakshamma v. The Collector of the Godavari District(1) the decision turned upon the fact that the ownership of the bed of the river was not the question raised for decision in the Courts below. In rejecting the contention which was put forward for the first time before the Board, Lord HOBHOUSE made use of these observations:

"The result is that their Lordships, having grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Godavari, would require to know much more about the river in question and the mode in which it has been dealt with, before dealing as to the presumption or its rebuttal."

In a more recent case reported in *Srinath Roy v. Dinabhandu Sen*(2), in which the question related to the right of fishery possessed by a riparian proprietor, Lord SUMNER in delivering the judgment of the Judicial Committee says at page 531, after reviewing at considerable length the English and American Law on the subject,

"In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which that rule is to be adapted."

Having regard to the observations of the Judicial Committee and to the difference in opinion between two learned Judges of this Court we do not think it desirable that we should finally dispose of this matter. The question is of very great importance to the Government as well as to private proprietors, and we think it desirable that the opinion of the Full Bench should be invited on the subject. We therefore propose the following questions for the opinion of the Full Bench:—

Whether when Government makes a grant in India of a village which is described as bounded by a non-navigable river the right of the grantee extends to half the bed of the river, and

Whether the onus of proving that the grant did not cover the bed of the river is on the grantee or on the grantor.

This last question has become necessary having regard to the observations of Lord HOBHOUSE in *Sri Balusu Ramalakshamma*

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(1) (1859) 12 Moo. P.C., 473.

(2) (1914) A.C., 253.

(3) (1888) 13 A.C., 364.

(4) (1909) 1 Ch., 427.

(5) (1900) I.L.R., 22 All., 96.

(6) (1916) 14 All. L.J., 684.

(7) (1880) I.L.R., 13 Mad., 369.

(8) (1902) I.L.R., 25 Mad., 625.

(9) (1915) 29 M.L.J., 389.

(1) (1899) I.L.R., 22 Mad., 464. (2) (1915) I.L.R., 42 Calo., 489 at p. 531.

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v. *The Collector of the Godavari District*(1) wherein he says the question of presumption or its rebuttal in a country like India would depend upon considerations different from those which obtain in England.

ON THIS REFERENCE.—

T. V. Venkatarama Ayyar and R. Rajagopala Ayyar for appellant.—The first question must be answered in the affirmative. In English law and in the law of the Colonies the presumption is to the effect that the grantee owns half the bed of the river; see *Lord v. The Commissioners for the City of Sidney*(2) and *David McLaren v. Attorney-General of Canada*(3), though in Quebec there was a statute resembling Madras Act III of 1905. This principle has been applied in the case of a highway in *City of London Land Tax Commissioners v. Central London Railway*(4) and in the case of a non-navigable creek in *Kali Kissen Tagore v. Jodoo Lal Mullick*(5); see also *Hunooman Doss v. V. Shama-churn Bhutta*(6), *Bhageeruthee Dabee v. Greesh Chunder Chowdry*(7), *Doss on Riparian Rights*, pages 113 and 114, *Khagendra Narain Chowdury v. Matangini Debi*(8), *Peacock on Easements*, Second Edition, pages 26 and 215, *Bengal Regulation XI of 1825*, section 4 (3) (based on the common law of the country) and *Micklethwaite v. Newlay Bridge*(9). The last case is followed in *Balbir Singh v. The Secretary of State for India*(10); see also *Doe dem Seebkristo and others v. The East India Company*(11), *Powel v. Powel*(12), *Baban Mayacha v. Nagu Shrivacha and others*(13), *Secretary of State for India v. Kadirikutti*(14) and *S. Sundram Ayyar v. The Municipal Council of Madura and the Secretary of State for India in Council*(15) (as to highways). There is nothing against this view in *Meenakshi Amma v. Secretary of State for India*(16), *Srinath Roy v. Dinabhandu Sen*(17) and *Sri*

- (1) (1899) I.L.R., 22 Mad., 464. (2) (1859) 12 Moo. P.C., 473 at pp. 497, 498.
(3) (1914) A.C., 258 at pp. 272, 273, 275, 276, 279.
(4) (1888) L.R., 13 A.C., 364 at pp. 371, 379.
(5) (1879) 5 C.L.R., 97 (P.C.) at p. 100. (6) (1862) 1 Hay, 426 at p. 427.
(7) (1863) 2 Hay, 541 at p. 547. (8) (1890) I.L.R., 17 Cal., 813 at p. 814.
(9) (1886) 33 Ch. D., 133 at p. 144. (10) (1900) I.L.R., 22 All., 96.
(11) (1866) 6 M.L.A., 267 at p. 288. (12) (1818) 14 A.L.J., 684.
(13) (1878) I.L.R., 2 Bom., 19 at p. 40.
(14) (1890) 1 L.R., 13 Mad., 369 at pp. 373, 374.
(15) (1902) I.L.R., 25 Mad., 635.
(16) (1914) 26 M.L.J., 385 at pp. 388, 389.
(17) (1915) I.L.R., 42 Cal., 489 at p. 525 (P.O.).

Rahusu Ramalakshamma v. The Collector of Godavari District(1). See also *The Secretary of State for India v. Janakiramayya*(2), *Secretary of State for India v. Maharaja of Bobbili*(3) and *The Secretary of State for India v. Ambalavana Panarasannadhi*(4). There is nothing in Indian conditions to show that the rule or presumption of English law should not apply.

V. Ramesam for respondent.—The question referred to does not arise as a whole village was not granted as inam but only a portion of a ryotwari village.

[T. V. Venkatarama Ayyar—Even then my argument is the same.]

In the case of a grant of a whole village we may presume an intention in Government not to reserve any rights to itself, but not when the inam is a portion of a ryotwari village. It is always a question of intention and the English technical rule of construction raising a presumption need not be applied in India. If a property is said to be bounded by a certain land, that land is outside the property and does not belong to it. Similarly in this case; *Micklethwaite v. Newlay Bridge*(5). *Marquis of Salisbury v. Great Northern Railway Co.*(6) lays down the circumstances when a grant does not pass half the highway; similarly *Simpson v. Dendy*(7), *Plumstead Board of Works v. British Land Company*(8) and *Pryor v. Petre*(9), see also *Ecroyd v Coulthard*(10) and *Lee v. Jack*(11), as to what exactly the rule is and when it arises. The Bengal Regulation XI of 1825 does not support the appellant's contention; moreover there is no such Regulation in this Presidency. In *Doe dem Seebkristo and others v. The East India Company*(12) and *Kali Kissen Tagore v. Jodoo Lal Mullick*(13) there is no decision on the present question. Madras Act III of 1905 does not really decide this question as it saves private ownership, if any, in rivers. In this Presidency beds of rivers are vested in Government; see *Narayanasawmy Naidu v. Secretary*

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- (1) (1899) I.L.R., 22 Mad., 464. (2) (1915) 29 M.L.J., 389 at pp. 392, 399.
(3) (1916) 30 M.L.J., 163. (4) (1917) 33 M.L.J., 415 at p. 428.
(5) (1886) 33 Ch. D., 133 at pp. 144, 145, 150.
(6) (1858) 5 C.B., N.S., 173; 141 E.R., 69 at p. 84.
(7) (1860) 8 C.B., N.S., 433; 141 E.R., 1233 at p. 1249.
(8) (1874) L.R., 10 Q.B., 16 at p. 24. (9) (1894) 2 Ch., 11 at p. 16.
(10) (1897) 2 Ch., 554. (11) (1879) L.R., 5 Eq., 264 at p. 273.
(12) (1856) 6 M.L.A., 267 at p. 288. (13) (1879) 5 C.L.R., 97 (P.C.) at p. 101.

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of State for India(1), *Krishna Bhatta v. Secretary of State for India*(2), *Meenakshi Amma v. Secretary of State for India*(3), *Ambalavana Pandarasannadhi v. Secretary of State*(4) and *The Secretary of State for India v. Janakiramayya*(5). The case of *Sree Rajah Oppalapaty Jogee Jaganadheruze v. Sub-Collector of Rajahmundry*(6), is an old decision of the Sudder Court. In *Durga Prasad Singh v. Rajendra Narain Bagchi*(7). Doss, J. holds that it is a question of intention when there is a difference between description and boundaries. That is the rule that ought to be applied in India. *Maclaren v. Attorney-General of Canada*(8), speaks of the presumption as an "English presumption" and does not treat it as one applicable everywhere. In *Farnham on Waters*, Volume I, pages 165 to 167, it is said that the presumption in England has a long history dating from the time of Edward the Confessor and Henry III. There is no such history in India. Madras Act III of 1905 shifts the onus from the State. English rules of construction do not apply to the construction of Crown grants in India; *Secretary of State for India v. Maharaja of Bobbili*(9) and *Secretary of State for India v. Ambalavana Pandarasannadhi*(10). He distinguished *Lord v. The Commissioners for the City of Sidney*(11), *Hunooman Doss v. Shamachurn Bhutta*(12), *Bhageeruthee Debea v. Greesh Chunder Chowdhry*(13), *City of London Land Tax Commissioners v. Central London Railway*(14) and *Powel v. Powell*(15).

T. V. Venkatarama Ayyar was not called upon to reply.

The OPINION of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—In Bengal Regulation XI of 1825, the legislature, acting, as recited in the preamble, on reports from the law officers as to the provisions of the Muhammadan and Hindu laws and on a consideration of the decisions of the Sudder Adalat, proceeded in section 4 to make a distinction as to the ownership of *churs* in navigable and non-navigable rivers, which, in the opinion of Sir MICHAEL WESTROPP, C.J., in *Baban Mayacha v. Nagn*

- (1) (1913) 24 M.L.J., 36. (2) (1913) 25 M.L.J., 161.
(3) (1914) 26 M.L.J., 335 at p. 404. (4) (1911) 1 M.W.N., 119.
(5) (1915) 29 M.L.J., 389 at pp. 399, 420, 422.
(6) (1858) Mad. S.A.D., 188. (7) (1910) I.L.R., 37 Cal., 293.
(8) (1914) A.C., 258 at pp. 263, 272.
(9) (1916) 30 M.L.J., 163. (10) (1916) 30 M.L.J., 415.
(11) (1850) 12 Moo. P.C., 473 at p. 496.
(12) (1862) 1 Hay, 426 at p. 427. (13) (1863) 2 Hay, 541 at p. 547.
(14) (1888) L.R., 13 A.C., 364. (15) (1916) 14 A.L.J., 684.

Shravucha and others(1) raised an inference, though not conclusive, that the beds of non-navigable rivers are generally private property. The observation of the Judicial Committee in *Doe dem Seebkristo and others v. The East India Company*(2) appears to proceed upon the same view. The law was laid down in the same way in *Rajah Neelanund Singh and others v. Rajah Teknarain Singh*(3), and by the Calcutta High Court in *Hunooman Doss v. Shamachurn Bhutta*(4), and *Bhageeruthee Debea v. Greesh Chunder Chowdhry*(5), where the Court held that "by the common law of this country the right to the soil of the bed of a river, when flowing within the estates of different proprietors belongs to the riparian owners, *ad medium filum aquae*."

In this Presidency the decisions of the Sudder Court in *Sree Rajah Oppalapaty Jogee Jaganadheruze v. Sub-Collector of Rajahmundry*(6) and of the High Court in *Subbaya and others v. Iarlagadda Ankinidu*(7), were to the same effect. It is only in the case of navigable rivers that the presumption has been laid down the other way by the Judicial Committee in *Ekwori Sing v. Hiralal Seal*(8), *Felix Lopez v. Muddan Thakoor*(9) and in *Nogender Chunder Ghose v. Mahomed Esof*(10) while in *Forbes v. Meer Mahomed Hussein*(11) it appears to be assumed that in the case of non-navigable rivers the ownership of the bed is in the riparian owners. The decision of the Judicial Committee in *Kali Kissen Tagore v. Jodoo Lal Mullick*(12) and in *Khagendra Narain Chowdhry v. Matangini Debi*(13) appears to proceed on the same basis. In *Sri Balusu Ramalakshamma v. The Collector of the Godavari District*(14) where the appellant before them sought to base her title to the *lanka* in question on the presumption arising from the fact that she was the owner of both banks of the river, their Lordships observed that such a claim was not made by the pleadings or by the issues, and was one about which much evidence might and probably would have

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- (1) (1878) I.L.R., 2 Bom., 19 at p. 40.
(2) (1856) 6 M.I.A., 267 at p. 288. (3) (1862) Cal. S.D.A. Reports, 160.
(4) (1862) 1 Hay, 426. (5) (1863) 2 Hay, 541.
(6) (1858) Mad., S.A.D., 188. (7) (1863) 1 M.H.C.R., 255.
(8) (1868) 2 B.L.R., 4. (9) (1870) 5 B.L.R., 521.
(10) (1872) 10 B.L.R., 431. (11) (1873) 12 B.L.R., 216.
(12) (1879) 5 C.L.R., 97. (13) (1880) I.L.R., 17 Cal., 814.
(14) (1899) I.L.R., 22 Mad., 464 (P.C.).

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been given if it had been raised; and they accordingly declined to discuss the question because it was not relevant to the case made by the plaintiff, and merely observed that, having grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Gōdāvari, they would require to know much more about the rivers in question before deciding as to the presumption or its rebuttal. This reservation, in a case in which the question in their Lordships' opinion did not arise and in which the authorities above referred to were apparently not cited, cannot be taken as a ruling that the presumption is generally inapplicable in the case of non-navigable rivers in this part of India. Certain *dicta* as to the ownership of river-beds were also cited from recent cases in this Court, but they are far from uniform, and in none of these cases was the present question considered in the light of the authorities. We therefore consider it unnecessary to refer to them. The result of the authorities in our opinion is that, as regards a grant of land in India described as bounded by a non-navigable river, the onus of showing that the grant did not cover the bed *ad medium filum aquae* is on the grantor. The presumption may be strong or weak according to the circumstances of the particular case, and the amount of evidence required to rebut it will vary accordingly. We do not think it desirable to attempt to lay down any more definite rule. Reference has been made to the Madras Land Encroachment Act (III of 1905), but that Act cannot affect the pre-existing rights, if any, of the grantee in this case.

N. R.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield
and Mr. Justice Seshagiri Ayyar.*

SRIMANTH RAJAH YARLAGADDA MALLIKHARJUNA
PRASADA NAYUDU BAHADUR ZEMINDAR GARU
(PLAINTIFF), APPELLANT

1918,
February 4
and July
15 and 22.

v.

MATIAPALLI VIRAYYA AND OTHERS
(DEFENDANTS NOS. 1 TO 24), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XXI, r. 63, applicability to claims to property attached before judgment—O. XXXVIII, r. 5.

Held by the Full Bench that Order XXI, rule 63, Civil Procedure Code, applies also to orders on claims preferred to property attached before judgment. Ramanamma v. Bathula Kamaraju (1918) I.L.R., 41 Mad., 23, overruled.

SECOND APPEAL against the decree of K. KRISHNAMA ACHARIYAR, the Temporary Subordinate Judge of Masulipatam, in Appeal No. 132 of 1915, preferred against the decree of G. G. SOMAYAJULU Garu, the Principal District Munsif of Masulipatam, in Original Suit No. 622 of 1912.

The facts are given in the first two paragraphs of the Order of Reference of KRISHNAN, J., to the Full Bench.

C. V. Anantakrishna Ayyar, Vakil, for appellant.

C. Rama Rao for P. Narayanamurti, Vakil, for respondent.

This Second Appeal coming on for hearing in the first instance before BAKEWELL and KRISHNAN, JJ., the following Orders of Reference to a Full Bench were delivered by—

KRISHNAN, J.—The facts necessary for this reference may be briefly stated as follow: The first defendant who is the appellant before us brought a suit for money against defendants Nos. 2 to 4 and when that suit was pending he obtained an order under rule 6, Order XXXVIII, of the Code of Civil Procedure, for attachment before judgment and attached the plaint properties. The plaintiff intervened and claimed the properties as belonging to him by reason of a prior purchase from the same defendants. The claim was enquired into and an order was passed in March 1910 in plaintiff's favour disallowing the attachment. In 1912 first

* Second Appeal No. 1561 of 1916.

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defendant obtained his decree for money against defendants Nos. 2 to 4 and he then proceeded again to attach the same properties. He had taken no steps to contest the order on the claim petition nor has he done so up to date. Nevertheless when plaintiff again filed a claim against the second attachment his claim was dismissed and the attachment was confirmed. For some reason not apparent the Court failed to consider the effect of the first order. Plaintiff has filed this suit under rule 63 of Order XXI of the Code of Civil Procedure for a declaration of his title and for setting aside the order of attachment.

Both the lower Courts have decreed the plaintiff's suit without going into the merits on the ground that the order on the first claim petition was conclusive between the parties because that order had decided in favour of plaintiff's title and against the first defendant's right to attach. In second appeal it is argued before us that as that order was passed on a claim to property attached *before judgment* it is of no force now and that it is not an order to which rule 63 applies or which need be set aside.

The appellant's vakil has relied on the ruling in *Ramanamma v. Bathula Kamaraju*(1) which certainly supports him. But on the other side our attention has been drawn to the decision in *Muthukumara Chettiyar v. Alagappa Chettiyar*(2) where my learned brother Mr. Justice SPENCER and I were of opinion that rule 63 did apply to cases of attachment before judgment. As there is a clear conflict between the two decisions on the point before us and as I still adhere to the view expressed by us in the second appeal, I consider that the question should be referred to the Full Bench.

As our attention was not drawn to the ruling in *Ramanamma v. Bathula Kamaraju*(1) when we were hearing *Muthukumara Chettiyar v. Alagappa Chettiyar*(2) we then stated our reasons for our view only very briefly. It is necessary now to state my reasons more fully as, with all respect to my learned brothers who decided *Ramanamma v. Bathula Kamaraju*(1), I am unable to accept their view that rule 63 is inapplicable in cases of attachment before judgment.

The decision on the point turns upon the construction of rule 63 of Order XXI and on the meaning to be attached to

(1) (1918) I.L.R., 41 Mad., 23.

(2) (1917) 8 L.W., 518.

the word 'investigated' in rule 8, Order XXXVIII. The wording of rule 63 is clearly wide enough to include claims before decrees, for the rule speaks of "claims and objections preferred" without restricting them in any way to claims after decree. The change in the wording of that rule from what it was in the corresponding section 283 of the Old Code of 1882, by omission of all reference to sections 280 to 282 seems to indicate that it was intended to widen the scope of the rule and to make it clearer that claims of all kinds were included in it. This is the view taken in *Bisheshar Das v. Ambika Prasad*(1) and I agree with it in spite of the dissent from it in *Ramanamma v. Bathula Kamaraju*(2). As rule 63 is an enabling rule which gives a right of suit to parties defeated in claim proceedings which they will not otherwise have, I am inclined to think that we should not unduly restrict its scope. If the rule is held not to apply, the result seems to me to be that the original order becomes final without being subject to the result of a suit; I fail to see on what ground it can be treated as of no force as argued. It is an order between parties by a competent Court deciding that a certain property can or cannot be attached for realizing by sale the amount of the decree that may be passed and as such, it seems to me it is binding on the parties thereto unless set aside. Considering that the two sets of orders, those before and those after decree are passed after similar enquiries, no distinction should be made between them as to their effect unless the legislature has clearly indicated a distinction.

Such a distinction is sought to be made out by reference to the word 'investigated' in rule 8 of Order XXXVIII. It is argued that the word refers only to the enquiry on the claim and nothing more, in other words only rules 58 and 59 of Order XXI apply. Now it will be seen that the heading of the subdivision of Order XXI where these rules are is "investigation of claims and objections" and under this heading we have grouped all the rules from 58 to 63. It is a reasonable inference from this that the Legislature treated them all as steps in 'investigation' or parts of it. If we adopt a restricted meaning for the word 'investigated,' rules 60 to 62 will not be included

(1) (1915) I.L.R., 37 All., 575.

(2) (1918) I.L.R., 41 Mad., 23.

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in it as they deal with orders to be passed after the 'investigation' proper is completed; and as a result we will have to hold that the Legislature has not made any provision for orders to be passed in claims under that rule as there is no other provision with regard to it except rule 8. Such a construction seems to me to be hardly right. If we consider that the order in the present case was passed under rule 60, Order XXI, read with rule 8 of Order XXXVIII, as I think we should, it follows that rule 63 applies to it as being an order under rule 60.

The restricted meaning is adopted in *Ramanamma v. Bathula Kamaraju*(1) as the learned Judges considered that it would be unfair and inexpedient to drive a plaintiff into a fresh litigation which might eventually turn out to be a futile proceeding if he failed to secure a decree. It may be remarked that even in cases of attachments after decree, the suit under rule 63 may turn out to be futile if the first decree is reversed on appeal or Second Appeal and plaintiff's suit is dismissed, and yet the Legislature has clearly given the right of suit. I can see nothing unfair in making a person sue if he wishes to insist on his right to attach a certain property in execution of his anticipated decree in spite of the adverse order against him in the claim. If his second suit turns out to be futile because he fails to secure a decree, the fault is his own in bringing an unfounded suit in the first instance. It seems to me however these are not relevant considerations in deciding whether a suit lies under rule 63, nor can the wording of the Article 11 of the Limitation Act be used to decide the question. If that article does not apply as to which I express no opinion it will be necessary to find what article does when the question arises.

A similar question as the one before us which arose in an attachment before judgment when the Code (Act VIII of 1859) was in force was considered by Sir BARNES PEACOCK, C.J., and Mr. Justice MITTER; the learned Judges held on a construction of sections 86 and 246 of that Code which were the corresponding provisions then in force, that the words "investigated in the same manner as a claim to property attached in execution of a decree" incorporated all the provisions of section 246 and gave the remedy by suit, which was the only and proper remedy, to

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contest the order on the claim. This was decided in 1868 [*Kartick Chunder Mookerjee v. Mookta Ram Sircar*(1)] and till the decision in *Ramanamma v. Bathula Kamaraju*(2) no ruling has been cited to us to the contrary. I feel therefore fortified in my view that rule 63 does apply to claims before decrees as well. But on account of the conflict of authority in this Court the question must now be decided by the Full Bench.

I would submit the case for the opinion of the Full Bench on the following question:—

"Does rule 63 of Order XXI, Civil Procedure Code, apply to orders on claims preferred to property attached before judgment?"

BAKEWELL, J.—I agree.

BAKEWELL, J.

ON THIS REFERENCE—

C. V. Anantakrishna Ayyar for appellant.—The question must be answered in the negative. As regards claims arising on attachments before judgment, it is only the manner of investigation prescribed by Order XXI, rule 63, and not the finality mentioned therein that applies. One year's period of limitation provided by Article 11 (a) of the Limitation Act of 1908 does not apply, but Article 120 applies, for Article 11 (a) refers to attachments in execution of a decree. It is open to the unsuccessful claimant to file a suit, but he is not bound to do so. The order has life only till a decree is passed. Reference was made to the language of section 86 and section 246 of Civil Procedure Code of 1859, and section 487, Civil Procedure Code of 1877 and sections 278 to 283 and Order XXI, rule 63 and Order XXXVIII, rule 5, Civil Procedure Code of 1908. I rely on *Ramanamma v. Bathula Kamaraju*(2). *Charles Agnew Turner v. Prestonji Fardunji*(3) and [*Kartick Chunder Mookerjee v. Mookta Ram Sircar*(1)] do not really decide this question. *Bisheshwar Das v. Ambika Prasad*(4) is not a case in point. All these simply decided that a suit lies; not that a suit should be brought within a year; see *Basiram Malo v. Kattayani Debi*(5). In *Kissori-mohun Roy v. Harsukh Das*(6) it was assumed that a suit would lie.

(1) (1868) 10 W.R., 21. (2) (1918) I.L.R., 41 Mad., 23.
(3) (1896) I.L.R., 20 Bom., 403 at p. 407.
(4) (1905) I.L.R., 37 All., 575 at p. 583. (5) (1911) I.L.R., 38 Cal., 448.
(6) (1890) I.L.R., 17 Cal., 436 at p. 414 (P.O.).

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P. Narayanamurti for respondent was not called upon.

The OPINION of the Court was delivered by—

WALLIS, C.J.—Section 86 of the Code of Civil Procedure of 1859, which was re-enacted without material alteration in section 487 of the Code of 1877 and in Order XXXVIII, rule 8 of the present Code, admittedly had the effect of applying to claims in respect of attachments before judgment all the provisions of section 246 of that Code, including the final provision enabling the party against whom the order was given to bring a suit to establish his right at any time within one year from the date of the order. By the Indian Limitation Act IX of 1871 the provision as to limitation was taken out of section 246 and dealt with in Article 15 of that Act. In the Code of 1877, sections 278 to 283 were substituted for section 246 of the Code of 1859. In section 283, which corresponded to the last sentence of section 246, the language was altered, but there was nothing in the alteration from which an intention to make any of these provisions inapplicable to attachments before judgment could be inferred, nor is there anything of the sort in the changes made in the Code of 1908. The general policy of the law is that questions of title raised by claims against attachments before or after judgment should be promptly disposed of and, as has been pointed out to us, this section was applied without question to a case of attachment before judgment which came before the Privy Council in *Kissorimohun Roy v. Harsukh Das*(1).

We must overrule *Ramanamma v. Bathula Kamaraju*(2) and answer the question in the affirmative.

N.R.

(1) (1890) I.L.R., 17 Cal., 436 (P.O.).

(2) (1918) I.L.R., 41 Mad., 23.

BOOKS AND PUBLICATIONS OF THE LEGISLATIVE DEPARTMENT OF THE GOVERNMENT OF INDIA FOR SALE.

*List of Books and Publications for Sale which are
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The British Enactments in force in Native States were issued by the Foreign Department.

[IN THE PRESS.]

The Central Province Code.

[The amounts within parentheses where noted are for packing and postage.]

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A.—CHRONOLOGICAL TABLES.

Chronological Tables of the Indian Statutes, Vol. I, 1917. Royal 8vo, cloth. Rs. 4. (As. 7.)

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List of General Rules and Orders under Statutes and General Acts in force in British India. Corrected up to 30th June 1916. Royal 8vo. Rs. 2. (As. 3.)

C.—LOCAL CODES.

The Punjab and North-West Frontier Code, 4th Edn., 1916. Royal 8vo, cloth. Rs. 6. (As. 10.)
The Ajmer Code, Fourth Edition, 1916. Royal 8vo. Cloth. Rs. 2 as. 8. (As. 5.)

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Acts (Unrepealed) of the Governor-General of India in Council from 1916 up to date.
Regulations made under the Statute 33 Vict., Cap. 3, from 1916 up to date.

Ordinances of the Governor-General of India from 1916 up to date.

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III.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL, AS MODIFIED BY SUBSEQUENT LEGISLATION.

Act II of 1886 (Indian Income-Tax), as modified up to 1st April 1916.
As. 8. (Anna 1 pies 6.)

Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1916. As. 9.
(As. 2.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Act I of 1916 (Indian Trusts Amendment). In Urdu. Pies 3.
(Anna 1.)

Act I of 1916 (Indian Trusts Amendment). In Nagri. Pies 8.
(Anna 1.)

Act II of 1916 (Defence of India Amendment). In Urdu. Pies 3.
(Anna 1.)

Act II of 1916 (Defence of India Amendment). In Nagri. Pies 3.
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Act IV of 1916 (Indian Tariff Amendment). In Urdu. Anna 1.
(Anna 1.)

Act IV of 1916 (Indian Tariff Amendment). In Nagri. Anna 1.
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Act V of 1916 (Indian Income-Tax Amendment). In Urdu. Pies 3.
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Act VIII of 1916 (Presidency Banks Amendment). In Urdu. Pies 3.
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Act II of 1917 (Motor Spirit Duties). In Urdu. Pies 3. (Anna 1.)

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Act VI of 1917 (Indian Tariff Amendment). In Urdu. Pies 3.
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Act VII of 1917 (Indian Income-Tax Amendment). In Urdu. Pies 3.
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Act VII of 1917 (Indian Income-Tax Amendment). In Nagri. Pies 3.
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- Act XX of 1917 (Indian Transfer of Ships Restriction). In Nagri. Pies 3. (Anna 1.)
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A.—CHRONOLOGICAL TABLES.

Index to Indian Statutes, Chronological Tables and Index to Indian Statutes, Vol. II, Edition 1911. Rs. 5. (As. 12.)

B.—RULES AND ORDERS.

General Rules and Orders under enactments in force in British India, consisting of General Rules, Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor-General in Council with an Index, Edition 1915, Vol. I, Rs. 3, Vol. II, Rs. 4-8-0, Vol. III, Rs. 4, and Vol. IV, Rs. 5.

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- Act V of 1882 (Indian Easements), as amended by the Repealing and Amending Act, 1891 (XII of 1891). As. 8. (Anna 1.)
- Act XII of 1882 (Indian Salt), as modified up to 1st August 1909. As. 7. (As. 2.)
- Act XV of 1882 (Presidency Small Cause Courts), as modified up to 1st June 1906. As. 10. (As. 2.)
- Act V of 1883 (Indian Merchant Shipping), as modified up to 1st September 1909. As. 6. (Anna 1.)
- Act VIII of 1883 (Little Cocos and Preparis Islands Laws), as modified up to 1st October 1902. Anna 1 p. 3. (Anna 1.)
- Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. As. 4 p. 6. (Anna 1.)
- Act IV of 1884 (Explosives), as modified up to 1st October 1911. As. 4 p. 9. (Anna 1.)
- Act VII of 1884 (Indian Steamships), as modified up to 1st July 1890. As. 6. (Anna 1.)
- Act IX of 1884 (Legal Practitioners), as modified up to 30th June 1909. Anna 1 p. 6. (Anna 1.)
- Act XII of 1884 (Agriculturists' Loans), as modified up to 1st February 1903. As. 2. (Anna 1.)
- Act VII of 1885 (Panch Mahal Laws), as modified up to 1st June 1915. Anna 1 p. 3. (Anna 1.)
- Act XIII of 1885 (Indian Telegraph), as modified up to 1st June 1910. As. 5. (Anna 1.)
- Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st May 1911. As. 6. (Anna 1.)
- Act XI of 1886 (Indian Tramways), as modified up to 1st December 1903. As. 9. (As. 2.)
- Act XIII of 1886 (Indian Securities), as amended by Act XII of 1891. As. 2 p. 9. (Anna 1.)
- Act VII of 1887 (Suits Valuation), as modified up to 1st November 1904. Anna 1 p. 9. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1900. As. 6. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XIV of 1887 (Indian Marines), as modified up to 15th February 1899. As. 8. (Anna 1.)
- Act III of 1888 (Police), as modified up to 1st January 1909. Anna 1 p. 9. (Anna 1.)
- Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. Anna 1 p. 9. (Anna 1.)
- Act II of 1889 (Measures of Length), with footnotes. Anna 1 p. 3. (Anna 1.)
- Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st August 1908. As. 6. (Anna 1.)
- Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. As. 2 p. 9. (Anna 1.)
- Act VII of 1889 (Succession Certificate), as modified up to 1st June 1910. As. 5 p. 6. (Anna 1.)
- Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. As. 3. (Anna 1.)
- Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. As. 2 p. 6. (Anna 1.)
- Act IX of 1890 (Indian Railways), as modified up to 1st June 1909. Re. 1 as. 2. (As. 2.)
- Act X of 1890 (Press and Registration of Books), as modified up to 1st December 1903. As. 2 p. 3. (Anna 1.)
- Act XI of 1890 (Prevention of Cruelty to Animals), with footnotes. As. 2. (Anna 1.)
- Act XIII of 1890 (Excise Malt Liquors), as modified up to 1st October 1908. Anna 1 p. 6. (Anna 1.)
- Act X of 1891 (Indian Criminal Law Amendment), as modified up to 1st August 1909. Anna 1. (Anna 1.)
- Act XII of 1891 (Amending Act), showing the Schedules as modified up to 31st May 1902. As. 12. (Anna 1 p. 6.)
- Act XIV of 1891 (Ondh Courts), as amended by the Ondh Courts Act (1891) Amendment Act, 1897. Anna 1 p. 3. (Anna 1.)
- Act I of 1894 (Land Acquisition), with footnotes. As. 7. (Anna 1.)
- Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898. As. 8. (Anna 1 p. 6.)
- Act XII of 1896 (Excise), as modified up to 1st March 1907. As. 8. (As. 2.)
- Act XX of 1896 (Sindh Incumbered Estates), as modified up to 1st June 1906. As. 4. (Anna 1.)
- Act IV of 1897 (Indian Fisheries), with footnotes. Anna 1 p. 9. (Anna 1.)
- Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. As. 2 p. 9. (Anna 1.)
- Act X of 1897 (General Clauses), as modified up to 1st February 1910. As. 5 p. 6. (Anna 1 p. 6.)
- Act III of 1898 (Lepers), as modified up to 1st September 1909. As. 4. (Anna 1.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. Rs. 3 as. 10. (As. 8.)
- Act II of 1899 (Indian Stamp), as modified up to 1st March 1907. Re. 1. (As. 2.)
- Act VIII of 1899 (Indian Petroleum), as modified up to 1st July 1911. As. 7 p. 6. (Anna 1 p. 6.)
- Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. As. 2 p. 9. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XVI of 1899 (Northern India Canal and Drainage), with footnotes. Anna 1. (Anna 1.)
 Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900. Anna 1. (Anna 1.)
 Act III of 1900 (Prisoners), as modified up to 1st July 1910. As. 6 p. 6. (Anna 1.)
 Act VI of 1901 (Assam Labour and Emigration), as modified up to 1st July 1910. Re. 1 as. 4. (As. 2.)
 Act II of 1902 [Cantonments (House-accommodation)], as modified up to 1st June 1910. As. 6 p. 6. (Anna 1.)
 Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. As. 5 p. 6. (Anna 1.)
 Act I of 1904 (Poisons), with footnotes. As. 2 p. 9. (Anna 1.)
 Act I of 1910 (Indian Press), with footnotes. As. 3 p. 6. (Anna 1.)
 Regulation III of 1818 (Bengal State Prisoners), as modified up to 1st August 1909. As. 2 p. 9. (Anna 1.)
 Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st March 1909. As. 6 p. 6. (Anna 1.)
 Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July 1903. Anna 1 p. 9. (Anna 1.)
 Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February 1897. As. 5 p. 6. (Anna 1.)
 Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894. As. 13. (As. 2.)
 Regulation V of 1886 (Ajmer Municipalities), as modified up to 1st February 1911. As. 15. (As. 2.)
 Regulation VI of 1886 (Ajmer Rural Boards), as modified up to 1st February 1897. As. 5 p. 6. (Anna 1.)
 Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October 1899. As. 4 p. 9. (Anna 1.)
 Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April 1902. As. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

- Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December 1893, with footnotes brought down to 1st December 1901. In Urdu. As. 2 p. 6. (Anna 1.)
 Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. In Urdu. Pies 6. (Anna 1.)
 Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. In Nagri. Pies 6. (Anna 1.)
 Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. In Urdu. Pies 3. (Anna 1.)
 Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. In Nagri. Pies 3. (Anna 1.)
 Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903. In Urdu. Pies 6. (Anna 1.)
 Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903. In Nagri. Pies 6. (Anna 1.)
 Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. In Urdu. Pies 9. (Anna 1.)
 Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XXX of 1852 (Naturalization), as modified up to 1st December 1902. In Urdu. Pies 6. (Anna 1.)
 Act XXX of 1852 (Naturalization), as modified up to 1st December 1902. In Nagri. Pies 6. (Anna 1.)
 Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. In Urdu. Pies 3. (Anna 1.)
 Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. In Urdu. Pies 6. (Anna 1.)
 Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. In Nagri. Pies 6. (Anna 1.)
 Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1856 (Hindu Widow's Re-marriage). In Urdu. Pies 6. (Anna 1.)
 Act XV of 1856 (Hindu Widow's Re-marriage). In Nagri. Pies 6. (Anna 1.)
 Act XX of 1856 (Bengal Chaudhari), as modified up to 1st November 1903. In Urdu. As. 2 p. 6. (Anna 1.)
 Act XX of 1856 (Bengal Chaudhari), as modified up to 1st November 1903. In Nagri. As. 2 p. 6. (Anna 1.)
 Act XIII of 1857 (Opium), as modified up to 1st August 1908. In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1857 (Opium), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
 Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. In Nagri. Pies 3. (Anna 1.)
 Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. In Nagri. Pies 3. (Anna 1.)
 Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903. In Urdu. Re. 1 as. 5. (As. 5.)
 Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903. In Nagri. Re. 1 as. 5. (As. 5.)
 Act V of 1861 (Police), as modified up to 7th March 1903. In Urdu. As. 2 p. 9. (Anna 1.)
 Act V of 1861 (Police), as modified up to 7th March 1903. In Nagri. As. 2 p. 9. (Anna 1.)
 Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. In Nagri. Anna 1 p. 3. (Anna 1.)
 Act XVI of 1863 (Excise), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act XVI of 1863 (Excise), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act XXXI of 1863 (Official Gazettes), with footnotes. In Urdu. Pies 3. (Anna 1.)
- Act XXXI of 1863 (Official Gazettes), with footnotes. In Nagri. Pies 3. (Anna 1.)
- Act III of 1864 (Foreigners), as modified up to 1st April 1915. In Urdu. Anna 1. (Anna 1.)
- Act III of 1864 (Foreigners), as modified up to 1st April 1915. In Nagri. Anna 1. (Anna 1.)
- Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. In Urdu. Pies 3. (Anna 1.)
- Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. In Nagri. Pies 3. (Anna 1.)
- Act III of 1865 (Carriers), as modified up to 31st May 1903. In Urdu. Pies 9. (Anna 1.)
- Act III of 1865 (Carriers), as modified up to 31st May 1903. In Nagri. Pies 9. (Anna 1.)
- Act X of 1865 (Indian Succession), as modified up to 1st April 1909. In Urdu. As. 11 p. 3. (As. 2.)
- Act X of 1865 (Indian Succession), as modified up to 1st April 1909. In Nagri. As. 11 p. 3. (As. 2.)
- Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. In Urdu. Pies 9. (Anna 1.)
- Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. In Nagri. Pies 9. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st December 1896. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st January 1905. In Urdu. Anna 1. (Anna 1.)
- Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
- Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August 1908. In Nagri. Pies 6. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1870 (Court-fees), as modified up to 1st February 1909. In Urdu. As. 5 p. 9. (Anna 1.)
- Act VII of 1870 (Court-fees), as modified up to 1st February 1909. In Nagri. As. 5 p. 6. (Anna 1.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. In Nagri. Anna 1 p. 9. (Anna 1.)
- Act V of 1871 (Prisoners), as modified up to 1st May 1894. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. In Urdu. Pies 9. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. In Nagri. Pies 9. (Anna 1.)
- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Urdu. As. 8. (As. 2.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Nagri. As. 8. (As. 2.)
- Act IV of 1872 (Punjab Laws), as modified up to 1st November 1904. In Urdu. As. 2 p. 6. (Anna 1 p. 6.)
- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. In Urdu. As. 9 p. 9. (As. 9.)
- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. In Nagri. As. 9 p. 9. (As. 3.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. In Urdu. As. 3. (Pies 9.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. In Nagri. As. 4. (As. 2.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. In Urdu. Pies 9. (Anna 1.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. In Nagri. Pies 9. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899. In Urdu. As. 3 p. 3. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899. In Nagri. As. 3 p. 3. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1903. In Urdu. Anna 1. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1903. In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1873 (Agra Village and Road Police). In Urdu. Anna 1. (Anna 1.)
- Act IX of 1874 (European Vagrancy). In Urdu. As. 2. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. In Urdu. Pies 3. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. In Nagri. Pies 3. (Anna 1.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. In Urdu. As. 3 p. 9. (Anna 1 p. 6.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. In Nagri. As. 3 p. 6. (Anna 1 p. 6.)
- Act XVIII of 1876 (Oudh Laws). In Urdu. As. 2. (Anna 1.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. In Urdu. As. 4 p. 6. (Anna 1 p. 6.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. In Nagri. As. 4 p. 6. (Anna 1 p. 6.)
- Act I of 1878 (Opium), as modified up to 1st October 1907. In Urdu. Anna 1 p. 6. (Anna 1.)
- Act I of 1878 (Opium), as modified up to 1st October 1907. In Nagri. Anna 1 p. 6. (Anna 1.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. In Urdu. As. 4. (Anna 1 p. 6.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. In Nagri. As. 4. (Anna 1 p. 6.)
- Act XI of 1878 (Indian Arms), as modified up to 1st May 1904. In Urdu. As. 2. (Anna 1.)
- Act XI of 1878 (Indian Arms), as modified up to 1st May 1904. In Nagri. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. In Urdu. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. In Nagri. As. 2. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896. In Urdu. As. 2 p. 6. (Anna 1.)
- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896. In Nagri. As. 2 p. 6. (Anna 1.)
- Act XII of 1880 (Kazis), with footnotes. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1880 (Vaccination). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XIII of 1880 (Vaccination). In Nagri. Anna 1 p. 3. (Anna 1.)
- Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. In Urdu. As. 4 p. 6. (Anna 1 p. 6.)
- Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. In Nagri. As. 4 p. 6. (Anna 1 p. 6.)
- Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898. In Urdu. As. 9. (Anna 1 p. 6.)
- Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898. In Nagri. As. 9. (Anna 1 p. 6.)
- Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September 1909. In Urdu. As. 4. (Anna 1.)
- Act XXVI of 1881. (Negotiable Instruments), as modified up to 1st September 1909. In Nagri. As. 4. (Anna 1.)
- Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. In Urdu. As. 3 p. 6. (Anna 1.)
- Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. In Nagri. As. 3 p. 6. (Anna 1.)
- Act IV of 1882 (Transfer of Property), as modified up to 1st March 1900. In Urdu. As. 6 p. 9. (As. 2.)
- Act IV of 1882 (Transfer of Property), as modified up to 1st March 1900. In Nagri. As. 6 p. 9. (As. 2.)
- Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. In Urdu. Anna 1. (Anna 1.)
- Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. In Nagri. Anna 1. (Anna 1.)
- Act IV of 1884 (Indian Explosives), as modified up to 1st September 1908. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act IV of 1884 (Indian Explosives), as modified up to 1st September 1908. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September 1906. In Urdu. Pies 6. (Anna 1.)
- Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September 1906. In Nagri. Pies 6. (Anna 1.)
- Act II of 1885 [Negotiable Instruments (Amendment)]. In Urdu. Pies 9. (Anna 1.)
- Act III of 1885 [Transfer of Property (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act X of 1885 [Oudh Estates (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1885 (Indian Telegraph), as modified up to 1st June 1910. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XXI of 1885 [Madras Civil Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act IV of 1886 [Indian Contract (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1886 (Births, Deaths and Marriages Registration). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act X of 1886 [Indian Criminal Law (Amendment)]. In Urdu. Pies 9. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900. In Urdu. As. 3 p. 3. (Anna 1.)
- Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900. In Nagri. As. 3 p. 3. (Anna 1.)
- Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891. In Urdu. Pies 9. (Anna 1.)
- Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891. In Nagri. Pies 9. (Anna 1.)
- Act VII of 1887 (Suits Valuation). In Urdu. Pies 9. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896. In Urdu. As. 2 p. 3. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896. In Nagri. As. 2 p. 3. (Anna 1.)
- Act X of 1887 (Native Passenger Ships). In Urdu. Anna 1 p. 6. (Anna 1.)
- Act XII of 1887 (Bengal, Agra and Assam Civil Courts). In Urdu. Anna 1 p. 8. (Anna 1.)
- Act XII of 1887 (Bengal, Agra and Assam Civil Courts). In Nagri. Anna 1 p. 8. (Anna 1.)
- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. In Urdu. As. 3 p. 6. (Anna 1.)
- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. In Nagri. As. 3 p. 9. (Anna 1.)
- Act XV of 1887 (Burma Military Police). In Urdu. Pies 9. (Anna 1.)
- Act XV of 1887 (Burma Military Police). In Nagri. Pies 9. (Anna 1.)
- Act XVIII of 1887 (Allahabad University). In Urdu. Anna 1. (Anna 1.)
- Act III of 1888 (Police), as modified up to 1st January 1909. In Urdu. Pies 3. (Anna 1.)
- Act III of 1888 (Police), as modified up to 1st January 1909. In Nagri. Pies 6. (Anna 1.)
- Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March 1893. In Urdu. Pies 3. (Anna 1.)
- Act IV of 1888 (Indian Reserve Forces), as passed. In Nagri. Pies 3. (Anna 1.)
- Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. In Urdu. Pies 6. (Anna 1.)
- Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. In Nagri. Pies 6. (Anna 1.)
- Act II of 1889 (Measures of Length). In Urdu. Pies 3. (Anna 1.)
- Act II of 1889 (Measures of Length). In Nagri. Pies 3. (Anna 1.)
- Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st February 1904. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st February 1904. In Nagri. As. 2. (Anna 1.)
- Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. In Urdu. Pies 6. (Anna 1.)
- Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. In Nagri. Pies 6. (Anna 1.)
- Act VII of 1889 (Succession Certificate), as modified up to 1st December 1903. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. In Urdu. Pies 9. (Anna 1.)
- Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1889 (Central Provinces Land Revenue). In Urdu. Anna 1 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—cont.

- Act XVI of 1889 (Central Provinces Land Revenue). In Nagri. Anna 1 p. 6. (Anna 1.)
- Act XX of 1889 [Indian Lunatic Asylums (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1890 (Revenue Recovery). In Urdu. Pies 3. (Anna 1.)
- Act II of 1890 (Probate and Administration). In Urdu. Pies 3. (Anna 1.)
- Act V of 1890 (Forest). In Urdu. Pies 6. (Anna 1.)
- Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
- Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
- Act VIII of 1890 (Guardians and Wards). In Urdu. As. 2 p. 3. (Anna 1 p. 9.)
- Act IX of 1890 (Indian Railways), as modified up to 1st June 1905. In Urdu. As. 8. (As. 2.)
- Act IX of 1890 (Indian Railways), as modified up to 1st May 1896. In Nagri. As. 8. (As. 2.)
- Act X of 1890 [Press and Registration of Books (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XI of 1890 (Prevention of Cruelty to Animals). In Urdu. Pies 6. (Anna 1.)
- Act XX of 1890 (United Provinces). In Urdu. Anna 1. (Anna 1.)
- Act X of 1891 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1891 (Oudh Courts). In Urdu. Pies 6. (Anna 1.)
- Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900. In Urdu. Pies 3. (Anna 1.)
- Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900. In Nagri. Pies 6. (Anna 1.)
- Act II of 1892 (Marriages Validation). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1892 [Bengal Court of Wards (Amendment)]. In Urdu. Pies 6. (Anna 1.)
- Act IV of 1893 (Partition). In Urdu. Pies 3. (Anna 1.)
- Act I of 1894 (Land Acquisition). In Urdu. As. 2 p. 3. (Anna 1 p. 6.)
- Act I of 1894 (Land Acquisition). In Nagri. Anna 1 p. 6. (Anna 1 p. 6.)
- Act III of 1894 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act IX of 1894 (Prisons). In Urdu. As. 2 p. 3. (Anna 1.)
- Act IX of 1894 (Prisons). In Nagri. As. 2 p. 3. (Anna 1.)
- Act VII of 1895 [Punjab Laws Act (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VII of 1895 [Punjab Laws Act (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1895 (Pilgrim Ships). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act II of 1896 (Cotton-duties). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act II of 1896 (Cotton-duties). In Nagri. Anna 1. (Anna 1.)
- Act VI of 1896 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VIII of 1896 (Inland Bonded Warehouses). In Urdu. Pies 3. (Anna 1.)
- Act VIII of 1896 (Inland Bonded Warehouses). In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—cont.

- Act XII of 1896 (Excise), as modified up to 1st March 1907. In Urdu. As. 2 p. 9. (As. 2.)
- Act XII of 1896 (Excise), as modified up to 1st March 1907. In Nagri. As. 3 p. 8. (As. 2.)
- Act I of 1897 [Public Servants (Inquiries) Amendment]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1897 [Public Servants (Inquiries) Amendment]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1897 (Epidemic Diseases). In Urdu. Pies 3. (Anna 1.)
- Act III of 1897 (Epidemic Diseases). In Nagri. Pies 3. (Anna 1.)
- Act IV of 1897 (Fisheries). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1897 (Fisheries). In Nagri. Pies 3. (Anna 1.)
- Act VI of 1897 [Negotiable Instruments (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1897 [Negotiable Instruments (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VIII of 1897 (Reformatory Schools). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act VIII of 1897 (Reformatory Schools). In Nagri. Pies 6. (Anna 1.)
- Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. In Urdu. Pies 9. (Anna 1.)
- Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. In Nagri. Pies 9. (Anna 1.)
- Act X of 1897 (General Clauses). In Urdu. Anna 1. (Anna 1.)
- Act X of 1897 (General Clauses). In Nagri. Anna 1. (Anna 1.)
- Act I of 1898 [Stage-carriages Act (1861) Amendment]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1898 [Stage-carriages Act (1861) Amendment]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1898 (Lepers), as modified up to 1st September 1909. In Urdu. Pies 6. (Anna 1.)
- Act III of 1898 (Lepers), as modified up to 1st September 1909. In Nagri. Pies 6. (Anna 1.)
- Act IV of 1898 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. In Urdu. Re. 1 as. 4. (As. 8.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. In Nagri. Re. 1 as. 6. (As. 8.)
- Act VI of 1898 (Indian Post Office). In Urdu. As. 3 p. 3. (Anna 1.)
- Act VI of 1898 (Indian Post Office). In Nagri. As. 3 p. 3. (Anna 1.)
- Act IX of 1898 (Live-stock Importation). In Urdu. Pies 3. (Anna 1.)
- Act IX of 1898 (Live-stock Importation). In Nagri. Pies 3. (Anna 1.)
- Act X of 1898 (Indian Insolvency Rules). In Urdu. Pies 3. (Anna 1.)
- Act I of 1899 [Indian Marine Act (1887) Amendment]. In Urdu. Pies 6. (Anna 1.)
- Act I of 1899 [Indian Marine Act (1887) Amendment]. In Nagri. Pies 6. (Anna 1.)
- Act II of 1899 (Stamps), as modified up to 1st March 1907. In Urdu. As. 7 p. 6. (Anna 1 p. 6.)
- Act II of 1899 (Stamps), as modified up to 1st March 1907. In Nagri. As. 7 p. 6. (Anna 1 p. 6.)
- Act IV of 1899 (Government Buildings). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1899 (Government Buildings). In Nagri. Pies 3. (Anna 1.)
- Act VIII of 1899 (Indian Petroleum), as modified up to 1st January 1909. In Urdu. Anna 1 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act VIII of 1899 (Indian Petroleum), as modified up to 1st January 1900. In Nagri. Anna 1 p. 6. (Anna 1.)
- Act IX of 1899 (Indian Arbitration). In Urdu. Pies 9. (Anna 1.)
- Act IX of 1899 (Indian Arbitration). In Nagri. Pies 9. (Anna 1.)
- Act XI of 1899 [Court-fees (Amendment)]. In Urdu. Pies 6. (Anna 1.)
- Act XI of 1899 [Court-fees (Amendment)]. In Nagri. Pies 6. (Anna 1.)
- Act XII of 1899 (Currency Notes Forgery). In Urdu. Pies 3. (Anna 1.)
- Act XII of 1899 (Currency Notes Forgery). In Nagri. Pies 3. (Anna 1.)
- Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. In Urdu. Pies 9. (Anna 1.)
- Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. In Nagri. Pies 9. (Anna 1.)
- Act XIV of 1899 [Tariff (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1899 [Tariff (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XVIII of 1899 [Land Improvement Loans (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XVIII of 1899 [Land Improvement Loans (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XX of 1899 (Presidency Banks). In Urdu. Pies 3. (Anna 1.)
- Act XX of 1899 (Presidency Banks). In Nagri. Pies 3. (Anna 1.)
- Act XXI of 1899 [Central Provinces Tenancy (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XXI of 1899 [Central Provinces Tenancy (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XXIV of 1899 (Central Provinces Court of Wards). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XXIV of 1899 (Central Provinces Court of Wards). In Nagri. Anna 1 p. 3. (Anna 1.)
- Act III of 1900 (Prisoners), as modified up to 1st March 1905. In Urdu. As. 2 p. 3. (Anna 1.)
- Act III of 1900 (Prisoners), as modified up to 1st March 1905. In Nagri. As. 2 p. 3. (Anna 1.)
- Act IX of 1900 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act IX of 1900 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act II of 1901 [Indian Tolls (Army)]. In Urdu. Pies 6. (Anna 1.)
- Act II of 1901 [Indian Tolls (Army)]. In Nagri. Pies 9. (Anna 1.)
- Act V of 1901 [Indian Forest (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1901 [Indian Forest (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VI of 1901 (Assam Labour and Emigration). In Urdu. As. 5. (As. 2.)
- Act VI of 1901 (Assam Labour and Emigration). In Nagri. As. 5. (As. 2.)
- Act VII of 1901 (Native Christian Administration of Estates). In Urdu. Pies 3. (Anna 1.)
- Act VII of 1901 (Native Christian Administration of Estates). In Nagri. Pies 3. (Anna 1.)
- Act VIII of 1901 (Indian Mines). In Urdu. Anna 1. (Anna 1.)
- Act VIII of 1901 (Indian Mines). In Nagri. Anna 1. (Anna 1.)
- Act X of 1901 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act X of 1901 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act II of 1902 [Cantonments (House-accommodation)]. In Urdu. Anna 1. (Anna 1.)
- Act II of 1902 [Cantonments (House-accommodation)]. In Nagri. Anna 1. (Anna 1.)
- Act IV of 1902 (Indian Tramways). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1902 (Indian Tramways). In Nagri. Pies 3. (Anna 1.)
- Act VII of 1902 [United Provinces (Designation)]. In Urdu. Pies 3. (Anna 1.)
- Act VIII of 1902 [Indian Tariff (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VIII of 1902 [Indian Tariff (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act II of 1903 [Indian Post Office (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act II of 1903 [Indian Post Office (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1903 (Indian Works of Defence). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act VII of 1903 (Indian Works of Defence). In Nagri. Anna 1 p. 3. (Anna 1.)
- Act VIII of 1903 (Probate and Administration). In Urdu. Pies 3. (Anna 1.)
- Act VIII of 1903 (Probate and Administration). In Nagri. Pies 3. (Anna 1.)
- Act IX of 1903 (Indian Tea Cess). In Urdu. Pies 3. (Anna 1.)
- Act IX of 1903 (Indian Tea Cess). In Nagri. Pies 3. (Anna 1.)
- Act X of 1903 (Victoria Memorial). In Urdu. Pies 3. (Anna 1.)
- Act X of 1903 (Victoria Memorial). In Nagri. Pies 3. (Anna 1.)
- Act XIII of 1903 [Lepers (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1903 [Lepers (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1903 (Indian Foreign Marriages). In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1903 (Indian Foreign Marriages). In Nagri. Pies 3. (Anna 1.)
- Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. In Urdu. Anna 1 p. 6. (Anna 1.)
- Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. In Nagri. Anna 1 p. 6. (Anna 1.)
- Act I of 1904 (Poisons). In Urdu. Pies 6. (Anna 1.)
- Act I of 1904 (Poisons). In Nagri. Pies 6. (Anna 1.)
- Act VI of 1904 [Transfer of Property (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1904 [Transfer of Property (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1904 (Ancient Monuments Preservation). In Urdu. Pies 9. (Anna 1.)
- Act VII of 1904 (Ancient Monuments Preservation). In Nagri. Pies 9. (Anna 1.)
- Act VIII of 1904 (Indian Universities). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act VIII of 1904 (Indian Universities). In Nagri. Anna 1 p. 3. (Anna 1.)
- Act XI of 1904 (to revive and continue section 8-B of the Indian Tariff Act, 1894). In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act XI of 1904 (to revive and continue section 8-B of the Indian Tariff Act, 1894). In Nagri. Pies 3. (Anna 1.)
- Act XV of 1904 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XV of 1904 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act IV of 1905 (Indian Railway Board). In Urdu. Pies 3. (Anna 1.)
- Act VI of 1905 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1905 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1906 (Indian Coinage). In Urdu. Pies 9. (Anna 1.)
- Act III of 1906 (Indian Coinage). In Nagri. Pies 9. (Anna 1.)
- Act V of 1906 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1906 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1907 (Provincial Insolvency). In Urdu. Anna 1 p. 6. (Anna 1.)
- Act III of 1907 (Provincial Insolvency). In Nagri. Anna 1 p. 6. (Anna 1.)
- Act IV of 1907 [Repealing and Amending (Rates and Cesses)]. In Urdu. Pies 3. (Anna 1.)
- Act IV of 1907 [Repealing and Amending (Rates and Cesses)]. In Nagri. Pies 3. (Anna 1.)
- Act I of 1908 [Legal Practitioners (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1908 [Legal Practitioners (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1908 [Indian Trusts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1908 (Code of Civil Procedure). In Urdu. Re. 1 as. 2. (As. 6.)
- Act V of 1908 (Code of Civil Procedure). In Nagri. Re. 1 as. 2. (As. 6.)
- Act VI of 1908 (Explosive Substances). In Urdu. Pies 3. (Anna 1.)
- Act VI of 1908 (Explosive Substances). In Nagri. Pies 3. (Anna 1.)
- Act VII of 1908 (Incitements to Offences). In Urdu. Pies 3. (Anna 1.)
- Act VII of 1908 (Incitements to Offences). In Nagri. Pies 3. (Anna 1.)
- Act IX of 1908 (Indian Limitation). In Urdu. As. 2. (Anna 1.)
- Act IX of 1908 (Indian Limitation). In Nagri. As. 2. (Anna 1.)
- Act X of 1908 (Indian Salt Duties). In Urdu. Pies 3. (Anna 1.)
- Act X of 1908 (Indian Salt Duties). In Nagri. Pies 3. (Anna 1.)
- Act XI of 1908 (Assam Labour and Emigration). In Urdu. Pies 3. (Anna 1.)
- Act XI of 1908 (Assam Labour and Emigration). In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1908 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1908 [Indian Criminal Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XVI of 1908 (Indian Registration). In Urdu. As. 2. (As. 2.)
- Act XVI of 1908 (Indian Registration). In Nagri. As. 2. (As. 2.)
- Act XVII of 1908 (Indian Emigration). In Urdu. As. 2 p. 3. (As. 2.)
- Act XVII of 1908 (Indian Emigration). In Nagri. As. 2 p. 3. (As. 2.)
- Act I of 1909 [Indian Steamships Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1909 [Indian Steamships Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act IV of 1909 (Whipping). In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act IV of 1909 (Whipping). In Nagri. Pies 3. (Anna 1.)
- Act V of 1909 [Amending (Army) Act]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1909 [Amending (Army) Act]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1909 (Anand Marriage). In Urdu. Pies 3. (Anna 1.)
- Act VII of 1909 (Anand Marriage). In Nagri. Pies 3. (Anna 1.)
- Act I of 1910 (Indian Press). In Urdu. Pies 6. (Anna 1.)
- Act I of 1910 (Indian Press). In Nagri. Pies 6. (Anna 1.)
- Act II of 1910 (Indian Paper Currency). In Urdu. Pies 6. (Anna 1.)
- Act II of 1910 (Indian Paper Currency). In Nagri. Pies 6. (Anna 1.)
- Act III of 1910 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act III of 1910 [Indian Penal Code (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act V of 1910 (Dourine). In Urdu. Pies 3. (Anna 1.)
- Act V of 1910 (Dourine). In Nagri. Pies 3. (Anna 1.)
- Act VI of 1910 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1910 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1910 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VII of 1910 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act IX of 1910 (Indian Electricity). In Urdu. Anna 1 p. 9. (Anna 1.)
- Act IX of 1910 (Indian Electricity). In Nagri. Anna 1 p. 9. (Anna 1.)
- Act XII of 1910 [Glanders and Farcy (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XII of 1910 [Glanders and Farcy (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIII of 1910 [Prisons (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1910 [Prisons (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1910 [Indian Emigration (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1910 [Indian Emigration (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XV of 1910 (Cantonments). In Urdu. Pies 9. (Anna 1.)
- Act XV of 1910 (Cantonments). In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1910 (Indian Census). In Urdu. Pies 3. (Anna 1.)
- Act XVI of 1910 (Indian Census). In Nagri. Pies 3. (Anna 1.)
- Act II of 1911 (Patents and Designs). In Urdu. Anna 1 p. 9. (Anna 1.)
- Act II of 1911 (Patents and Designs). In Nagri. Anna 1 p. 9. (Anna 1.)
- Act III of 1911 (Criminal Tribes). In Urdu. Pies 9. (Anna 1.)
- Act III of 1911 (Criminal Tribes). In Nagri. Pies 9. (Anna 1.)
- Act V of 1911 [Tramways (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1911 [Tramways (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1911 [Indian Paper Currency (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VII of 1911 [Indian Paper Currency (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VIII of 1911 (Indian Army). In Urdu. As. 8 p. 6. (Anna 1.)
- Act VIII of 1911 (Indian Army). In Nagri. As. 2 p. 6. (Anna 1.)
- Act X of 1911 (Prevention of Seditious Meetings). In Urdu. Pies 3. (Anna 1.)
- Act X of 1911 (Prevention of Seditious Meetings). In Nagri. Pies 3. (Anna 1.)
- Act XI of 1911 [University (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XII of 1911 (Factories). In Urdu. Anna 1 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XII of 1911 (Factories). In Nagri. Anna 1 p. 6. (Anna 1.)
 Act XIII of 1911 [Christian Marriage (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1911 [Christian Marriage (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1911 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1911 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1911 [Forest (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XV of 1911 [Forest (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XVI of 1911 [Bengal, Agra and Assam Civil Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XVII of 1911 (Aircraft). In Urdu. Pies 3. (Anna 1.)
 Act XVII of 1911 (Aircraft). In Nagri. Pies 3. (Anna 1.)
 Act I of 1912 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1912 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1912 (Co-operative Societies). In Urdu. Anna 1. (Anna 1.)
 Act II of 1912 (Co-operative Societies). In Nagri. Anna 1. (Anna 1.)
 Act III of 1912 [Indian Post Office (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act III of 1912 [Indian Post Office (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act IV of 1912 (Lunacy). In Urdu. Anna 1 p. 9. (Anna 1.)
 Act IV of 1912 (Lunacy). In Nagri. Anna 1 p. 9. (Anna 1.)
 Act V of 1912 (Provident Insurance Societies). In Urdu. Pies 6. (Anna 1.)
 Act V of 1912 (Provident Insurance Societies). In Nagri. Pies 6. (Anna 1.)
 Act VI of 1912 (Indian Life Assurance Companies). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VI of 1912 (Indian Life Assurance Companies). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1912 (Wild Birds and Animals Protection). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1912 (Wild Birds and Animals Protection). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1912 (Delhi Laws). In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1912 (Delhi Laws). In Nagri. Pies 3. (Anna 1.)
 Act I of 1913 [Extradition (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1913 [Extradition (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act V of 1913 (White Phosphorus Matches Prohibition). In Urdu. Pies 3. (Anna 1.)
 Act V of 1913 (White Phosphorus Matches Prohibition). In Nagri. Pies 3. (Anna 1.)
 Act VI of 1913 (Musalman Wakf Validating). In Urdu. Pies 3. (Anna 1.)
 Act VI of 1913 (Musalman Wakf Validating). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1913 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1913 [Indian Criminal Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act I of 1914 [Civil Procedure Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1914 [Civil Procedure Code (Amendment)]. In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont

- Act II of 1914 (Destructive Insects and Pests). In Urdu. Pies 3. (Anna 1.)
 Act V of 1914 [Negotiable Instruments (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1914 [Provincial Small Cause Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1914 [Provincial Small Cause Courts (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1914 [Indian Telegraph (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act VII of 1914 [Indian Telegraph (Amendment)]. In Nagri. Pies 6. (Anna 1.)
 Act VIII of 1914 (Indian Motor Vehicles). In Urdu. Pies 6. (Anna 1.)
 Act VIII of 1914 (Indian Motor Vehicles). In Nagri. Pies 6. (Anna 1.)
 Act IX of 1914 (Local Authorities Loan Act). In Urdu. Pies 6. (Anna 1.)
 Act IX of 1914 (Local Authorities Loan Act). In Nagri. Pies 6. (Anna 1.)
 Act XIII of 1914 (Indian Life Assurance). In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1914 (Indian Life Assurance). In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1914 [Post Office and Telegraphs (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1914 [Post Office and Telegraphs (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1914 [Indian Army (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XV of 1914 [Indian Army (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XVI of 1914 [Indian Aircraft (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XVI of 1914 [Indian Aircraft (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act I of 1915 (Emergency Legislation Continuance). In Urdu. Pies 3. (Anna 1.)
 Act I of 1915 (Emergency Legislation Continuance). In Nagri. Pies 3. (Anna 1.)
 Act III of 1915 [Foreigners (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act III of 1915 [Foreigners (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act IV of 1915 [Defence of India Criminal Law (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act IV of 1915 [Defence of India Criminal Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VI of 1915 (Indian Patents and Designs Temporary Rules). In Urdu. Pies 3. (Anna 1.)
 Act VI of 1915 (Indian Patents and Designs Temporary Rules). In Nagri. Pies 3. (Anna 1.)
 Act VII of 1915 (Delhi Laws). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1915 [Assam Labour and Emigration (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act VIII of 1915 [Assam Labour and Emigration (Amendment)]. In Nagri. Pies 6. (Anna 1.)
 Act XII of 1915 (Indian Soldiers Litigation). In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act XII of 1915 (Indian Soldiers Litigation). In Nagri. Pies 3. (Anna 1.)
- Act XIII of 1915 (North-West Frontier Constabulary). In Urdu. Pies 9. (Anna 1.)
- Act XIII of 1915 (North-West Frontier Constabulary). In Nagri. Pies 9. (Anna 1.)
- Act XIV of 1915 (Enemy Trading). In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1915 (Enemy Trading). In Nagri. Pies 3. (Anna 1.)
- Regulation V of 1890 (British Baluchistan Forests). In Urdu. As. 2 (Anna 1 p. 6.)
- Regulation VIII of 1896 (British Baluchistan Criminal Justice). In Urdu. Pies 9. (Anna 1.)
- Regulation IX of 1896 (British Baluchistan Civil Justice). In Urdu. As. 2 p. 3. (Anna 1.)
- Regulation III of 1901 (Frontier Crimes). In Urdu. As. 2 p. 6. (Anna 1.)
- Regulation IV of 1901 (Frontier Murderous Outrages). In Urdu. Pies 6. (Anna 1.)
- Regulation VII of 1901 (North-West Frontier Province). In Urdu. As. 4 p. 3. (Anna 1.)
- Regulation V of 1910 (British Baluchistan Forests). In Urdu. Anna 1 p. 9. (Anna 1.)
- Regulation III of 1914 (Ajmer Alienation of Land). In Urdu. Pies 3. (Anna 1.)
- Regulation III of 1914 (Ajmer Alienation of Land). In Nagri. Pies 3. (Anna 1.)
- Regulation I of 1915 (Excise). In Urdu. Anna 1 p. 6. (Anna 1.)
- Regulation I of 1915 (Excise). In Nagri. Anna 1 p. 6. (Anna 1.)
- Ordinance I of 1914 [Indian Naval and Military News (Emergency)]. In Urdu. Pies 3. (Anna 1.)
- Ordinance I of 1914 [Indian Naval and Military News (Emergency)]. In Nagri. Pies 3. (Anna 1.)
- Ordinance III of 1914 (Foreigners). In Urdu. Pies 3. (Anna 1.)
- Ordinance III of 1914 (Foreigners). In Nagri. Pies 3. (Anna 1.)
- Ordinance V of 1914 (Ingress into India). In Urdu. Pies 3. (Anna 1.)
- Ordinance V of 1914 (Ingress into India). In Nagri. Pies 3. (Anna 1.)
- Ordinance VI of 1914 (Commercial Intercourse with Enemies). In Urdu. Pies 3. (Anna 1.)
- Ordinance VI of 1914 (Commercial Intercourse with Enemies). In Nagri. Pies 3. (Anna 1.)
- Ordinance VII of 1914 [Foreigners (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Ordinance VII of 1914 [Foreigners (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Ordinance VIII of 1914 [Foreigners (Further Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Ordinance VIII of 1914 [Foreigners (Further Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Ordinance IX of 1914 (Articles of Commerce). In Urdu. Pies 3. (Anna 1.)
- Ordinance IX of 1914 (Articles of Commerce). In Nagri. Pies 3. (Anna 1.)

V.—MISCELLANEOUS PUBLICATIONS.

- Table showing effect of legislation in the Governor-General's Council during 1898 to 1900. Re. 1. (Anna 1 p. 6.)
- Table showing effect of legislation in the Governor-General's Council during 1901. As. 6. (As. 2.)
- Table showing effect of legislation in the Governor-General's Council during 1902. As. 2 p. 6. (Anna 1.)
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- HINDU LAW—Adoption—Successive adoptions—Limit for exercise of power to adopt—Death of first adopted son leaving widow but no son—Second adoption by widow of previous owner of impartible zamindari—Family governed by Mitakshara Law—Divesting of property by adoption—Rule that adoption must be made to last male owner.] *A*, the holder of an impartible zamindari and a member of a joint family governed by Mitakshara Law, gave authority to his wife to adopt a son to him. On *A*'s death his brother *R* took possession of the property. The widow subsequently adopted a son *B* who recovered the estate of *R* and held it until 1906, when he died leaving a widow but no son. A descendant of *R* then took possession of the property but died in the same year, and was succeeded by his son the respondent. In 1907 *A*'s widow purported to make a second adoption to *A* under the authority from him, by taking in adoption the appellant. In a suit brought by him to recover the zamindari, *Held*, that the law imposed a limit within which a widow can exercise a power of adoption conferred on her, and the limit to her power was reached when *B* died after attaining full legal capacity to continue the line of descent either by a natural born son, or by the adoption to him of a son by his own widow against whom it had not been established (she not being a party to the suit) that she had no power to adopt. This conclusion was in no way in conflict with the previous decision of the Board

in *Baghunada Deo v. Brozo Kishore Patta Deo* (1876) I.L.R., 1 Mad., 69; L.R., 3 I.A., 154. It was therefore not necessary to decide whether the authority to adopt empowered *A*'s widow to take a second adoption.

- Madana Mohana Deo v. Purushottama Deo* (1918) I.L.R., 41 Mad. (P.C.), 855
- HINDU LAW—Religious office and emoluments—Hindu females, right of, to inherit.] *Held* by the Full Bench (SADASIVA AYYAR, J., dissenting), that according to the practice and precedents obtaining in the Madras Presidency, a Hindu female is not incompetent by reason of her sex to succeed to the office of archaka in a temple and to the emoluments attached thereto. *Sundarambal Ammal v. Yogavana Gurukkal* (1915) I.L.R., 38 Mad., 850, overruled. *Mohan Lalji v. Gordhan Lalji Maharaj* (1913) I.L.R., 35 All., 283 (P.C.), distinguished.
- Annaya Tantri v. Aminakka Hengsu* ... (1918) I.L.R., 41 Mad. (F.B.), 886

INDIAN RAILWAYS ACT (IX OF 1890), SS. 72 AND 77—Duty of Railway Company, as a bailee, under the Indian Contract Act (IX of 1872)—Delivery of goods to person entitled but without production or delivery of railway receipt—Subsequent pledge of railway receipt—Suit by pledgee—Notice of claim, whether necessary—Damage, cause of.] The liability of a Railway Company under the Indian Railways Act in respect of goods consigned for carriage is at an end when the goods are delivered to a person rightfully entitled to them, even though he is not the consignee and even if the delivery is not made against the railway receipt. After delivery of the goods to the rightful person, the railway receipt ceases to be a symbol of goods and ceases to be negotiable. Hence an innocent endorsee for value of the railway receipt after delivery to such a person has no cause of action for damages against the Railway Company. A Railway Company is not under any duty to the public to insist upon the return of the railway receipt. *Held* further, that delivery of goods by the Railway Company without getting in the railway receipt was not the proximate cause of the loss to the endorsee. *Barber v. Meyerstein* (1870) 4 E. & Ir. App., 317, followed. *Held*, also that the suit was barred for want of notice under section 77 of Indian Railways Act which applies to claims for compensation arising not only from non-delivery or accidental loss or destruction or deterioration of goods but also from wilful delivery to a person not entitled to them. The Indian Common Carriers Act III of 1865 and the Indian Railways Act are not in *pari materia* with the English Carriers Act of 1830 as to when notice of loss is necessary. Hence decisions under the English Act are not applicable to India.

- M. & S. M. Ry. Co., Ltd. v. Haridoss Banmalidoss* (1918) I.L.R., 41 Mad., 871
- PROVINCIAL INSOLVENCY ACT (III OF 1907), SEC. 16 (1)—Adjudication by Official Receiver—No order vesting property in Receiver, effect of—Action for money had and received, scope of—Privity of plaintiff and defendant, necessity for—Nature of privity.] The Official Receiver in the insolvency of *R* put up for sale the debts of a firm in which *R* and the second, third and fourth defendants were partners, and the first defendant purchased them from the Receiver and afterwards recovered a debt due to the firm. The

plaintiff having attached three-fourths of the money so recovered by the first defendant in execution of a decree obtained by him against the second, third and fourth defendants for a debt due by the firm and having been appointed Receiver in the execution proceedings sued the first defendant to recover the said three-fourths of the money as money had and received to the use of the second, third and fourth defendants. *Held*, that the plaintiff had no cause of action against the first defendant, because in an action for 'money had and received' there must be, as shown by the English decisions, privity of a legally recognizable nature between the plaintiff and the defendant and no such privity existed in this case and that the suit also failed as regards the shares of the second and third defendants by reason of their adjudications as insolvents prior to the attachment. Scope of the action for money had and received, pointed out; English and Indian cases reviewed. *Sinclair v. Brougham* (1914) A.C. 398, explained. *Sankunni v. Govinda* (1914) 37 Mad., 381, referred to. *Per* SADASIVA AYYAR, J.—While privity of contract between the parties is of course not necessary to sustain an action for money had and received, there must be what might be called some privity of a legally recognizable nature such as some knowledge of particular facts in the man who received the money and some mistake or ignorance of fact on the part of the man who paid the money or some relation of trust and confidence between them on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant. *Per* OLDFIELD, J.—(Obiter) It may be permissible in India as it is in England to sue only the solvent members of a firm when a decree is sought against it. *Hawkins v. Ramsbottom* (1815) 6 Taunton, 179, referred to.

Ramasami Naidu v. Muthusami Pillai ... (1918) I.L.R., 41 Mad., 923
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Allagappa Chettiar v. Chockalingam Chettiar ... (1918) I.L.R., 41 Mad. (F.B.), 904
 TRUSTS ACT (II of 1882), sec. 90—Co-owner, right of, to appropriate rents collected by him towards his share.] A co-owner who has collected as rent more than sufficient to pay the Government peshkash and has paid it, is not entitled to sue another co-owner for contribution to the peshkash. Section 90 of Trusts Act (II of 1882), referred to.

Sivamarasa Reddi v. Doraisami Reddi ... (1918) I.L.R., 41 Mad., 861

PRIVY COUNCIL.*

MADANA MOHANA RANGA BHEEMA DEO (PLAINTIFF)

v.

PURUSHOTTHAMA RANGA BHEEMA DEO (DEFENDANT).

[On Appeal from the High Court of Judicature at Madras.]

1918,
 March 12, 14
 and
 April 26.

Hindu Law—Adoption—Successive adoptions—Limit for exercise of power to adopt—Death of first adopted son leaving widow but no son—Second adoption by widow of previous owner of impartible Zamindari—Family governed by Mitakshara Law—Divesting of property by adoption—Rule that adoption must be made to last male owner.

A, the holder of an impartible zamindari and a member of a joint family governed by Mitakshara Law, gave authority to his wife to adopt a son to him. On A's death his brother R took possession of the property. The widow subsequently adopted a son B who recovered the estate of R and held it until 1906, when he died leaving a widow but no son. A descendant of R then took possession of the property but died in the same year, and was succeeded by his son the respondent. In 1907 A's widow purported to make a second adoption to A under the authority from him, by taking in adoption the appellant. In a suit brought by him to recover the zamindari.

Held, that the law imposed a limit within which a widow can exercise a power of adoption conferred on her and the limit to her power was reached when B died after attaining full legal capacity to continue the line of descent either by a natural born son, or by the adoption to him of a son by his own widow against whom it had not been established (she not being a party to the suit) that she had no power to adopt. This conclusion was in no way in conflict with the previous decision of the Board in *Raghunada Deo v. Brozo Kishore Patta Deo* (1876) I.L.R., 1 Mad., 69; L.R., 3 I.A., 154.

It was therefore not necessary to decide whether the authority to adopt empowered A's widow to make a second adoption.

APPEAL No. 122 of 1916 from a judgment and decree (22nd April 1914) of the High Court of Madras, which affirmed a judgment and decree (1st November 1910) of the District Judge of Gaujam.

The main question for determination in this appeal was as to the validity and effect of the appellant's adoption under the Mitakshara law.

* Present.—Viscount HALDANE, Lord DUNEDIN, Lord SUMNER, Sir JOHN EDGE and Mr. AMRER ALI,

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For the purpose of the report the facts are sufficiently stated in the judgment of the Judicial Committee. They will also be found in the report of the case in the High Court (Sir CHARLES ARNOLD WHITE, C.J., and SESHAGIRI AYYAR, J.) in *Madana Mohana v. Purushotthama*(1).

On this appeal—

De Gruyther, K.C., and *B. Dubé* for the appellant contended that his adoption was good and valid under the Hindu Law. The widow of Adikonda could validly exercise her power to make a second adoption notwithstanding that Ratnamala, the widow of Brojo Kishore, was then alive. Under the circumstances, and on the construction of the authority to adopt, the first adoption did not exhaust the power as the intention was that a second adoption could be made if necessary. Reference was made to *Kannepalli Suryanarayana v. Pucha Venkata-ramana*(2), and *Bhagwat Pershad v. Murari Lal*(3). The adoption of Brojo Kishore was not made until after Adikonda's death, yet he was held to be entitled to succeed; see *Raghunada Deo v. Brozo Kishore Patta Deo*(4). There is no text to support the rule laid down in *Ramkrishna Ramchandra v. Shamrao Yeshwant*(5) as to the limit to the exercise of a power to adopt, and it does not apply to the present case as there is nothing to show that Ratnamala had authority to adopt, and as the widow herself took no estate in the joint Mitakshara family. The appellant took by survivorship, and therefore the rule that an estate once vested can only be divested by an adoption to the last holder was also not applicable. The decision of the Board in *Raghunada Deo v. Brozo Kishore Patta Deo*(4) shows that this family should be treated as joint, only subject to a custom that the estate descends to a single heir. The decision in *Sartaj Kuari v. Deoraj Kuari*(6) does not affect the decision in *Raghunada Deo v. Brozo Kishore Patta Deo*(4). The fact was that the allegation in the plaint that Adikonda took by

(1) (1915) I.L.R., 38 Mad., 1105.

(2) (1906) I.L.R., 29 Mad., 382; L.R., 33 I.A., 145.

(3) (1910) 15 C.W.N., 524.

(4) (1876) I.L.R., 1 Mad., 69; L.R., 3 I.A., 154.

(5) (1902) I.L.R., 26 Bom., 526.

(6) (1898) I.L.R., 10 All., 272; I.L.R., 15 I.A., 51.

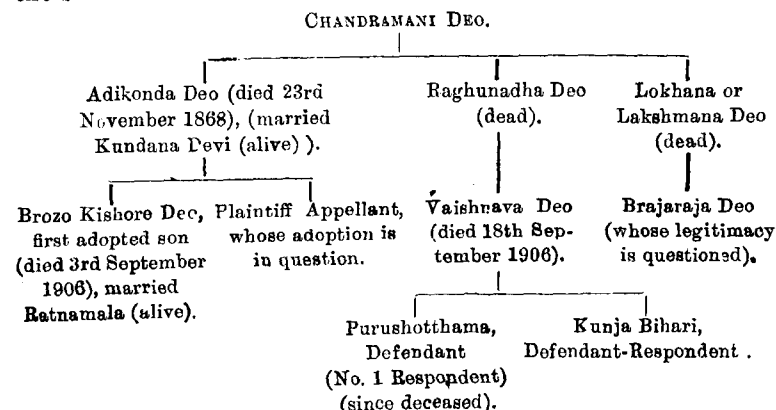
survivorship was not put in issue, and Order VIII, rule 5 of the Civil Procedure Code, therefore precluded the respondent from denying that the family was joint and that the succession in it was by survivorship. A valid authority to adopt gives power to add a new co-parcener at any time. Reference was made to *Bachoo Herkissandas v. Mankorebai*(1). The decision in *Bhobun Moyee Debia v. Ram Kishore Acharjee*(2) is not applicable because there the family was not joint, and the property had vested by inheritance.

Sir H. Erle Richards, K.C., and *J. M. Parikh* for the respondent were not called upon.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE.—This is an appeal from a decree of the High Court of Judicature at Madras which affirmed a decree of the District Judge of Ganjam. The main question to be decided relates to the validity of the appellant's adoption.

The suit is concerned with an impartible zamindari in the district of Ganjam called Chinnakimidi or Pratapgiri. In 1868 the holder of the zamindari was Raja Adikonda Deo, who was a member of a joint Hindu family subject to the Mitakshara law. The following pedigree shows the relationship of the parties to the suit to each other:—



Before his death in 1868 Adikonda Deo, the then Raja, gave to his widow, who was at that time *enceinte*, a written authority to adopt in the following terms:—

"As I know that my end, consequent upon the expiration of the terms fixed by fate, is approaching, I do hereby declare that in

(1) (1907) I.L.R., 31 Bom., 373; L.R., 34 I.A., 107. (2) (1865) 10 M.I.A., 279.

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case you, who are at present pregnant, be delivered of a male issue, the said child alone shall inherit my taluk as well as all my property both movable and immovable. Becoming the owner of movable and immovable properties, till he arrives at the proper age you will look after him; or if a daughter be the result of your present pregnancy, you, adopting a son, who may be in your opinion worthy of the throne, and making him owner of the taluk, etc., shall, pending the attainment of the said boy's majority, take care of him. This agreement is executed with my free will."

On the death of Adikonda, his brother, Raghunadha Deo, took possession of the zamindari. The widow gave birth to a daughter, and, acting on the authority, adopted to her husband a boy, Brozo Kishore Deo, in 1870. The adopted son instituted a suit to recover the zamindari from Raghunadha Deo, and this suit was decided in his favour by this Board in 1876. Having recovered possession of the zamindari, Brozo Kishore Deo held it until his death in 1906. He left a widow, Ratnamala, but no son. Possession of the zamindari was then taken by Vaishnava Deo, who died later in the same year, and was succeeded in the possession by the deceased respondent, Purushotthama Deo.

In 1907 the widow of Adikonda Deo purported to make a second adoption to her husband, under the terms of the authority already set out, by adopting the present appellant. The latter as plaintiff, subsequently instituted the present suit to recover the zamindari.

Several issues were framed, but that on which the result of the appeal must in any view turn is whether the adoption was legal. For, if this question be answered in the negative, other issues which were raised before the Courts below do not arise, and the root is cut from the appellant's case.

It is not in dispute that the zamindari was impartible and descended by the rule of primogeniture to a single heir. When Brozo Kishore was adopted, he succeeded as though he had been the actual son of Adikonda, and, as this Board decided in 1876 with reference to this very succession *Raghunada Deo v. Brozo Kishore Patta Deo*(1) he became entitled to oust Raghunadha, whose right to enter was only temporary, operating merely to prevent the ownership from being in abeyance pending any such succession to his elder brother as the adoption brought about.

(1) (1876) I.L.R., 1 Mad., 69; L.R., 3 I.A., 154.

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But when Brozo Kishore succeeded he became himself the full owner, from whom heirship must be traced instead of as earlier from Adikonda. The widow of the latter was therefore in a different position when she endeavoured to effect the second adoption from that which she occupied on the former occasion. She could on that occasion, by exercising the power conferred on her, establish a direct succession to the estate of her husband Adikonda, which related back to his death. On the second occasion the ownership which had become vested in Brozo Kishore had intervened, and it was only to his estate that she could possibly establish a succession. The learned Judges in the Courts below have all agreed in holding that any authority she could originally be taken to have received to make a second adoption had become inoperative by reason of the changed circumstances, and their Lordships are of opinion that the conclusion so come to was right.

The Hindu Law no doubt recognizes the validity of an authority given to a Hindu widow by her deceased husband to make a second, or even a third or fourth, adoption on failure of the previous adoption to attain the object for which the power is given, viz., the perpetuation of the deceased's line to discharge the obligations that rest on a pious Hindu. When the authority to make successive adoptions is alleged, two questions arise: (1) whether it was in fact given; and (2), if so given, did it still exist in the widow when the subsequent adoption is made.

In the present case their Lordships do not consider it necessary to decide whether the document before them can be construed as by its terms enabling a second adoption to be made. For the vital question here is whether after the adoption of Brozo Kishore Deo the power still survived in the widow of Adikonda Deo.

When and under what circumstances the authority ceases to be exercisable has been considered in a number of cases both by this Board and the Courts in India. The High Court at Bombay took the view that the power must be looked on as extinguished under analogous circumstances in the case of *Ramkrishna Ramchandra v. Shamrao Yeshwant*(1), where CHANDAVARKAR, J., delivering the judgment of the Full Bench, examines

(1) (1902) I.L.R., 26 Bom., 526.

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the authorities closely. He interprets earlier decisions of the Judicial Committee as having established conclusively that, quite apart from any question of construction, there is a limit imposed by law to the period within which a widow can exercise a power of adoption conferred on her, and that when that limit is reached the power is at an end. That limit may arise from circumstances such as those already referred to. The authorities on which he founds are the judgment of this Board as delivered by Lord KINGSDOWN in *Bhoobun Moye Dibia v. Ram Kishore Acharjee*(1), and the subsequent judgments in *Padma Kumari Debi v. Court of Wards*(2) and *Thayammal v. Venkata Rama*(3).

Their Lordships are in agreement with the principle laid down in the judgment of the Full Court of Bombay as delivered by the learned Judge, and they are of opinion that on the facts of the present case, the principle must be taken as applying so as to have brought the authority to adopt conferred on Adikonda's widow to an end when Brozo Kishore, the son she originally adopted, died after attaining full legal capacity to continue the line either by the birth of a natural-born son or by the adoption to him of a son by his own widow. That widow was not a party to the suit, and, whether or not she had power to adopt to Brozo Kishore, it has not been established against her that she had no such power. Their Lordships think it right to draw attention to this circumstance, but they do not desire to be understood as saying that even in its absence the succession of Brozo Kishore and his dying after attaining full legal capacity to continue the line would not in themselves have been sufficient to bring the limiting principle into operation, and so to have so determined the authority of Adikonda's widow, who was not the widow of the last owner, and could not adopt a son to him. This conclusion is in their opinion in no way in conflict with the previous decision of this Board as to the succession to this zamindari. There the title of Adikonda's widow to displace Raghunadha's succession was recognized. But Raghunadha's succession was of a character only provisional, and subject to defeasance by the emergence of a male heir to Adikonda.

(1) (1865) 10 Moore's I.A., 279.

(2) (1881) I.L.R., 8 Cal., 302; L.R., 8 I.A., 229.

(3) (1887) I.L.R., 10 Mad., 205; L.R., 14 I.A., 67.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitors for the respondent: *Chapman-Walker and Shephard.*

J.V.W.

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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

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APPELLANTS

1918.
February
14, 15 and 21.

v.

DORAISAMI REDDI AND ANOTHER (DEFENDANT AND THIRD
PLAINTIFF), RESPONDENTS.*

*Co-owner, right of, to appropriate rents collected by him towards his
share—Trusts Act (II of 1882), sec. 90.*

A co-owner who has collected as rent more than sufficient to pay the Government peshkash and has paid it, is not entitled to sue another co-owner for contribution to the peshkash.

Section 90 of Trusts Act (II of 1882), referred to.

SECOND APPEAL against the decree of R. ANNASWAMI AYYAR, the Temporary Subordinate Judge of Cuddalore, in Appeal No. 7 of 1915, preferred against the decree of K. L. VENKATA RAO, the Additional District Munsif of Villupuram, in Original Suit No. 15 of 1914.

The facts are given in the first paragraph of the judgment of SADASIVA AYYAR, J. The plaintiffs Nos. 1 and 2, whose suit was dismissed by the lower Appellate Court, preferred this second appeal.

T. R. Ramachandra Ayyar, T. R. Krishnaswami Ayyar and A. Krishnaswami Ayyar for appellants.

Hon'ble Mr. *T. Ranga Achariyar* and *C. Padmanabha Ayyan-
gar* for respondents.

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The Court delivered the following JUDGMENT :—

OLDFIELD, J.—First and second plaintiffs, appellants, with third plaintiff sued defendant to recover his share of the peshkash they had paid on the mitta which all own in common, defendant's interest being one-fourth. The defence was that plaintiffs had collected from the tenants sufficient to cover what they paid for defendant in addition to what they were entitled to retain as their own share of the collections; and the issue between the parties relates to the manner in which the collections should be apportioned, plaintiffs contending that, as co-owners, they are entitled to all they may collect up to a sum equal to three-quarters of the total demand of the estate; defendant, as his case was put forward in the lower Appellate Court and finally here, that they are entitled to retain only three-quarters of their total actual collections and must hold the balance in trust for him and credit it against the amount they have paid out on his behalf.

Of these methods of calculation, that proposed by plaintiffs is evidently open to the objection, regarded by the lower Appellate Court as *decisive*, that it admits of one side collecting its share of the rents from the solvent tenants and leaves the other to collect at excessive trouble and expense from the insolvent and recalcitrant. But plaintiffs have founded their contention on their alleged right as co-tenants to any enjoyment of the common property, which does not involve their receipt of more than their just share of the profits realizable from it or the ouster of the other co-tenants; and this is supported by reference to two Indian and two English cases, in which, it is contended, the law applicable to the co-tenants before us is laid down.

The first of these, *Nallayappa Pillai v. Ambalavana Pandara Sannadhi*(1) no doubt dealt with collection of rents and it was said that

"not only was the kattalai, as one of the tenants in common, not bound to pay over to the mutt (the other) a moiety of what it received from the ryots, so long as such receipts did not exceed its proper share, but in an action against the kattalai to account for its receipts over and above what it was entitled to, it was for the mutt distinctly to allege and show that the kattalai's receipts did in fact exceed its due share."

(1) (1904) I.L.R., 27 Mad., 465 at p. 477.

But the judgment proceeded

"No averment of that kind having been made and no proof in support of it having been offered, the suit (brought on an agreement, not, as the District Munsif treated it, for an account) necessarily failed."

The circumstances were peculiar and it appears from the record that, not only was the suit not for an account but the kattalai had been tendering pattas and presumably collecting only its half share. With the English authorities referred to including *Kennedy v. De Trafford*(1), I deal later. The material fact is that the Court referred to the share of receipts, not of demand; and this is in defendant's favour.

The other Indian decision, *Mahesh Narain v. Nowbat Pathak*(2), relied on as supporting plaintiffs, can in my opinion be distinguished. The dispute was between one co-tenant of a quarry and a lessee under another, the lessee's rights being discussed as equivalent to those of his lessor, and it was no doubt held that, as there was no ouster or destruction of the common property, the co-tenant plaintiff, who himself had not attempted or been debarred from any enjoyment of it, was not entitled to an account in the absence of proof that the lessee had taken more than his lessor's just share of the stone. The case however differs from that before us in respect of the manner, in which the profits are claimed and in which they were obtained. Firstly in *Mahesh Narain v. Nowbat Pathak*(2), they were claimed directly by the plaintiff, co-tenant, whilst as the judgments show, he was disclaiming any liability to contribute towards the expenses incurred. Here not only has defendant been ready to give and plaintiffs have not refused credit for the proper proportion of the expense incurred by the latter in collection, but also defendant's claim is made in answer to one by plaintiffs to be reimbursed for expenditure, essential to the continuance of the common property in the common ownership, but for which it would have been brought to sale by Government for arrears of peshkash and no profits could have accrued. It is not suggested that contribution is claimed from defendant in respect of any distinct portion of the estate, for which plaintiffs have not collected and he is at liberty to collect, or otherwise than for

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(1) (1897) A.C., 180.

(2) (1905) I.L.R., 32 Calc., 837.

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his unascertained share in the property as a whole. The second distinction between the present case and *Mahesh Narain v. Nowbat Pathak*(1), appears clearly from the quotation from the judgment in one of the English authorities now relied on, *Henderson v. Eason*(2), on which the Calcutta decision is based. The claim in *Henderson v. Eason*(2), was to an account and share of the profits derived by a co-tenant from common property, of which he was in possession and which he had cultivated directly just as the lessee and the co-tenant lessor had enjoyed the quarry, which was in question in Calcutta, and it was observed that in such cases it is impossible to say that the co-tenant has received more than his just share.

"He takes the whole of the crops, and is he to be accountable for any of the profits, when it is clear, that, if the speculation had been a losing one altogether he could not have called for a moiety of the losses, as he would have been enabled to do, had the land been so cultivated by the mutual agreement of the co-tenants? . . . He receives—in truth the return of his own labour and capital to which his co-tenant has no right."

This ground of decision was as directly available in *Mahesh Narain v. Nawbat Pathak*(1), as it is excluded by the facts before us, plaintiffs' acceptance of profits, to the making of which their own exertions or expenditure have not gone, except as regards the latter so far as they claim that defendant was jointly liable for the peshkash with them.

The portion of the judgment in *Henderson v. Eason*(2), relating to a state of facts similar to these before us is also relied on because it also is said to support plaintiff's claim, inasmuch as it shows that the English Common Law to be applied in the present case had previously been that, whilst the co-tenancy continued, one co-tenant had no remedy against another, who had received the profits, unless the latter had been expressly appointed the former's bailiff or the former had been ousted. Vide also the extract from Co-Litt. 200 b. in the argument. And it is argued that this view is further supported by *Kennedy v. De Trafford*(3), in which LORD HERSCHELL said that a co-tenant collects rents in the right, which he possesses as such, and does

(1) (1905) I.L.R., 32 Calc., 837.

(2) (1851) 17 Q.B., 701.

(3) (1897) A.C., 180.

not need any special contract (such as was proved in that case) or any agency express or implied to justify him in collecting. This *dictum* was however relevant only to the question then in issue, whether the co-tenant, who collected the rents, was on that account in a fiduciary relationship with the other co-tenant which would debar him from purchasing the property, when it was sold by a mortgagee. There was no issue and no decision as to his liability to account for any part of his collections or its extent, and there is nothing to affect the conclusion as to the liability in *Henderson v. Eason*(1), based on the statute, 4 Anne c. 16, which was held applicable in supersession of the Common Law, to

"cases in which one of two tenants in common of lands leased at a rent payable to both receives the whole or more than his proportionate share according to his interest in the subject of the tenancy," that "he is bailiff only by virtue of his receiving more than his just share, and as soon as he does so, is answerable for only so much as he actually receives."

The statute is dependent on no local or temporary considerations and has been the English Law from prior to the date of its reception in India, as representing justice, equity and good conscience; and, if there were no Indian provision for the case, I should treat it, not the earlier Common Law, as applicable.

It is however argued, it seems to me correctly, that such provision, is available in section 90, Trusts Act (II of 1882) the relevant portion of which provides that,

"where a co-owner, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold for the benefit of all persons so interested the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred in gaining such advantage."

It is unnecessary to decide whether the section was intended to embody the English rule. For it is sufficient that it applies to a co-owner's right existing like defendant's in the present case, but unlike that in question in *Mahesh Narain v. Nowbat Pathak*(2), independently of and antecedently to the realizations, which not only his position as co-owner, but also his special exertions or expenditure enable him to make. Here

(1) (1851) 17 Q.B., 701.

(2) (1905) I.L.R., 32 Calc., 837.

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OLDFIELD, J. defendant, as the plaint admits and the claim made involves, is a co-owner; and it is not disputed that he is, apart from plaintiff's collection of the rents, entitled to a proportionate share in them. The co-owner, who collects them, can in the absence of arrangement with the others, do so only as their representative, this appearing from the fact that if he attempts to recover by suit, he is bound to join those others either as plaintiffs or defendants, the court being able to protect their interests at the execution stage by an order under Order XXI, rule 15; *Nepal Chandra Ghose v. Mohendra Nath Roy Choudhury*(1), and *Pramada Nath Roy v. Ramani Kanta Roy*(2). The terms of the section being fulfilled, plaintiffs under it must account to defendant for the advantage they have gained in the shape of the excess over their own proportionate shares in the collection.

No other ground of appeal being argued, this entails concurrence in the Lower Appellate Court's decision. The Second Appeal is dismissed with costs.

SADASIVA AYYAR, J.—The plaintiffs Nos. 1 and 2 are the appellants. They and the third plaintiff own a three-fourth share in a mitta and the defendant owns the remaining one-fourth share. The lands in the mitta are enjoyed by tenants and the plaintiffs' share of the net rents (after deducting costs of collection) is a $\frac{3}{4}$ fraction and the defendant's the remaining $\frac{1}{4}$ th fraction. Both the plaintiffs and the defendant are jointly liable for the peshkash due to Government. The plaintiffs paid more than their three-fourth share of the peshkash due for faslis 1319 and 1320 and the defendant paid much less than his one-fourth share and hence the plaintiffs brought the suit for the recovery of the excess (over three-fourth share) paid by them. The defendant contended (among other defences) that the plaintiffs have collected and enjoyed more than their three-fourth share of the rents due by the tenants and that if accounts are taken, nothing would be found due to the plaintiffs. The District Judge passed an order on the 27th January 1915 calling for a finding from the lower Court, the material portions of the order being as follows:—

"The defendant claims in issue 3 that the rents collected by the plaintiffs should be set off against their demand. The lower

(1) (1904) I.L.R., 31 Cal., 707.

(2) (1908) I.L.R., 25 Cal., 331 (P.C.).

Court has held that so long as the plaintiffs have not collected more than their share of the whole rental, they are not accountable to the defendant. I think that the correct view is that the plaintiffs are accountable for a proportionate amount *on each patta*." (Italics are mine.) "With joint holders, it would never do for one to be allowed to collect his fraction of the total rent from the solvent tenants leaving it to his fellows to collect their dues from the other tenants. Each landholder is entitled to a *proportionate amount of each tenant who contracts with the landholders jointly*. It is, therefore, necessary in this case to have a statement of accounts showing what has been paid by each pattadar or tenant to each landholder from the beginning of fasli 1318 up to date of plaint together with the expenses incurred by each landholder for collection. Accordingly, I remand this case for submission of such an account." It is not very clear from this remand order whether the District Judge thought (a) that after totalling the collections from all the tenants holding under several pattas, it should be ascertained whether the total amount exceeded three-fourths of the *total demand* from all the holdings in the village and plaintiffs should account for the balance to the defendant or (b) whether the plaintiffs should account for one-fourth of *the total collections* made by the plaintiffs to the defendant or (c) whether they should account to the defendant whenever they had collected more than *three-fourths of the demand due on any patta* for the excess over that three-fourths on that patta though their total collections from all the holdings might be less than three-fourths of the demand on all the holdings or might be less than even three-fourths of the total amounts due by the tenants from whom they made collections. From the way, however, in which the accounts were afterwards taken by the District Munsif and by the Commissioner appointed by him without protest, it appears that all the parties understood that the District Judge held that out of the net collections made by the plaintiffs in each fasli from all the tenants, they should account for one-fourth share to the defendant while the defendant in his turn should account for three-fourths of his net collections (that is, collections after deducting expenses of collection) to the plaintiffs and that the accounts should be taken in the above manner. When accounts were taken as above it was found that a sum of Rs. 134 and odd was due by the plaintiffs themselves to the defendant,

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and hence the Subordinate Judge (to whom the appeal had been transferred after remand) dismissed the plaintiffs' suit with costs. The second of the grounds in the memorandum of Second Appeal before us is as follows:—"It having been admitted and proved that the plaintiffs did not collect more than their share of the rent from the ryots and they paid not only the peshkash due by them but also that due by the defendant, the lower Court should have held that the plaintiffs are entitled to contribution and the suit should have been decreed." It is not clear whether the expression "plaintiffs' share of the rent" found in this second ground of the appeal memorandum means (a) *plaintiffs' share of the total annual demand from all the ryots* or (b) whether it means plaintiffs' share of the total demands due by those tenants alone from whom they made collections, or (c) the plaintiffs' share of the demand on each particular holding from the tenant of which they made collections. In the course of the argument Mr. T. R. Ramachandra Ayyar for the appellants contended that, as the plaintiffs' total collections were not alleged by the defendant to have exceeded three-fourths of the total demand from all the ryots, the plaintiffs were not in law bound to account for one-fourth share of the net sum so collected by the plaintiffs as decided against them by the lower appellate Court in the remand order which decision was adopted by the Commissioner in taking the accounts.

In support of this proposition of law, the learned vakil relied on the observations in certain English cases and on the *dicta* found in *Nallayappa Pillai v. Ambalarana Pandara Sannadhi* (1) and *Mahesh Narain v. Nowbat Pathak* (2). A few more facts might be stated here to appreciate the relative positions of the parties. The defendant and the plaintiffs Nos. 2 and 3 were willing in January 1910 to have the first plaintiff recognized as the 'manager' of the whole mitta estate and registered by the Collector as 'the senior joint owner' so that he might be recognized as proprietor under Act II of 1894 to exercise the powers of appointment of village officers, of reporting against them, of punishing them and so on. As manager the first plaintiff alone issued pattas to the tenants in faslis 1319 and 1320. And this could have been done only on behalf of all the four joint

(1) (1904) I.L.R., 27 Mad., 465.

(2) (1905) I.L.R., 32 Cal., 837.

proprietors. As regards arrears not collected from the tenants, all the three plaintiffs and the defendant filed suits jointly in the Revenue Court for such arrears due for faslis 1320, 1321 and 1322 and most of the suits have been decreed in favour of all the four jointly. The first plaintiff says in his evidence: "Under ordinary circumstances, all the four mittadars should share equally profit and loss. The profit or loss can be ascertained only after payment of peshkash." Each of the four mittadars seems to own the kudivaram also in some of the lands in the estate and usually the rent due by each of the four mittadars as a ryot of these lands (to the four mittadars jointly as landlords) is not actually collected, but each debits the rents due by him in the account of collections which he gives to the common karnam (see evidence of the karnam, plaintiff's second witness). Where attachments or other proceedings have to be taken and expenses incurred, the net collections alone are considered as received by the proprietor who has incurred the cost of such collections. On the above facts, it is clear to my mind that the justice and equity of the case is in favour of the view taken by the lower appellate Court that every one of the co-owners must be deemed to collect on behalf of all, every rupee he obtains as net collection from any tenants, that the net amount must, therefore, be brought into the common account and that each co-sharer is entitled to his fraction in that amount in proportion to his share. After I prepared my judgment up to this point, I had the advantage of a perusal of the judgment just now pronounced by my learned brother and as I entirely concur with him in his discussion of, and conclusions on, the English and Indian precedents, I think it unnecessary to myself refer to them or detail them. Where there is no risk, no question of adventure or enterprise, no question of the employment of real and appreciable labour or skill or capital or industry in the obtaining of pecuniary profits from the common property by one co-sharer, the reason of the decisions quoted by the appellant does not apply and even if there are old English decisions in which wide language is used as to the irresponsibility of a co-sharer to his other co-sharers under all circumstances, it should be remembered that the rights and liabilities of joint owners, joint debtors, and joint creditors were looked at sometimes under the English common law in a too technical manner not quite consistent with

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plain equity and justice and I am not prepared to follow such old decisions, especially after the English statute of Anne was passed evidently in order to get rid of some at least of the said technicalities based upon the old forms of action. Of course where one co-sharer obtains the amenities of mere comforts, conveniences or residential advantage or of mere user and occupation without an adverse *animus* against the other co-owners he cannot be treated as bound to account to his other co-sharers as if he had obtained the common premises for the rent to which they could have been let to a stranger.

In cases other than those in which the co-sharer *expressly intended to collect for his own share alone, made a demand on tenants for his own share alone as in Nallayappa Pillai v. Ambalavana Pandara Sannadhi*(1) and was paid by the tenants expressly for or towards that share alone (these facts being required to be alleged and proved by that co-sharer in any litigation between him and other co-sharers) if he wants to rebut the natural presumption that he collected for the common benefit, plain law and equity, in my opinion, is in favour of the view that he collects whatever he collects on behalf of all.

In the result, I concur in dismissing the second appeal with costs.

N.R.

(1) (1904) I.L.R., 27 Mad., 465.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Spencer.

THE MADRAS AND SOUTHERN MAHRATTA
RAILWAY COMPANY, LIMITED (DEFENDANT), APPELLANTS,

1918,
February 20,
21 and 22.

v.

HARIDOSS BANMALIDOSS (PLAINTIFF), RESPONDENT.*

Indian Railways Act (IX of 1890), ss. 72 and 77—Duty of Railway Company, as a bailee, under the Indian Contract Act (IX of 1872)—Delivery of goods to person entitled but without production or delivery of railway receipt—Subsequent pledge of railway receipt—Suit by pledgee—Notice of claim, whether necessary—Damage, cause of.

The liability of a Railway Company under the Indian Railways Act in respect of goods consigned for carriage is at an end when the goods are delivered to a person rightfully entitled to them even though he is not the consignee and even if the delivery is not made against the railway receipt. After delivery of the goods to the rightful person, the railway receipt ceases to be a symbol of goods and ceases to be negotiable. Hence an innocent endorsee for value of the railway receipt after delivery to such a person has no cause of action for damages against the Railway Company.

A Railway Company is not under any duty to the public to insist upon the return of the railway receipt.

Held further that delivery of goods by the Railway Company without getting in the railway receipt was not the proximate cause of the loss to the endorsee.

Barber v. Meyerstein (1870) 4 E. and Ir., App., 317, followed.

Held also that the suit was barred for want of notice under section 77 of Indian Railways Act which applies to claims for compensation arising not only from non-delivery or accidental loss or destruction or deterioration of goods but also from wilful delivery to a person not entitled to them.

The Indian Common Carriers Act III of 1865 and the Indian Railways Act are not in *pari materia* with the English Carriers Act of 1830 as to when notice of loss is necessary. Hence decisions under the English Act are not applicable to India.

APPEAL against the judgment of KUMARASWAMI SASTRIYAR, J., in Civil Suit No. 262 of 1915.

On 23rd July 1914, one Gurunathan at Guntūr delivered 65 bales of cotton to the appellant Railway Company for carriage

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to Madras, and on the same day the Railway Company issued a railway receipt in which Gurunathan appeared both as consignor and consignee. This railway receipt was immediately endorsed by Gurunathan to the Bank of Madras. The bales arrived in Madras on 29th July 1914 and lay in the Harbour Station until 4th August 1914 when they were delivered to a firm trading as Swaminatha Reddy & Co. At the date of this delivery Swaminatha Reddy & Co. had not purchased the cotton from the Bank and had not received an assignment of the railway receipt and were not in possession of it, and the cotton was permitted to be taken away without the receipt being produced or given up. Three days thereafter, however, namely on 7th August 1914, Swaminatha Reddy & Co. did pay the Bank the value of the cotton and obtained the railway receipt duly endorsed in their favour. On 21st August 1914, Swaminatha Reddy & Co. pledged the railway receipt with Haridoss, the plaintiff in this suit, and it was assumed throughout that the pledge was for money actually advanced in good faith and under the belief that the cotton was at the moment of pledge in the custody of the Railway Company though it had been taken delivery of by Swaminatha Reddy & Co. two weeks before that firm had induced him to lend money on the pledge of the railway receipt. Plaintiff, without giving notice of his claim to the Railway Company within six months from the delivery for carriage as provided by section 77 of the Indian Railways Act, brought this suit for damages alleged to have been caused to him by the failure of the defendant Railway Company to deliver the goods to him. The Railway Company pleaded *inter alia* (1) that it had delivered the goods to the rightful person then entitled, namely, Swaminatha Reddy & Co., (2) that the liability of the Railway Company in respect of the goods was then at an end, (3) that the Company was not bound to get back the receipts on delivery of the goods, (4) that it was not liable for the fraudulent endorsement of Swaminatha Reddy to the plaintiff after delivery of the goods and (5) that the suit was not maintainable for want of notice of claim within six months of the consignment as required by section 77 of the Indian Railways Act. KUMARASWAMI SASTRIYAR, J., who tried the suit, held that notice of claim under section 77 of the Indian Railways Act was not necessary in a

case of wilful misdelivery like this and gave plaintiff a decree. The Railway Company preferred this appeal.

D. Chamier (R. N. Ayyangar with him) for the appellants.— Notice of intended suit is necessary under section 77 of the Indian Railways Act in all cases, whether the loss complained of was accidental or was the result of some positive misfeasance such as misdelivery. Section 77 found place in a chapter headed 'Responsibility of Railway Administrations as carriers', and the word 'loss' occurred not only in that section but in every section in the chapter and must be taken to have the same meaning in section 77 as in section 72. 'Loss' in section 77 meant 'loss' however caused, whether accidentally or wilfully; otherwise there would be no provision in the Act for liability for any wilful misdelivery by the Company.

V. V. Srinivasa Ayyangar for the respondent contended that 'loss' in section 77 only referred to losses caused by accident and that a Railway Company was not entitled to notice when the loss had been caused by non-delivery and cited *Hearn v. London and South Western Railway* (1), *Morrit v. North Eastern Railway Co.* (2) and *Millen v. Brasch & Co.* (3), decided under the English Carriers Act of 1830.

D. Chamier in reply.—The Railways Act was intended to be exhaustive of the responsibilities of a Railway Company for all losses however caused. The liability of the Company is that of a bailee and it is clear that a bailee would be responsible to his bailor if he deliberately gave the goods bailed to a person not entitled to them. (He referred to the sections of the Indian Contract Act dealing with bailments.)

On the merits he contended that the Railway Company had not made a wrong delivery, because Swaminatha Reddy & Co. paid for the goods and obtained an assignment of the railway receipt in their favour three days after the delivery to them and two weeks prior to the pledge of the railway receipt to the plaintiffs. It must be taken as a correct delivery because plaintiff's interests were in no way affected by the fact that for three days the Reddy had not been entitled to delivery. The result was that the railway receipt ceased to exist as a

(1) (1855) 10 Ex., 798.

(2) (1876) 1 Q.B.D., 302.

(3) (1882) 10 Q.B.D., 142.

M. & S. M. symbol representing the goods two weeks before the receipt
 Ry. Co., Ltd., had been pledged, and plaintiff advanced his money on a
 HARIDOSS document which was spent and valueless; *Barber v. Meyerstein*
 BANMALI- (1). Nor was the Railway Company liable for giving delivery
 DOSS. without getting in the receipt. The Company owed no duty
 to the public to get it in. Clause 3 printed at back of the
 receipt negatives such a duty and no purchaser or pledgee of the
 receipt was justified in supposing that the goods must neces-
 sarily be with the Railway Company merely because the railway
 receipt was outstanding. Moreover, the failure to get in the
 receipt was not the proximate cause of the loss. That was due
 to the intervention of the fraudulent act of Swaminatha Reddy;
Bank of Ireland v. Trustees of Evans' Charities(2), and *Farquhar-
 son Brothers & Co. v. King & Co.*(3). A railway receipt is not a
 negotiable instrument and not even a document of title except as
 between the owner of the goods and a transferee or pledgee from
 a person to whom the owner has entrusted the receipt. In such
 cases a railway receipt has the attributes of a negotiable instru-
 ment because the person transferring or pledging can confer a
 better title than he himself has. This is a test of negotiability.
 In other words a railway receipt is a document of title and has
 the attributes of negotiability in cases governed by sections 102,
 103, 108 and 178 of the Indian Contract Act and under the
 English Factors Act; *Englis v. Robertson*(4) and Halsbury's
 Laws of England, Volume 25, page 119. The decision of the
 Judicial Committee in *Ramdas Vithaldas v. Amerchand & Co.*(5)
 was in a case governed by section 103 of the Contract Act. A
 railway receipt could not have the attributes of negotiability in
 a contest in which the Railway Company was a party.

T. G. Raghavachari (for V. V. Srinivas Ayyangar) for the
 respondents, replying on this part of the case, contended that
 the Railway Company had enabled Swaminatha Reddy to pledge
 the goods with plaintiff by not getting in the receipt and of the
 two innocent persons the Company should be made to suffer the
 loss: *Lickbarrow v. Mason*(6). A railway receipt is a negotiable

(1) (1870) 4 E. and Ir., App., 317.

(3) (1902) A.C., 325 at p. 332.

(5) (1916) I.L.R., 40 Bcm., 630 (P.C.)

(6) (1787) Smith's Leading Cases, Vol. I, p. 726.

(2) (1855) 5 H.L.C., 389.

(4) (1898) A.C., 616.

security like a promissory note and failure to get the receipt was
 a breach of duty which rendered the Company liable to subse-
 quent transferees for value: *Nash v. De Freville*(1), *Glasscock v.*
Balls(2), *Barber v. Meyerstein*(3), *Babcock v. Lawson*(4), *The*
Mayor, Constables & Co. of the Merchants of the Staple of
England v. The Governor & Company of the Bank of England(5),
London and County Banking Co. v. Land and River Plate Bank
 (6), *Macmillan v. London Joint Stock Bank*(7).

D. Chamier in reply submitted that a bill of lading is not
 strictly a negotiable instrument and quoted Carver on "Carriage
 by Sea", page 487.

The Court delivered the following JUDGMENT :—

WALLIS, C.J.—This is an appeal from the judgment of Mr. WALLIS, C.J.
 Justice KUMARASWAMI SASTRI in a suit brought by the plaintiff who
 was the indorsee for value of two railway receipts to make the
 Railway Company liable for misdelivery. The facts were that
 the goods in question were consigned by one Gurunatham, to his
 own order, to the Madras Harbour station of the defendant
 railway. Gurunatham had pledged the railway receipts with the
 Bank of Madras, and the Bank of Madras were the persons
 entitled to delivery of the goods. It was intended that one
 Swaminatha Reddy should pay the Bank and get the railway
 receipts assigned to him and then take delivery of the goods.
 He managed however to get possession of the goods from the
 Railway Company without production of the railway receipts and
 before he had paid the Bank. This was apparently because
 for many years large consignments of cotton had been consigned
 by Gurunatham in this way and had been duly taken delivery
 of by Swaminatha Reddy. Two or three days afterwards Swami-
 natha Reddy paid the Bank of Madras and obtained the railway
 receipts. When that happened, in our opinion, the contract of
 carriage by the Railway Company was entirely completed. Swami-
 natha Reddy however did not return the railway receipts to the
 Railway Company but committed a fraud on the plaintiff by
 obtaining an advance against the railway receipts which were
 taken as is usual to represent that the goods specified in the
 receipts were still in course of transit which was not the case as

(1) (1900) Q.B., 72.

(2) (1890) 24 Q.B.D., 13.

(3) (1870) 4 E. and Ir., App., 317.

(4) (1879) 4 Q.B.D., 394 at p. 400.

(5) (1887) 21 Q.B.D., 160. (6) (1888) 21 Q.B.D., 535 at pp. 539 and 543.

(7) (1917) 2 K.B., 439.

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they had already been delivered to him and had come into his possession as the rightful owner.

In these circumstances, two interesting questions have been raised and very elaborately argued before us. The first question is one of limitation whether the suit is barred under section 77 of the Indian Railways Act because notice of the claim for compensation for the loss of the goods was not given in writing by the plaintiff or on his behalf to the Railway, within six months from the date of the delivery of the goods for carriage by the Railway. The learned Judge held that this section was inapplicable to the present case because the servants of the Railway delivered the goods to Swaminatha Reddy without the production by the railway receipts and with full knowledge that they were consigned not to Swaminatha Reddy but to Gurunatham. Mr. V. V. Srinivasa Ayyangar who argued this part of the case for the respondent relied on certain English decisions on the Carriers Act of 1830 which is practically re-enacted in India by Act III of 1865. That Act exempted carriers from liability in respect of loss or injury to certain valuable articles if they were consigned without being declared and the extra charges paid. That Act was construed by the Court of Exchequer in *Hearn v. London and South Western Railway Co.*(1), where Parke, B., held that the exemption only applied to what I may describe as accidental loss; and similarly in the subsequent case of *Morrit v. The North Eastern Railway Co.*(2), Mr. Justice BLACKBURN, as he then was, also observed that a misdelivery, such as that with which we are dealing would not be a loss covered by the Act. The Act was also construed in *Millen v. Brasch & Co.*(3), in which it was held among other things that delays would be covered by the word 'loss' as thus used. These decisions undoubtedly would support Mr. Srinivasa Ayyangar if the Indian Act was in *pari materia* with the Carriers Act of 1830, but it is not. That was an Act relieving carriers to a certain extent from their common law liability as insurers, and we may point out that in arriving at that construction Baron Parke took into account the preamble of the Act and the object with which it was passed. We must do the same with regard to this Act. Chapter VII of the Indian Railways Act of 1890

(1) (1855) 10 Ex., 793.

(2) (1876) Q.B.D., 302.

(3) (1882) 10 Q.B.D., 142.

is headed 'Responsibility of railway administrations as carriers,' and *primâ facie* is intended to deal with the whole subject. The marginal note, which is not part of the Act but represents what I gather upon an independent perusal of the section to be its meaning, describes section 72 as

"Measure of the general responsibility of a railway administration as a carrier of animals and goods."

That measure of general responsibility is said, subject to the other provisions of that Act, to be that of a bailee under sections 152 and 161 of the Indian Contract Act. Now section 151 of the Contract Act deals with the duty of a bailee to take as much care of the goods bailed to him as he would take of his own goods while they are in his custody, and section 152 says that in the absence of a special contract he is not responsible for the loss, destruction or deterioration of the thing bailed, if he takes this amount of care. Then section 160 provides

"It is the duty of the bailee to return or deliver according to the bailor's directions the goods bailed without demand as soon as the time for which they were bailed has expired or the purpose for which they were bailed has been accomplished."

Therefore it deals with the duty of the bailee to duly deliver the goods bailed at the proper time and the marginal note to the section is

"Return of goods bailed on expiration of time or accomplishment of purpose."

Section 161 provides for the contingency of the bailee's failure to discharge the duty prescribed in that section including the duty of making delivery. It says:—

"If by the default of the bailee the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time."

The marginal note is

"Bailee's responsibility when goods are not duly returned."

So that these sections of the Contract Act, which are applied by the Indian Railways Act, purport to deal not merely with the bailee's duty of safe custody but also with the performance of the bailee's duty to deliver at the proper time. Therefore, it seems to me that this chapter must be taken, and was intended, to cover the whole liability of the Railway Company including among other things the responsibility of the Railway Company for

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misdelivery by whatever reason caused. That being so when we come to section 77 and find that notice is required in any claim for compensation

"for the loss, destruction or deterioration of animals or goods," it seems to me that notice is required in all claims which arise with reference to the liability defined in the earlier section and in the specified sections of the Contract Act, sections 152 and 161, the latter of which covers all cases of non-delivery or misdelivery. In section 9 of Act III of 1865, which is reproduced in section 76 of the Indian Railways Act, it is provided

"In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents."

In section 76 of the Railways Act it was not thought necessary to reproduce the word 'non-delivery' the reason being in my opinion that cases of non-delivery are already sufficiently provided for by the reference to sections 152 and 161 of the Contract Act in the earlier section.

In this matter of requiring notice to the Railway Company within a reasonable time in order to enable them to make enquiries and if possible to recover the goods, there is really no reason for making a distinction between cases in which goods have been delivered inadvertently to the wrong person and cases such as the present in which they were delivered to a person other than the consignee who claimed to be entitled to them but did not produce the railway receipt as he should have done in support of his claim. We ought not to import distinctions of this sort into the Railways Act unless they rest upon some basis of sound reason which would be likely to have commended itself to the legislature. I see none such in this case. For these reasons, I think that the cases decided under the Carriers Act on which the learned Judge relied are inapplicable, and that the claim is barred, because notice was not given as required by section 77 of the Railways Act.

That would be sufficient to dispose of the present case, but, as another interesting question was raised and was decided by the learned Judge, I propose to deal with it. It is said that the fact that the Railway did not get back the railway receipts

when it delivered the goods ought to make them responsible to the plaintiff for the value of the goods, the plaintiff having, on the strength of the production of the railway receipts by Swaminatha Reddi, advanced money to him, considering the railway receipts as representing that goods to that value were in transit and in possession of the Railway Company. Much reliance has been placed in the arguments before us, and some reliance was also placed apparently by the learned Judge, on the fact that the delivery to Swaminatha Reddi, when it was made was a wrongful delivery, because at that time he had no right to the goods. But, long before Swaminatha Reddi indorsed over the railway receipts to the plaintiff, he had paid the Bank of Madras and obtained the railway receipts and was therefore the only person entitled to the goods, and also the contract of carriage was at an end. The goods had found their way into the hands of the lawful owner, and therefore no one was prejudiced by the misdelivery and no injurious consequences followed. There may have been *damnum* so far as the Bank of Madras was concerned, but it was *damnum sine injuria*. I think that in the event which happened the case must be decided as if the railway had made delivery of these goods to Swaminatha Reddi, without the production of the railway receipts at a time when he was entitled to them, although he had not brought the railway receipts with him.

But even so, it has been contended before us, that the action of the railway in not getting back the railway receipts was such negligence or breach of duty as to make them liable to subsequent transferees for value of the railway receipts. This proposition has been supported mainly on the authority of the case of *Nash v. De Freville*(1). That was a case of the execution and delivery by the defendant of promissory notes payable on demand. Such an 'on demand' note is intended to be a continuing security and cannot be treated as overdue merely because it was indorsed over some years after the date of execution [*Briggs v. Mitchell*](2). Consequently it remains current in the hands of the payee or indorsee until the maker gets it back; and if, as in the case cited, he omits to get it back when he pays it, he cannot set up that payment against a subsequent transferee.

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(1) (1900) 2 Q.B., 72.

(2) (1841) M. & W., 15.

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Now it by no means follows that a decision as to a promissory note payable on demand is necessarily applicable to a spent bill of lading or a railway receipt. Indeed the analogy is rather with an overdue note. A bill of lading, in origin, as it still is in form, is nothing but a receipt for the goods from the master of the ship to the shipper. But for mercantile convenience and by mercantile usage, it has become a symbol of the goods as explained by Baron Martin in *Barber v. Meyerstein*(1). As possession could not be given of goods at sea, the bill of lading came to be treated as a symbol of the goods and a transfer of the bill of lading as equivalent to a transfer of the goods themselves. The question of the period during which bills of lading can pass title to the goods was considered in the leading case of *Barber v. Meyerstein*(1) to which I have just referred, and the general effect of that decision is that the property in the goods passes by indorsement of the bill of lading so long as the contract of carriage has not been completed by delivery to the proper consignee. This limitation follows from the very origin of this mercantile custom which, as already stated, depends on the fact that goods in transit are incapable of delivery. But once transit is over and they have come to the possession of the consignee, there is no reason for the goods any longer being held to pass by indorsement of the bill of lading, and no authority has been cited before us for the proposition that they would so pass. The contrary is in my opinion clearly assumed in *Barber v. Meyerstein*(1). At the very beginning of his judgment, Lord HATHERLEY says:—

“The question has really turned upon one point, and I may almost say upon one point alone, namely, whether or not the bills of lading had fully performed their office and were discharged and spent at the time that the plaintiff took his security. Whether, in other words, the landing of those goods . . . was or was not a delivery which had exhausted the whole effect of the bill of lading.”

And the case proceeded on the footing, that, if that was so, any subsequent transfer of the bill of lading would be entirely ineffective. It was held in that case that that stage had not yet been reached. Similarly later on, Lord HATHERLEY says:—

(1) (1870) 4 E. & Ir. App., 317.

“The shipowner contracts that he will deliver the goods on the payment of freight. He discharges his contract when he delivers the goods.”

Then Lord WESTBURY says:—

“Unquestionably the bill of lading as long as the engagement to the shipowner has not been fulfilled, is a living current instrument and no doubt the transfer of it for value passes the absolute property in the goods.”

There is no authority whatever for the proposition that, after the bill of lading has ceased to be a living instrument by the delivery of the goods, any dealing with it can affect the property in those goods. Similarly in *Sandars Brothers v. Maclean & Co.*(1). *BOWEN, L.J., observed in a much quoted passage—

“And for the purpose of passing such property in the goods and completing the title of the indorsee to the full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it remains in force as a symbol and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of a warehouse floating or fixed, in which the goods may chance to be.”

Now, if that be so with regard to a bill of lading, it is equally so with regard to a railway receipt. The contract of the railway is to carry goods and to deliver them to the consignee. Ordinarily, it would be bound to deliver at its peril to the person entitled at the end of the transit. But section 57 of the Indian Railways Act protects the railway, and empowers it to refuse delivery except upon the production of the railway receipt. The terms of the railway receipt show that the railway does not hold itself out as delivering goods only on production of the railway receipt. It only reserves liberty to refuse in its discretion to deliver the goods, unless the railway receipt is produced or unless, if the receipt is not produced, an indemnity is given. There is no reason for saying that the railway holds itself out to the mercantile community as never parting with goods except upon the production of the railway receipt. The railway is not in my opinion under any duty to the public or to anybody else to insist upon the return of the railway receipt. It is said that

(1) (1883) 11 Q.B.D., 327 at p 341.

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mercantile men in India treat railway receipts as documents of title and that the usage has now at any rate since the decision of the Privy Council in *Ramdas Vithaldas v. Amerchand and Co.*(1) received legal recognition. But that cannot alter the position of the Railway Company in this respect. It seems to me that the first step in the respondent's position is not established, namely, that there was some duty on the part of the railway not to part with the goods except against the railway receipt.

Apart from that, there is the serious question as to whether what happened could be held to follow from their failure to do so. What happened was that a fraud and a crime were committed by Swaminatha Reddi in obtaining money from the plaintiff on a railway receipt for goods that had already been delivered to him at the end of the transit. Reliance has been placed on the maxim laid down in *Lickbarrow v. Mason*(2)

"that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

In that case, it was held that by parting with the bill of lading to the consignee the consignor had estopped himself from asserting his right to stop in transit against a transferee of the bill of lading from the consignee. It is however well established that there are serious limitations to the general application of this doctrine. In the *Bank of Ireland v. Trustees of Evans' Charities*(3), it was held that the carelessness of the company in leaving its seal in the hands of its secretary, even if it amounted to negligence did not estop it from disputing forged transfers of its securities made by the secretary under its seal. In the similar decision in *The Mayor Constables and Company of Merchants of the Staple of England v. The Governor and Company of the Bank of England*(4), BOWEN, L.J., pointed out that there was a distinction between doing that which enabled a fraud to be effected, and being the cause of that fraud, and held that the fraudulent transfer in that case was not the natural consequence of the alleged negligence of the defendant Company so as to give rise to an estoppel against them. The limitations on this doctrine were further considered

(1) (1916) I.L.R., 40 Bom., 630 (P.C.).

(2) (1787) Smith's Leading cases, Vol. I, p. 726.

(3) (1855) 5 H.L.C., 389.

(4) (1887) 21 Q.B.D., 160.

in *Farquhason Brothers & Co. v. King & Co.*(1) and in the very recent case of *Macmillan v. London Joint Stock Bank*(2), where SWINFEN EADY, L.J., referred to the opinion of BLACKBURN, J., in *Swan v. The North British Australasian Company*(3) that negligence in order to estop must be in the transaction itself and must also be the proximate cause of the loss and SCRUTTON, L.J., observed (at p. 459):

"I think the effect of the authorities is that if A owing a duty to B by the neglect of that duty induces B to believe that a certain state of facts exists he is estopped as against B from denying that such a state of facts exists. But the neglect must be in the transaction itself, not in previous history. . . . And the neglect must be the proximate cause of leading B to his belief. Neglect of precautions by A which enables C to commit a crime causing loss to B can never in my view give rise to a claim by B against A, for the loss is not the proximate or even natural consequence of the neglect."

As regards the present case, I think it has not been shown that the railway was under any duty to the public to get back the railway receipts on delivery of the goods; and, even if there was such a duty, I think, on the authorities cited, that would not render the railway liable for the fraud subsequently perpetrated by the holder of the receipts.

In the judgment under appeal the learned Judge observed:—

"Had Swaminatha Reddi & Co., on the dates when they obtained delivery of the goods, been the persons who were really entitled to delivery, it follows from the authorities above cited that the railway receipts would have exhausted their force and any negotiation subsequent to it by Swaminatha Reddi & Co. would not be operative or pass any title."

That, if I may say so, appears to me to accurately state the effect of the authorities. But the learned Judge went on to make a distinction which I am unable to follow and held the railway liable because at the time of delivery to Swaminatha Reddi, he was not the person entitled to the goods. I have already given my reasons for holding that this circumstance makes no difference having regard to the fact that Swaminatha Reddi had become entitled to the goods before the date of his transfer of the spent railway receipts to the plaintiff. For these reasons on both

(1) (1902) A.C., 325. (2) (1917) 2 K.B., 439.
(3) (1863) 2 H. & C., 175, 182.

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grounds I think the appeal must be allowed and the suit dismissed with costs throughout.

SPENCER, J.—I entirely agree. I do not think I can usefully add much to what has fallen from my Lord the Chief Justice on the second point which he has discussed in the judgment just delivered. On the question of limitation I cannot follow the learned Judge who tried this case in the opinion that he expressed that section 77 of the Railways Act does not include cases where the Railway Company have with their eyes open delivered the goods to the wrong person. In sections 72 and 77 of the Act 'loss' is coupled with 'destruction' or 'deterioration' of goods. Now it could not be asserted for a moment that in cases where a Railway Company found it necessary to destroy goods, say for some necessary purpose such as to clear their line to avoid danger of life to a passenger train such destruction would not come within the meaning of 'destruction of goods' in these sections.

If 'destruction' is to include deliberate acts of the Company or its servants I cannot see why the word 'loss' should only apply to cases where the goods have been mislaid. If the Company is liable for negligence it must *a fortiori* be liable for wilful acts. I think the intention of the legislature in inserting section 77 into the Act must have been that by requiring notice to be given before claims are put in, the Company might have time to investigate such cases and meet the claims of persons who have suffered loss, if possible out of Court. The word 'loss' in the English language is, in my opinion, sufficiently wide to cover cases where the goods are not forthcoming either from deliberate acts or from acts of negligence and I see no reason to confine it only to cases of the latter kind.

I therefore agree in thinking that notice not having been given within six months of the consignment of these goods, the present suit cannot be maintained. I also agree in thinking that there is no cause of action against the Railway Company. The plaintiff presents his claim in two ways. Either he says to the Railway Company "Property has passed to me by the pledge of the railway receipts which by mercantile usage represent goods. As I paid money in good faith on the belief that the goods were with you, you must give me the goods or their value if they have been converted." Or, he says "By the negligence of

your booking clerk in making over the goods without taking the railway receipts I was led to believe that I had good security for the loan which I made to Swaminatha Reddi; you are responsible for the misrepresentation made to me and you must compensate me for the loss."

The Railway Company can, in my opinion, meet both of these demands in a legal way. Its answer to the first will be this: "The railway receipts are only symbols of property and they ceased to be living instruments of title from the moment the goods were delivered to a person having a right to take them. Swaminatha Reddi had a right to receive the goods and he actually took them before you acquired any interest under the pledge to you. You have been the victim of a fraud but the transaction so far as we are concerned had come to an end before you acquired an interest in the goods." See *Barber v. Meyerstein*(1).

To the second its defence is this: "It may be that our clerk was negligent but he only risked our responsibility till the receipts were forthcoming. We know nothing of Swaminatha Reddi's subsequent transactions with you and we did not conspire with him to cheat you. We acknowledge no liability to the public to see that our receipts are all collected, and the fact that this receipt happened to be left in the consignee's hands was not a proximate or effective cause of your being cheated, nor did it directly lead to that result." See *The Mayor, Constables and Company of Merchants of the Staple of England v. The Governor and Company of the Bank of England*(2) and *Macmillan v. London Joint Stock Bank*(3).

Messrs. Grant and Greatorex, Attorneys for appellants.

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(1) (1870) 4 E. & Ir. App., 317.

(2) (1887) 21 Q.B.D., 160.

(3) (1917) 2 K.B., 439.

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APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice
Sadasiva Ayyar and Mr. Justice Spencer.

ANNAYA TANTRI (SECOND DEFENDANT), APPELLANT,

v.

AMMAKKA HENGUSU AND TWO OTHERS (PLAINTIFF AND
FIRST AND THIRD DEFENDANTS), RESPONDENTS.*

Hindu Law—Religious office and emoluments—Hindu females, right of, to inherit.

Held, by the Full Bench (SADASIVA AYYAR, J., dissenting), that according to the practice and precedents obtaining in the Madras Presidency a Hindu female is not incompetent by reason of her sex to succeed to the office of Archaka in a temple and to the emoluments attached thereto.

Sundarambal Ammal v. Yogavana Gurukkal (1915) I.L.R., 38 Mad., 850, overruled. *Mohan Lalji v. Gordhan Lalji Maharaj* (1918) I.L.R., 35 All., 283 (P.C.), distinguished.

SECOND APPEAL against the decree of A. J. CURGENVEN, the acting District Judge of South Kanara, in Appeal No. 445 of 1915, preferred against the decree of K. APPAJI RAO, the District Munsif of Karkal, in Original Suit No. 314 of 1914.

The facts are given in the first paragraph of the Order of Reference of SESHAGIRI AYYAR, J. The second defendant preferred this Second Appeal.

B. Sitarama Rao for the appellant.

K. P. Lakshmana Rao for first respondent.

This Second Appeal came on for hearing in the first instance before SESHAGIRI AYYAR and NAPIER, JJ., who made the following ORDER OF REFERENCE TO A FULL BENCH:—

SESHAGIRI AYYAR, J.—The question for consideration in this Second Appeal is whether the plaintiff, a widow, is entitled to recover possession of the property which was enjoyed by her husband and his predecessors by doing archaka service in a temple. The Courts below have given her a decree for possession. Mr. Sitarama Rao relying on *Sundarambal Ammal v. Yogavana Gurukkal*(1) has argued at some length that as the

plaintiff is not competent to perform the archaka service, she is not entitled to the property. AYLING and HANNAY, JJ., in *Rama-sundaram Pillai v. Savundrathammal*(1) and KUMARASWAMI SASTRIYAR and PHILLIPS, JJ., in *Raja Rajeswari Ammal v. Subramania Archakar*(2) have dissented from *Sundarambal Ammal v. Yogavana Gurukkal*(3).

In these circumstances, it becomes necessary to consider the question in some detail as to which of these conflicting views should be followed.

In *Sundarambal Ammal v. Yogavana Gurukkal*(3) SADASIVA AYYAR, J., who delivered the leading judgment, lays stress upon the duties attaching to the archaka office as opposed to rights, and says that the emoluments should go only to those who are competent to perform the services. It is true that from the point of view of the worshipper, it is the fitness of the archaka for the discharge of his duties that has to be considered. From the point of view of the archaka, the question of secular rights is more important. In considering the relative importance of the two functions and in endeavouring to reconcile these two conceptions, the historical aspect of the grant for service in temples may be considered.

It is often said that there is nothing in the Hindu Law texts on the question. It may seem strange that in a country where religion plays such an important part in the daily concerns of the people, there should be so little about succession, etc., to religious institutions and offices in the writings of the Rishis or of their commentators. The reason is not far to seek.

In the Vedas and in the ancient Smritis, we do not hear of the founding of temples. It is to the Puranic age that we owe their existence. In Manu's days, the only religious teacher was the ascetic sanyasi. He gave instructions to his disciples, who in their turn spread the light of wisdom among the lay people. There were no places of worship, and no images to worship. It is to Buddha that India owes the introduction of fixed places of worship and of ordained orders of preachers. In Buddhism there are three essentials: (a) Adoration of Buddha, (b) Observance of his laws and (c) the congregation. Buddha instituted the order of monks and nuns with a view to religious instruction

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(1) (1915) I.L.R., 38 Mad., 850.

(1) (1914) 16 M.L.T., 423. (2) (1917) I.L.R., 40 Mad., 105.
(3) (1915) I.L.R., 38 Mad., 850.

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being imparted to the uninitiated. Places of shelter or refuge were founded in order that the world-weary may retire to them and receive religious consolation. From these simple beginnings a disciplined army of Bikshus came into existence, and edifices known as monasteries were erected to afford facilities for prayer, consultation and contemplation. It is to this period that we owe the founding of temples in Southern India. The followers of Buddha pursued a policy which was resented by the orthodox. Temples for the worship of Siva and Vishnu were established mostly by non-Aryans at or about this time to circumvent the Buddhist influence.

The second period begins with the advent of Sankara. He found that the ancient worship of the elements was losing hold on the popular mind, and that the people were being led by the precepts of Buddhism into the track of atheism. He had to fight blind orthodoxy behind him and materialism ahead of him. He adopted a compromise. He founded Mutts which took the place of monasteries. He founded various orders of sanyasins who were enjoined to lead celibate lives and to impart religious instruction. He undoubtedly succeeded in driving Buddhism from the land: and he laid the foundation for institutions which cannot be said to have fully served the purpose which he had in mind.

The successors of Sankara did not find it easy to console the religiously-inclined by the doctrines of advaitic philosophy. Sankara was described as the pseudo-Buddha. The common people hankered after something more real than is to be had in the severely logical philosophy of Sankara. Three philosophers who gave prominence to the existence of a personal God diverted public attention from Sankara's teachings. The Vaishnavites, the Madhwas and the Saivites founded independent Mutts where the Dvaitic philosophy was taught. They had to proceed a step further. They accepted control over existing temples and encouraged the construction of new temples in honour of the particular Deity they represented as the Supreme Being.

As this is a rough summary of events, I should not be understood as saying that all the temples in India came into existence only in the way I have described. There were apparently some independent institutions.

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By this time, the Puranas had gained a hold on the popular mind, and the worship of the avatars of Vishnu and of the manifestations of Siva came to be regarded as the essential feature of religious life among the people. Rich endowments were made for the upkeep of the temples. But the priest capable of rendering services in these institutions had to be found. It has always been the belief in India that the nearer a man is to God, the farther is he from Him. The following slokas from the writings of Vaidyanatha Dikshitar express the ultra orthodox and conservative view of the office of an archaka in a Hindu temple:—

* वैद्यनाथीये वर्णाश्रमकाण्डे शातातपः —

“देवार्चनरतो विप्रो वित्तार्थी वत्सरत्रयम् ।

स वै देवलको नाम हव्यकव्येषु गर्हितः” ॥ इति ॥

तत्रैव संग्रहे—

“देवार्चनपरोक्षासीत् परार्थे वित्तकांक्षया ।

चतुर्वेदधरो विप्रस्य चण्डालसमो भवेत् ॥

कर्मदेवलकाः केचित् कल्पदेवलकाः परे ।

शुद्धदेवलकाः केचित् त्रिधा देवलकाः स्मृताः ॥

आगमोक्तविधानज्ञो रुद्रकाल्युपजीवकः ।

शुद्धदेवलको नाम सर्वकर्मबहिष्कृतः ॥

आर्षयोक्तविधाने तु देवलत्वं न विद्यते ।

तस्मात् सर्वप्रयत्नेन वैदिकेनैव पूजयेत् ॥

अर्थार्थी काम्यमार्गेण यो देवं पूजयेत् सदा ।

कर्मदेवलको नाम सर्वकर्मबहिष्कृतः ॥

पांचरात्रविधानज्ञो दीक्षाविरहितोऽर्चकः ।

चतुर्वेदाधिकारोऽपि कल्पदेवलकः स्मृतः” ॥ इति ॥

वैद्यनाथीये प्रायश्चित्तकाण्डे नित्यकर्मादिविक्रये प्रायश्चित्तम्—

“स्नानादिनित्यकर्माणि इष्टापूर्तादिकानि च ॥

* Transliteration into Deva Nagari characters and translation by Mangat Krishna Menon (Translator).

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उपोषणव्रतादीनि श्रौतस्मार्तादिकानि च ।

विक्रीणीयात्तु यो विप्रो माघस्नानं तथैव च ॥

चान्द्रायणव्रतं कृत्वा पुनस्संस्कारकृत् तथा ।

पंचगव्यं ततः पीत्वा शुद्धिमाप्नोति नैष्ठिकीम् ॥ इति ॥

The above slokas (verses) may be translated thus :—

“Saathathapa” says :

“A Vipra (Brahman) who performs *pooja* for the sake of money for a period of three years is known as the *Devalaka* : such a person becomes incompetent to participate in the usual *Havya* and *Kavya* rites enjoined on Brahmins.”

Again it is laid down in the same work in the *Samgraha*.

“A Vipra, who, though he may be well-versed in the four *Vedas* is desirous of getting money, and who performs the worship of the gods for the sake of another will be considered equal to a *Chandala*.

The *Devalakas* are classed under three heads : Some as *Karmadevalakas* ; others as *Kalpadevalakas* ; and the rest as *Buddhadevalakas*.

He who knows the precepts as ordained in the *Agamas* and makes a living by performing worship to *Rudra* and *Kali* is called *Buddhadevalaka*, and is excluded from taking part in all rites.

A person performing *pooja* will not become a *Devalaka* if the worship is conducted in accordance with the sacred injunctions of the *Rishis*. Therefore great care should be taken to have the *pooja* conducted according to the precepts of the *Vedas*. He is called a *Karmadevalaka* who for the sake of money always performs the worship of the gods for attainment of worldly objects ; such a person is unfit to take part in religious rites.

An *archaka* even if he is an authority on the four *Vedas* and knows the rites prescribed in *Pancharathra* is known as *Kalpadevalaka* if he is devoid of *Deeksha*, i.e., consecration.”

Then the propitiatory ceremonies for these mercenary acts are prescribed : “A Brahman who sells for another the *Nitya Karmas* (daily rites), such as *Snanam* (bathing), *Ishtapoortham* (performance of pious or charitable deeds, performing sacrifices, and digging wells and doing other acts of charity), *Uposhanam* (fasting) and other *Vratham*s (religious acts) of devotion as are ordained in the *Vedas* and *Smritis* has to perform by way of penance, *Maghasnanam* in the month of *Maagha*, three *chandrayanams* and fresh *Samskaras*, should then take in *Panchagavya* and thus become completely purified”.

The *archakas* having been looked down upon in the above manner, naturally great inducements had to be offered by liberal grants of land and by the promise of perquisites. That is how the *archaka* office came to be founded.

I have thus far given a brief outline of the origin and spread of temples and of the manner in which the *archaka* office was instituted. My survey shows that the founder of the temples looked to the due discharge of the services in the temple as his primary and sole object. The *archaka* accepted his position as giving primarily a means of livelihood to him and to his posterity, and as ultimately enabling him to minister to God. The existence of various *inams* in the names of the *archakas* is irrefutable evidence that rich endowments were granted to them to bind them to the service of the Deity. These endowments were intended, and in most cases expressed to be, from generation to generation. It may be assumed that the donors were not over-anxious to make hereditary grants to the donees' family without regard to the latter's capacity to perform religious worship ; but the law would not have permitted them to stipulate that the property shall be enjoyed only by those competent to minister in the temple. They must have trusted to chance to see that the descendants of the donees carried on the good work for which their predecessors were given grants.

Mr. Justice SADASIVA AYYAR asks why, if that must be presumed to have been the intention of the donor, should the inheritance go to persons who by themselves are incapable of discharging the duties. The answer is that Courts and even legislatures must trust to the same chance which the founders calculated upon when they endowed the *archaka* office. What reason have Courts for holding that a reversioner would be a more welcome minister of religion than the *gumasta* employed by a widow to perform the services ? It would be an ideal to be sought after, if the community interested in temple worship were to be permitted to select on the death of an *archaka* a person competent to fill his place. Even in this view, can we trust to society here or elsewhere to be guided in the selection of an *archaka* solely by considerations of religious merit and fitness ? There is no guarantee that a nominee of the community would be a fitter *archaka* than the proxy of the widow. *Non constat*,

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he would be worse than a male reversioner of the last archaka. Under such circumstances, there cannot be much room for doubt, that society would prefer that the secular rights with the obligations to do or to get done the spiritual duties should vest in the line of heirs to whom private property would descend. The confirmation of numerous grants in this Presidency by the Inam Commissioners in the name of the widows and daughters of the deceased archakas indicates that the Government of the country have recognized the principle of heredity as the only safe guide in such matters. I see no reason why Courts should not be guided by the executive action of the Government in these matters.

I shall briefly refer to one other reason why the principle of heredity should not be departed from in the case of these offices. It is common knowledge that the archakas of a temple form a caste among themselves. They are a select people. In the case of the great temple at Chidambaram, they claim to have come down to earth with the Deity. They do not intermarry with the other Brahman sects. Among these people, the moment that a boy is married, he gets a share in the emoluments of the archaka office. This testifies to the solicitude of this class of people for an early expansion of the sect. In the case of other Siva temples, the archakas are known as gurukkals. Unfortunately they are a diminishing race. They are not permitted to take brides from other Brahman sects; and worship in a temple cannot be performed by a Brahman who is not a gurukkal. In the Vaishnava temples, there are two prominent classes of the archakas: the Pancharatras and the Vaikhanasas. I do not believe even these intermarry. A temple whose services are performed according to Pancharatra rituals cannot be served by a Vaikhanasa archaka and *vice versa*. These limitations show that the field of choice for the archaka service in Hindu temples is very limited. It would often lead to the application of the principle of escheat, if the grants made for their services are not continued in the line of the heirs of the last male archaka.

I have referred to the above considerations out of deference to the views of my learned brother SADASIVA AYYAR, J. No one shows more anxiety than the learned Judge that the true intent of a grant should be strictly enforced. I respectfully share his anxiety, but as I have shown above, the change to which he gives

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his sanction while upsetting fixity of tenure and disturbing long understood and enforced notions of rights of property, is not calculated to bring the Courts any the nearer to the administration of the golden rule that competency to minister and capacity to inherit should go hand-in-hand. I am therefore unable to hold that the widow is not entitled to inherit her husband's property granted for the performance of religious services.

I shall now examine the case law on the point to see how far the learned Judge's conclusions are supported by decided cases.

I shall first deal with *Mohan Lalji v. Gordhan Lalji Maharaj*(1) which apparently has not been considered in any of the three decisions of this Court, and on which Mr. Sitarama Rao naturally laid great stress. The facts of the case must be examined in some detail in order to show that while it does not lend support to the contention of the learned vakil, it can be regarded as an authority for the proposition I have suggested. The temple in respect of which the office was claimed belonged to the Gossain sect of Vallabhachariars. The Vallabhachariars as explained in the judgment of the High Court of Allahabad in *Mohan Lalji v. Mudhsulan Lala*(2) from which there was an appeal to the Judicial Committee in *Mohan Lalji v. Gordhan Lalji Maharaj*(1) are a Vaishnava sect of religious teachers who founded temples. The question before the Judicial Committee was whether the grandson by the daughter of the last male archaka was entitled to succeed to the office and the emoluments in preference to the reversioner of the last male holder. It was found in that case that the Gossain sect of Vallabhachariars took daughters from a sect known as the Bhat in marriage. On the marriage of the Bhat daughter into the Gossain family she was initiated into the mantram of the Gossain sect. The ritual in a Gossain temple was essentially different from the ritual observed by the Bhats in their temples. The Gossain daughters were similarly married by Bhats, and I take it although it is not so mentioned in either the judgment of the High Court or in that of the Privy Council, that the Gossain daughter marrying a Bhat husband would be initiated into the mantram of the Bhat sect. I must not omit to mention a statement in the judgment of the Right Hon'ble Mr. AMEEB ALI that the daughters of a

(1) (1913) I.L.R., 35 All., 283 (P.C.). (2) (1910) I.L.R., 32 All., 461.

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Gossain, although married into a Bhat family, generally remained in the Gossain house. In these circumstances the question was whether in a temple whose rituals were of the Gossain sect, a Bhat grandson of the last male Gossain could inherit the office and the emoluments. The Judicial Committee held that he could not. It is stated in the judgment of the Board that after the death of the last male-holder his widow and his daughter were in enjoyment of the office and emoluments. Mr. Sitarama Rao suggested that the widow and the daughter were competent to perform the religious worship in the Gossain temple. There is no express mention of their having officiated in the temples. From my experience of South India I cannot believe that where a large congregation of males assemble for worship, a female would be allowed to perform religious service within the temple. In the north the Gosha system is prevalent and the seclusion of women is more pronounced than in the south; and I would require very strong evidence to hold that the widow and the daughter of the deceased male Gossain were as a matter of fact officiating as priestesses in the temple. I must take it that they employed deputies to perform their duties. If my surmise is correct, it lends great support to the proposition that so long as the service can be done by a proxy, there can be no objection to women inheriting the office and emoluments of an archaka.

Then it was argued, if a proxy was held competent to perform the duties, why should not a Bhat grandson have been allowed to inherit the office and the emoluments on the understanding that he should employ a Gossain priest to officiate in the temple. The position of a widow or daughter and a grandson are not in *pari materia*. In the case of a grandson, he starts a new line of descendants and to countenance the employment of a perpetual gumastah in the case of males would not be right; therefore the Judicial Committee held that as a grandson *suo moto* is entitled to minister in the temple and as the grandson was of Bhat origin and incompetent to perform religious worship in a Gossain temple, he should be discarded in favour of a Gossain reversioner who was competent to perform religious worship by himself. In that judgment, however, it is pointed out that ordinarily the descent of *debutter* property vesting in an officiating priest would go to the ordinary heirs of the last holder unless there was some usage or course of devolution

or some other circumstance to indicate a different mode of devolution. The conclusion of the Judicial Committee was that in the particular case, the circumstances and the usage pointed to a mode of devolution different from that of the ordinary descent of property. In my opinion, this decision is no authority for the proposition that competency to officiate is a *sine qua non* of capacity to inherit. On the other hand the fact that the widow and the daughter were allowed to inherit the office and the emoluments is a strong indication that service in a temple can be rendered by a proxy so long as the essential nature of the worship is not departed from.

Now, I shall deal with the other cases bearing on the question. In *Tangirala Chiranjivi v. Rajamanikya Rao* (1) BENSON and SUNDARA AYYAR, JJ., said:

"The District Judge has assumed that a minor, a female and a person unlearned in the Vedas would lose the right to the service in the temple. There is no basis for the assumption."

My experience of life in this Presidency is that in innumerable cases services in a temple are performed by proxies employed by women. In *Mujavar Ibrambibi v. Mujavar Hussain Sheriff* (2) referring to the competency of a Muhammadan lady to perform the duties of Majuvar of a Durga which was not of a secular nature, TURNER, C.J., and KINDERSLY, J., stated that it was not proved

"that the plaintiff had ever participated in the profits or performed the duties by proxy," thereby indicating that if she had got the service done by a proxy she would have been entitled to the office. In *Sheshu Ammal v. Soundararaja Aiyar* (3) the learned Judges state:

"They further explain that an Archika Meerassee, which is the species of Meerassee involved in Suit No. III of 1846, on the file of the Hindu Sudder Ameen referred to by the Civil Judge, and a Poorobita Meerassee also instanced by the Civil Judge, may descend to a female and the functions thereof be performed by deputy."

These are all the Madras decisions, and Mr. Ganapati Ayyar in his book on Religious Endowments after reviewing these authorities has come to the conclusion that it has been the

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(1) (1914) 27 M.L.J., 179. (2) (1879) I.L.R., 3 Mad., 95.
(3) (1853) M.S.D.A., 261.

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uniform practice in Madras to allow females to inherit the archaka service and the emoluments. In Bombay the same view has been held. In *Keshavbhat bin Ganeshbhat v. Bhagira-thibai Kom Narayanbhat*(1) the learned Judges state the law thus :

" Finally, with respect to the objection, that a Hindu female cannot perform the duties attached to the office for the maintenance of which the allowance was granted it may be observed that the defendant has not proved the existence of any usage in conformity with his allegation."

So the burden was cast upon the objector to show that the usage was different. At the end of the judgment the learned Judges reserved liberty to the reversioner to bring a suit to support his position that a widow was not competent to inherit the office and the emoluments of archaka. In *Sitarambhat v. Sitaram Ganesh and Kashiraj Namabhat*(2) the learned Judges of whom COUCH, C.J., was one, proceeded on the assumption that the priestly office would descend in the ordinary line of succession through a daughter to her son. The decision in *Dhuncooverbai and others v. Advocate-General*(3) may be explained away as SADASIVA AYYAR, J., suggests on the ground that the office inherited by the widow was not a purely religious one.

The decisions of the Calcutta High Court also support this proposition. In *Poorun Narain Dutt v. Kasheessuree Dosses*(4) the learned Judges say :

" It has been held in this Court that a woman can be a *Moot-wullee*, and that the profits of a *debutter* can be received by a female."

They held in that case that a woman can succeed to the office. In *Joy Deb Surmah v. Huropetty Surmah*(5) an issue was sent down to ascertain whether a female can succeed to a priestly office. The report does not say what the result of the finding was. In *Mitta Kunth Audhicarry v. Neerunjan Audhicarry*(6) Sir RICHARD COUCH, C.J., says that

" the right of performing worship of an idol follows the same line of succession as that of private property."

(1) (1866) 3 Bom., H.C.R. (A.C.J.), 75. (2) (1869) 6 Bom., H.C.R. (A.C.J.), 250.
(3) (1899) 1 Bom., L.R., 743. (4) (1865) 3 W.R., 180.
(5) (1871) 16 W.R., 282. (6) (1875) 14 B.L.R., 166.

In *Mahamaya Debi v. Haridas Haldar*(1) Mr. Justice MUKHERJEE says at page 475 :—

" There is no question that a pala in the Kalighat Temple is heritable and it is immaterial whether the heir is a male or female. The custom in this respect is established beyond doubt."

These are all the authorities available on the question. None earlier than *Sundarambal Ammal v. Yogavana Gurukkal*(2) has been cited in which it has been laid down that a female is not entitled to inherit a priestly office and the emoluments. The decisions are practically uniform and it would lead to an unnecessary disturbance of rights of property, if we introduce the innovation that a female is not entitled to succeed to an archaka office or emoluments. As regards the quotation from Jagannatha's digest which Mr. Justice SADASIVA AYYAR has extracted in his judgment, I may say that I have read it very carefully and there is no expression in it of any decided view one way or the other. The author quotes the contentions of both sides and leaves the reader to draw his own inference from the two statements. I am rather inclined to think that the weight of argument, if any, is in favour of giving females their right to hold religious office.

Although I have come to this conclusion, having regard to the strong view held by SADASIVA AYYAR, J., and having also regard to the fact that it is necessary that a uniform principle should be enunciated in this matter to guide the Courts below, I think it desirable that the following question should be referred for the opinion of the Full Bench, namely, "*whether a Hindu widow is incompetent by reason of her sex from inheriting the service and emoluments of a priestly office held by her husband.*"

NAPIER, J.—I agree that this question should be referred to a Full Bench in the terms suggested by my learned brother.

ON THIS REFERENCE—

B. Sitarama Rao for appellant.—The question must be answered in the affirmative, as a female is not qualified to the duties of the Archaka office. I rely on *Mohan Lalji v. Gordhan Lalji Maharaj*(3) which has not been considered in any of the

(1) (1915) I.L.R., 42 Calc., 455. (2) (1915) I.L.R., 38 Mad., 850.
(3) (1913) I.L.R., 35 All., 283 (P.C.).

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cases before; it lays down that competency for the office and the purpose the founder had in view in creating the office are the tests; see also *Sundarambal Ammal v. Yogavana Gurukkal*(1), *Joy Deb Surmah v. Huroputti Surmah*(2) and *Mahamaya Debi v. Haridas Haldar*(3) were distinguished.

K. P. Lakshmana Rao for respondent argued *contra* and relied on the arguments in the Order of Reference and quoted *Venkatarama Aiyangar v. Venkatarama Aiyangar*(4) in addition to the cases therein noted and distinguished *Mohan Lalji v. Gordhan Lalji Maharaj*(5).

The Court expressed the following OPINIONS:—

WALLIS, C.J. WALLIS, C.J.—It is well settled that the succession to temple offices is governed by user which is taken to represent the intentions of the founder, and it is not disputed that in this part of India the user in the case of temple archakas is that the office is hereditary and descends in the ordinary course of succession to women who are not themselves competent to perform the duties of the office by ministering in the temple and perform them by deputy. The opinion of the pandits in 1853 in *Seshu Ammal v. Soundararaja Ayyar*(6) shows that this was then the recognized usage. The question appears to have first come before the Court in 1910, but since that time there have been numerous decisions where the user has been recognized and enforced, and all the Hindu members of the Court with one exception have been parties to these decisions which also are conformable with the decisions of other High Courts. The only authority the other way is the judgment of SADASIVA AYYAR, J., in *Sundarambal Ammal v. Yogavana Gurukkal*(1) who considered that on principle a personally disqualified heir could not inherit the office and delegate the duties to others. In the argument before us it was again contended that the decision of the Privy Council in *Mohan Lalji v. Gordhan Lalji Maharaj*(5) was in accordance with this view and must be taken to have overruled the other cases. In that case the office of archaka had descended to the widow and daughter of the last male archaka,

(1) (1915) I.L.R., 38 Mad., 850. (2) (1871) 16 W.R., 282.

(3) (1915) I.L.R., 42 Calc., 455.

(4) Second Appeal No. 2078 of 1915 (unreported).

(5) (1913) I.L.R., 35 All., 2+3 (P.C.), (6) (1853) M.S.D.A., 261.

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and the question was whether the daughter was to be succeeded by her son or by the reversioner of the last male holder. The archakas were gossains and there was a usage among them that females continued to belong to their father's *kul* or family after marriage. On this ground apparently the daughter had been allowed to fill the office even though married to a member of the Bhat community who was incapable of filling it. No question arose in that case as to the right of the widow and her daughter after her to fill the office; and it does not appear whether while they held it they performed the duties in person or by deputy. What their Lordships had to consider was, whether on the daughter's death the office should go to her son and her descendants, a line of heirs who, as Bhats, would be incapable of performing its duties, or should revert to the male heirs of the last male holder. Their Lordships at p. 288 observe:

"The rule as to the shebaitship being vested in the heir of the founder must from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship"

and they say later on at page 289 that

"to allow the plaintiff's claim to an admittedly Ballav temple where the rights are performed according to Ballav ritual, which it is clearly established they cannot perform, would in their Lordships' judgment, defeat the purpose for which the worship was established."

A contrary decision would have involved the devolution of the office to a line of heirs incompetent to perform its duties. Moreover, the plaintiff's claim in that case was not shown to be in accordance with any well recognized user which is the best evidence of the founder's intentions. I do not consider that this decision of their Lordships warrants us in overruling the numerous decisions of this Court in conformity with the decisions of other Courts by which the widow and daughter of the last male archaka are held entitled in accordance with the established user to succeed to the office of archaka discharging its duties by deputy and to transmit it to their heirs, who, as male heirs are preferred to female, will generally be competent to perform the duties in person. SADASIVA AYYAR, J., for whose opinion I

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have a great respect, considers, if I rightly understand him, that the established custom of female succession to this office is of so mischievous and objectionable a character that it cannot have been intended by the founder. That view is not shared by SESHAGIRI AYYAR, J., who has considered this aspect of the case in the Order of Reference, or by the other Hindu members of the Court who have considered the question. We should not in my opinion be justified in overruling on this ground the numerous decisions of this Court in which the usage has been recognized and enforced, unless its mischievous character had been established beyond all doubt or controversy. This has not been done and I feel bound to answer the question in the negative.

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SADASIVA AYYAR, J.—I have carefully reconsidered my decision in *Sundarambal Ammal v. Yogavana Gurukkal*(1) in the light of the later decisions of this Court quoted by my learned brother Mr. Justice SESHAGIRI AYYAR in his Order of Reference, also of his own keen and yet considerate criticisms (if I may be permitted to say so) of my said decision and also of the opinions of my Lord and of Mr. Justice SPENCER on this reference. I am, notwithstanding, unable to convince myself that my opinion was erroneous. On the other hand, the decision of their Lordships of the Privy Council in *Mohan Lalji v. Gordhan Lalji Maharaj*(2) lends, in my opinion, strong support to my conclusion. With respect, I am unable to agree with Mr. Justice SESHAGIRI AYYAR that the widow and daughter of the last male Shebait of the Ballavacharya Gossain sect in the Privy Council case must have been not competent to perform the duties of the office and must have “employed deputies to perform the duty” and that their enjoyment of the emoluments of the office during their lifetime must be due to their having performed the duties through such deputies and not directly. On the contrary, it seems to me clear from the report that the out-of-date unshastraic custom obtaining in the South by which *Dharmapathnies* (who are *Sahadharmacharinees* of their husbands) are considered incompetent to pronounce mantrams and do religious duties along with (and even solely in the absence of) their husbands does not obtain among the Ballavacharya Gossains, one of the Vaishnavite sects which are in several respects much more liberal in the

(1) (1915) I.L.R., 38 Mad., 850.

(2) (1913) I.L.R., 35 All., 283 (P.C.).

treatment of women and birth-sudras than other sects though many Vaishnavite sects might have become very degenerate in other respects.

I am further unable to see that my conclusion as to Jagan-natha's opinion and the weight of the authority of the texts quoted by him being in my favour is wrong.

A general rule has been laid down by their Lordships of the Privy Council that where a person is incompetent to perform the rites of a religious office, it would defeat the very purpose for which the worship was established if he (including of course ‘she’) is allowed to inherit the office. Any usage inconsistent with such purpose is clearly invalid in law. [See *Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi*(1)].

I am unable to appreciate any distinction in principle between the incompetency of the claimant to the office by reason of sex and the incompetency due to any other cause. I do not think that the pronouncement of their Lordships of the Privy Council can be got round through any such distinction.

Though ‘law’ is not always logical and though the narrow point referred to us relates to inheritance by a person incompetent by reason of sex alone for performing the duties of a religious office, I do not think that considerations of the difficulties which are aggressively prominent when we take the four analogous cases (1) of a male heir *being* incompetent by reason of conversion to another faith when the inheritance opens, (2) of his *becoming* incompetent after the inheritance opens, (3) of a female heir *being* incompetent by reason of conversion before the inheritance opens and (4) *becoming* incompetent after the inheritance opens, can be kept out of mind in deciding the present reference, especially having regard to the provisions of Act XXI of 1850.

Coming to the weight to be given to practice and usage, many pernicious and unshastraic usages have crept into the Hindu religions and social systems during dark medieval days and through efflux of time. Most of them entered gradually and insidiously through the tendency of that subtle materialism which sometimes parades as strict orthodox spirituality. The letter is exalted over the spirit, the so-called hereditary rights are given more importance than the performance of the religious

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(1) (1917) I.L.R., 40 Mad., 709 (P.C.).

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duties, instead of the rights being kept as a very subordinate adjunct and appurtenance of the duties, and religious offices and caste status are looked upon more as intended for the means of livelihood and for the enjoyment of worldly power and material possessions than as things bestowed upon one for helping all humanity in its evolutionary progress towards the common goal.

I respectfully agree with my Lord that the law as at present settled by the decisions of the Privy Council is that unless the usages in connexion with religious institutions and offices are manifestly immoral or opposed to public policy or opposed to the intentions of the founders of a religious trust or manifestly injurious to the trust, the Courts are not entitled to go back for the law to the purer, more liberal and more ancient shastraic fountain heads. The question therefore narrows itself to this: Whether the usage relied on by the respondents is manifestly injurious (both in its material and moral aspects) to the religious institution, and whether it could have been in conformity with the intention of the founder of the trust. It is on this question that I feel that there is real and substantial difference of opinion between myself and the learned Judges who have considered this question in this Court since 1910. My angle of vision in respect of these questions might have been affected by my longstanding interest and sensitiveness in the cause of Hindu religious and social reform on shastraic lines. I find, however, that after making sincere attempts to allow as much discount as possible to the above factor, my view of the seriousness of the evils of usage in question has not been materially affected. While the incumbent of a religious office must be allowed to employ a temporary deputy when a temporary disqualification or inability occurs, such as birth and death pollutions, absence from home owing to urgent private affairs, etc., I am clear in my mind that a usage permitting a permanently disqualified claimant to receive the emoluments of a religious office and to appoint his or her own deputy to do the duties is of such a seriously mischievous character that it ought not to be recognized. I regret I am unable to agree with Mr. Justice SESHAGIRI AYYAR that the performance of the duties through the deputy of a female disqualified heir is not less beneficial to the religious institution than the performance of the next qualified male heir. It is notorious that the deputy is usually chosen on the principle of a Dutch

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auction. The man who agrees to allow the widow to retain the largest portion of the emoluments of the office and to receive the least as his own remuneration is given the place of deputy. Thus when the usually small remuneration in rice and cash attached to the archaka office does not go to the deputy who does duties, the deputy cannot be expected to perform the duties at all satisfactorily. I do not see why a religious office should be considered less important than any other kind of office. To allow even the office of a peon to be held by a permanently disqualified man because he undertakes to appoint a deputy, out of the remuneration of the office is, in my opinion, entirely mischievous and it ought not to be allowed even if it is sanctioned by usage.

In the result, my answer to the question referred is that so long as a Hindu widow is held incompetent by reason of her sex from doing the duty of a priestly office, she is also incompetent to inherit the service and emoluments of the office.

SPENCER, J.—Without laying down any rule as to particular institutions, in which there may be a special custom that females cannot succeed to the office and emoluments, the trend of decisions in this Court has certainly been to treat females as competent to succeed to the archakaship of Hindu temples in this Presidency. See *Subraya Kakrannaya v. Subraya Padyaya*(1), *Tangirala Chiranjivi v. Rajamanikya Rao*(2), *Ramasundaram Pillai v. Savundrathammal*(3), *Raja Rajeswari Ammal v. Subramania Archakar*(4) and *Venkatarama Aiyangar v. Venkatarama Aiyangar*(5).

The judgment of SADASIVA AYYAR, J., in *Sundarambal v. Yogavana Gurukkal*(6) was an exception to the course of decided cases and was not adopted by TYABJI, J., who sat with him. I do not think it contains reasons of such weight as to justify a departure from the principle of *stare decisis*. I would answer the question referred to us in the negative.

N.R.

- (1) (1910) 8 M.L.T., 325: s.c. (1910) M.W.N., 445.
(2) (1914) 27 M.L.J., 179. (3) (1914) 16 M.L.T., 423.
(4) (1917) I.L.R., 40 Mad., 105.
(5) Second Appeal No. 2078 of 1915 (unreported).
(6) (1915) I.L.R., 38 Mad., 850.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice,
Sadasiva Ayyar and Mr. Justice Spencer.

ALAGAPPA CHETTIAR (NINTH RESPONDENT),
APPELLANT

v.

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NOS. 1 TO 6 AND RESPONDENTS NOS. 1 TO 8 AND ADDITIONAL
RESPONDENT), RESPONDENTS.*

Provincial Insolvency Act (III of 1907), ss. 46, 47 (1) and (2)—Appeal under section 46, filed out of time—Dismissal of—Memorandum of objections, right of respondent to file—Civil Procedure Code, Section 108 (2), Or. XLI, r. 22.

Section 47 (2) of the Provincial Insolvency Act and section 108 (2), Civil Procedure Code, apply the procedure of the Civil Procedure Code to appeals filed under section 46 of the Provincial Insolvency Act; hence a respondent in such an appeal is entitled to file a memorandum of cross-objections under Order XLI, rule 22, Civil Procedure Code.

When an appeal is dismissed as filed out of time, a memorandum of objections filed by a respondent under Order XLI, rule 22, cannot be heard. *Ranjivan Mal v. Chand Mal* (1888) I.L.R., 10 All., 587, followed.

Decisions on Order XLI, rule 22 (formerly sec. 561, C.P.C.), reviewed.

APPEAL against the order of the District Judge of Madura, dated the 18th July 1916, in Insolvency Petition No. 6 of 1913.

The facts are given in the first paragraph of the ORDER OF REFERENCE of OLDFIELD, J.

K. Srinivasa Ayyangar and K. Bashyam Ayyangar for the appellant.

A. Krishnaswami Ayyar and A. Venkatrayaliah for sixth respondent.

B. Sitarama Rao for seventh respondent.

S. R. Muthusami Ayyar for seventh and eighth respondents.

A. Sriranga Achariyar for ninth to twelfth respondents.

The Hon. Mr. T. Ranga Achariyar for thirteenth and fourteenth respondents.

K. S. Desikan for fifteenth respondent (Official Receiver).

* Appeal Against Order No. 327 of 1916.

This Appeal and the Memorandum of Objections came on for hearing in the first instance before OLDFIELD and SADASIVA AYYAR, JJ., who made the following

ORDERS OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—The decision under appeal is one adjudicating respondents Nos. 7, 9, 12, 13 insolvents and avoiding transfers evidenced by Exhibit B series. Appeal against Order No. 327 of 1916 is by the transferee under these documents. The memoranda of objections are by respondents Nos. 7 and 9 to 14, the persons adjudicated and their sons, for the cancellation of the order of adjudication. If the memoranda succeed, the order under appeal must be set aside *in toto*; and we have therefore dealt with them first. We consider at present two preliminary objections taken by sixth respondent, a creditor who in consequence of an attempt by the original petitioners to withdraw the petition was given the carriage of the proceedings by the lower Court and who now opposes the appeal and memoranda. His first objection is that memoranda of objections are not authorized by insolvency law and cannot be heard; his second, arising from the fact that this appeal is admittedly out of time with reference to the decision in *Lingayya v. Chinna Narayana*(1), is that a memorandum cannot be heard on an appeal, which itself cannot be heard, because it is out of time.

That memoranda cannot be entertained in insolvency appeals is argued on the ground that the Provincial Insolvency Act contains no reference to them. A memorandum is the means, by which a respondent can take any cross objection to the decree or order, which he could have taken by way of appeal, and in view of *Munisami Mudaly v. Abbu Reddy*(2) nothing turns on the fact that the objection raises, as it does in the present case, an issue between him and his co-respondent. A memorandum, although it can be presented only in special circumstances (a qualification material in the sequel), is in substance indistinguishable from an appeal. It follows that the right to present a memorandum, like the right to present an appeal, "cannot be assumed" and that "both alike must be given by statute or some authority equivalent to it." *Meenakshi Naidu v.*

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(1) (1918) I.L.R., 41 Mad., 169 (F.B.). (2) (1915) I.L.R., 38 Mad., 705.

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Subramania Sastri(1). And certainly no right to present a memorandum is given explicitly by statute in the case before us.

The first answer attempted is that such a right is given by necessary implication, since the recognition of a right of appeal involves recognition of a right of objection under the general law applicable to appellate proceedings. But, although a memorandum may be indistinguishable from an appeal in substance, the right of appeal is distinguishable from the right of objection, since they are exercisable by different persons in different circumstances, objection being open only to a respondent when an appeal has been filed by an appellant; and it does not follow from the recognition of the right of one person in one set of circumstances, that a similar right must be recognized in favour of another person in others. In fact the right of objection represents an extension of the right of appeal, for which distinct warrant must be required; and such warrant is not forthcoming in any general law applicable to appellate proceedings. For the existence of such general law is impliedly negatived by the decisions in *Sesha Aiyar v. Nagaratna Lala*(2) and *Kausalia v. Gulab Kuar*(3) in which it was not invoked or applied, the latter relating directly to the right of objection; and it may be observed that we have not been shown in the present case any such course of practice as that referred to in it as a possible ground of decision. The attempt in those cases was to apply, not any general law, but that enunciated in the Civil Procedure Code, consistently, it would appear, with the application to the appeals in question of the provision then corresponding with the present section 96; and, when the general law was relied on in *Meenakshi Naidu v. Subramania Sastri*(1), the judgment dealt with it as represented by that and the connected provisions. I accordingly turn to the argument that section 96 is applicable to appeals under the Provincial Insolvency Act, and that the right of objection follows from its application.

Section 96 authorizes appeals from all decisions of civil Courts, "save when otherwise expressly provided in the body of the Code or by any other law"; and no doubt section 46,

(1) (1888) I.L.R., 11 Mad., 26 (P.C.). (2) (1914) I.L.R., 27 Mad., 121.
(3) (1899) I.L.R., 21 All., 297.

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Provincial Insolvency Act, which purports to deal with appeals under it, contains nothing similar to the provisions in section 48 of the Guardians and Wards Act (VIII of 1890) and section 19 (3), Succession Certificate Act (VII of 1889), by which all orders not specified as appealable are declared final. On the other hand the provision in section 46 for a right of appeal and, a point to which I return, the absence of other provisions regarding appeals or the procedure in them indicate that the right of appeal under the Provincial Insolvency Act, is conferred by it alone, is subject to the restrictions it imposes and cannot be enlarged by the application of section 96 and other provisions of the Civil Procedure Code. This indication is strengthened by reference to those restrictions, the requirements of leave to appeal in certain cases and the mention of periods of limitation, and the absence of similar provisions regarding objections. It has not been shown how any argument in favour of the right of objection can be limited in its application to the cases of appeals, for which no leave is required. It was no doubt held in *Raghunath Das v. Secretary of State*(1), that a provision permitting an appeal to the High Court attracted the application of section 561, Civil Procedure Code, which at that time authorized the filing of objections; and not the less so, because an appeal could not be filed without the certificate of the original tribunal. But the judgment notices the distinction between a certificate that the case is a fit one for appeal and leave to appeal, such as is now in question, granted to a particular individual in respect of a particular part of the case, that in which he is interested. And the requirement of leave to appeal is material; for, when it is required, it is difficult to assume either that the objector is at liberty to proceed without obtaining it and has thus been placed in a better position than the appellant or that the former's obligation to obtain leave is to be based on mere implication from the provision regarding the latter. Again, although the periods specified for appeals are identical with those provided for ordinary appeals in articles 152, 156, Schedule II, Limitation Act, it was thought necessary to specify them distinctly in the section; and, when limitation was thus dealt with, it is hard to believe that the necessity for a provision similar to Order XLI,

(1) (1905) I.L.R., 29 Bom., 514.

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rule 22 (1), was overlooked or that such a provision was to be imported from the Civil Procedure Code. As regards both leave and limitation the easy and natural explanation for the omission of provision for memoranda of objection is that memoranda are not contemplated. The specification in section 46 of the appeals, which can be entertained and of the conditions imposed on their entertainment indicate, in my opinion, an intention to deal with the law relating to appeals exhaustively in that section and to exclude the application of section 96, Civil Procedure Code, with all its implications.

Lastly it is argued that the law relating to appeals is to be found also in section 47, Provincial Insolvency Act, and that its references to 'powers' and 'procedure' impose on this Court the duty to deal with the objections in accordance with the Civil Procedure Code and confer on respondents the right to make them. The first objection to this is that, if the section is intended to deal generally with appellate work, the respondent's right to make and the Court's duty to deal with objections, although they are provided for under the heading "Procedure on hearing" in Order XLI, involve an extension of the right of appeal, which, as the decision in *Colonial Sugar Refining Co. v. Irving*(1) shows, cannot be described as matter of procedure; and if the question is of the Court's powers, it is an unusual and strained construction to treat the reference to them as conferring a right on the party. But in fact the argument, against the application of section 47, rests on the broader foundation, that no part of it applies to appellate business proper. Sub-section (1) applies only "to the Court" and allows it the powers and procedure appropriate to the exercise of original civil jurisdiction; and it therefore is irrelevant in this connexion. Sub-section (2) applies to High Courts and District Courts, which no doubt exercise appellate powers, but deals with their position only "in regard to proceedings in Courts subordinate to them," not in appeals before them, and allows them the powers and procedure appropriate, not to appeals, but to civil suits; and the effect of the sub-section must therefore be taken as being, not the application to their appellate work of any of the provisions of Part VII, Civil Procedure Code, but only of the powers of transfer

(1) (1905) A.C., 889.

and withdrawal and the procedure relating thereto, referred to in sections 22, 23, 24.

As in my opinion the right to present memoranda of objections involves an extension of the right of appeal which the Provincial Insolvency Act does not sanction expressly and is not shown to sanction by implication or with reference to any general principle applicable to appellate proceedings, I would hold that the memoranda before us cannot be heard. As however my learned brother entertains doubts on the point and it is one of general importance, I concur in referring to a Full Bench the question:—

"whether a memorandum of objections can be presented in an appeal against a decision under the Provincial Insolvency Act."

On the question, which would arise in case a memorandum of objections can be presented, there is a clear conflict of authority in the decisions of this Court, which we cannot resolve. See *Narayana Moosad v. Vasudevan Moosad*(1), *Dwibashyam Venkanna v. Peddenti Venkatramaniah*(2), *Venkadu v. Receiver of Nidadavole*(3), and *Kuppa Narasaiyer v. Pappachar*(4). It is therefore necessary to refer to the Full Bench this question also:—

"whether a memorandum of objections, presented in an appeal, which is dismissed as out of time, can be heard?"

SADASIVA AYYAR, J.—The preliminary questions for consideration are:—

- (1) Whether a respondent is entitled to file a memorandum of objections in an appeal filed under section 46 of the Provincial Insolvency Act;
- (2) Whether, if such a memorandum of objections is admissible, it can be heard after the appeal is dismissed as presented out of time.

As regards the first question, the Provincial Insolvency Act is clearly not a self-contained or complete Act in itself. [See last paragraphs in pages 172 and 178 of *Lingayya v. Chinna Narayana*(5)]. As regards procedure, section 47 of the Provincial

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(1) (1910) 8 M.L.T., 447.

(2) (1915) 19 M.L.T., 86.

(3) (1915) M.W.N., 792.

(4) S.A. No. 1884 of 1916.

(5) (1918) I.L.R., 41 Mad., 169 (F.B.).

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Insolvency Act directs the Court exercising insolvency jurisdiction to follow the same procedure as it has and follows in the exercise of original jurisdiction. Clause 2 of the same section directs High Courts and District Courts to follow the same procedure *in regard to proceedings under the Act in Courts subordinate to them* as the High Court and District Courts follow in regard to civil suits. The High Court and the District Courts have got appellate jurisdiction in respect of decisions passed in certain matters in insolvency proceedings in the lower Courts. As regards appeals under the Civil Procedure Code, Order XLI, rules 1 to 21 prescribe rules of procedure relating to several necessary matters such as the form of the appeal, stay of proceedings in the lower Court on appeal, endorsements to be made upon the memoranda of appeal, demands for security, sending of notices on appeal, calling for records from the lower Courts, fixing days for the hearing of appeal, service of notices on opposite party, right to begin and so on. There is no provision in the Insolvency Act as regards any of these matters of procedure in respect of appeals filed under section 46 of that Act (at least until rules are framed under section 51 by the High Court) and unless we hold that they are incorporated in the Act by the provision in section 47, clause 2, which directs the High Court and District Courts in regard to proceedings of Subordinate Courts to follow the procedure in regard to civil suits, there is an unexplained omission to make such a provision in the Act. I therefore am inclined to think that section 47, clause 2, does apply to appellate business proper of the High Court and District Courts and not only to the powers of transfer and withdrawal referred to in sections 22, 23 and 24 of the Civil Procedure Code. Having regard to the position of section 47 as immediately following section 46 which latter section gives the power of appeal, I think section 47, clause 2, though not as clearly and happily worded as it might have been, was intended by the Legislature to apply the provisions of all the rules under Order XLI of the Civil Procedure Code in respect of the regulation of the procedure in appeal, appeals being only continuations of the original proceedings in suits. I think that the expression "in regard to civil suits" means "in regard to all proceedings in civil suits" and includes proceedings in appeals in civil suits.

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Then comes the question whether Order XLI, rule 22, which empowers the respondent to file a memorandum of objections is a rule of procedure. No doubt several provisions relating to substantive law are incorporated in the Civil Procedure Code but the rules in Order XLI from rules 9 to 15 are entitled as "procedure on admission of appeal," rules 16 to 37 are headed as "procedure on hearing" and rule 22 occurs among these latter rules described as falling under the head of "procedure on hearing." This is no doubt not conclusive on the point and there is much to be said (as shown by my learned brother in his opinion) for the opposite view that whatever may be the nature of the rules 9 to 37 other than rule 22, rule 22 gives a substantial right of appeal just as sections 96, 97 and 100 in the body of the Civil Procedure Code and section 46 of the Insolvency Act give a substantial right of appeal. In *Raghunath Das v. Secretary of State*(1), JENKINS, C.J., and ASTON, J., had to construe a section which stated that subject to the provisions of section 48, sub-section 11, of the City of the Bombay Improvement Act IV of 1898, the provisions of the Civil Procedure Code with respect to appeals and original decrees "shall, so far as they can be made applicable, apply to appeals under that sub-section." The learned Judges held that the procedure as to memorandum of objections in section 561 of the old Civil Procedure Code became thereby applicable, that is, that the respondent became entitled to file a memorandum of objections on an appeal having been filed with the necessary permission.

I think that without much straining of language, it could be argued that every party to the insolvency proceedings is given the substantial right of appeal under section 46 (just as every party aggrieved is given a right of appeal under sections 96, 97 and 100 of the Civil Procedure Code) and that the respondent (who as a party has such a right of appeal) is merely allowed to avail himself of an additional rule of procedure by way of memorandum of objections as provided for in Order XLI, rule 22, in exercising his said right of appeal. On the whole I am inclined to the view that the Legislature intended that Order XLI, rule 22, about the right to file a memorandum of cross-objections (the objections being confined under that rule to those which the

(1) (1905) I.L.R., 29 Bom., 514.

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respondent could have taken by way of appeal) could be availed of by a respondent where an appeal had been filed under section 46 of the Provincial Insolvency Act. It was objected that one of the classes of appeals provided for under section 46, that is, the class coming under clause 3 of the section, requires leave of the District Court or of the High Court, and, if a memorandum of objections is allowed after an appeal has been filed under that clause, it will contravene the intention of the Act, as Order XLI, rule 22, of the Civil Procedure Code makes no mention of the leave of the Court being required for filing a memorandum of objections in any case. I am not, however, impressed with this argument as Order XLI, rule 22, restricts the right to take cross objections to those grounds which the respondent could have taken by way of appeal, and, as he could not advance grounds by way of appeal without the leave of the District Court or of the High Court in a case falling under section 46, clause 3, he could not file a memorandum of objections also in such an appeal without the leave of the Court (see also the observations in *Raghunath Das v. Secretary of State*(1), where the learned Judges seem to hold that once permission is given to appeal and an appeal is filed, a separate permission for a memorandum of objections is not necessary). However, I should like, if possible, to express no final opinion on these points and to have the questions argued before a Full Bench and decided finally by such a Bench.

Coming to the second question as to whether a memorandum of objections can be heard after the appeal is dismissed as barred by limitation, there has been a conflict of authority in the several High Courts, and, in this Court itself, there has been such a conflict. See *Narayana Moosad v. Vasudevan Moosad*(2), *Dwibashyam Venkanna v. Peddenti Venkatramiah*(3), *Kuppa Narasier v. Pappachari*(4). I would therefore refer the second question also for the decision of the Full Bench if the first question is answered in the affirmative by the Full Bench.

ON THIS REFERENCE—

A. Krishnaswami Ayyar for sixth respondent.—I contend for the view taken by *OLDFIELD, J.* No memorandum of objections

(1) (1905) I.L.R., 29 Bom., 514.

(8) (1915) 19 M.L.T., 86.

(2) (1910) 8 M.L.T., 447.

(4) Second Appeal No. 1884 of 1916.

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lies in an appeal from a decision under the Provincial Insolvency Act. Sections 46 and 47 do not give the right to file one and no rules have been framed under section 51 (2) of the Act. The right to file a memorandum of objections is not a matter of procedure, but is equivalent to a right to file an appeal and it is a substantive right and unless given by a statute, a memorandum of objections will not lie, even though an appeal has been filed. Compare section 104 of the English Bankruptcy Act. The word 'procedure' in section 47 (2) refers only to the procedure in subordinate Courts and not in the Appellate Court; the words 'power' and 'procedure' in that section do not empower the filing of a memorandum of objections. Special periods of limitation are prescribed for appeals in section 46. A different period of limitation applies to appeals and memoranda of objections. Some appeals under section 46 require leave, whereas no such restriction is imposed on the memoranda of objections. As regards *M. Raghunath Das v. Secretary of State*(1) the statute therein concerned mentioned the word 'case' which means the whole case. The procedure of the Civil Procedure Code applies to Land Acquisition appeals. Hence *The Deputy Collector of Madura v. Muthirula Mudali*(2) holds that memoranda of objections in land acquisition appeals; see *Rangoon Batatoung Company, Limited v. The Collector of Rangoon*(3) and section 54 of the Land Acquisition Act.

As regards the second question, the memorandum of objections is incompetent if the appeal is out of time. Courts cannot excuse delay if an appeal in insolvency is out of time; there is no section in the Act corresponding to section 5, Limitation Act. *Sivanupandia Thevar v. Zamindar of Urkad*(4), *Narayana Moosad v. Vasudevan Moosad*(5), *Dwibashyam Venkanna v. Peddenti Venkatramiah*(6) and *Venkadu v. Receiver of Nidadavole*(7). An appeal filed out of time is not a competent appeal. It is as if no appeal has been filed and the Privy Council has condemned the practice of admitting the appeal subject to objections at the time of the hearing; *Krishnasami*

(1) (1905) I.L.R., 29 Bom., 514, at pp. 526 and 527.

(2) Appeals Nos. 267 to 270 of 1917 (unreported).

(3) (1913) I.L.R., 40 Cal., 21 (P.C.). (4) (1918) I.L.R., 41 Mad., 109.

(5) (1910) 8 M.L.T., 447. (6) (1915) 19 M.L.T., 86.

(7) (1915) M.W.N., 792.

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Panikondar v. Ramasami Chettiar(1); see also *Kuppa Narasier v. Pappachar*(2). Order XLI, rule 22, contemplates the hearing of the appeal. An incompetent appeal cannot be heard. Order XLI, rule 22, clause (4), allows the hearing of memorandum of objections, when the appeal is not heard, only in two cases; and this is not one of them.

Hon'ble Mr. T. Ranga Achariyar for the thirteenth and fourteenth respondents.—Section 47 (1) applies all the procedure of the Civil Procedure Code for the conduct of proceedings in insolvency in the original Court and clause (2) of section 47 for conduct of proceedings in appeal. If it is intended that rules framed under section 51 alone should govern, it would have been so stated. Section 108 (b), Civil Procedure Code, corresponding to section 590 of the old Civil Procedure Code, applies to all miscellaneous appeals; see also sections 3 and 4, Civil Procedure Code. The 'procedure' spoken of in section 47 (2) means procedure in appeal and includes the procedure to be applied in the High Court. This appeal is one filed without leave. If section 47 (2) is held not to apply, then there is no other section which prescribes the procedure to be applied. *Lingayya v. Chinna Narayana*(3) assumes that Order XLI applies. Filing memoranda of objections is not a right allowed by substantive law but belongs to 'procedure'; compare Order XLIII, rule 2, as to filing memoranda of objections in miscellaneous appeals; *Sellammall v. Veerappa Naicker*(4). Moreover section 47 of the Provincial Insolvency Act was enacted with reference to the old Civil Procedure Code. Filing a memorandum of objections is a fresh right acquired by a respondent as soon as notice of appeal is served on him; *Venkatachariar v. Ponnappa Ayyangar*(5). If Order XLI, rule 22, does not apply, a respondent cannot support the decree on a ground decided against him. A memorandum of objections is an incident of the right of appeal. See *Secretary of State for India v. Chellikani Rama Rao*(6). This case shows that even without section 47 (2), Order XLI, rule 22, Civil Procedure Code, will apply if once an appeal is filed in the High Court. By section 117 of Civil Procedure Code all the provisions of

(1) (1918) I.L.R., 41 Mad., 412 at p. 416 (P.C.).

(2) Second Appeal No. 1864 of 1916 (unreported).

(3) (1918) I.L.R., 41 Mad., 169 (F.B.). (4) (1908) 18 M.L.J., 157.

(5) Appeal No. 223 of 1916 (unreported).

(6) (1916) I.L.R., 39 Mad., 617 at p. 624 (P.C.).

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the Civil Procedure Code apply to all cases before the High Court not therein excepted; compare section 120, Civil Procedure Code. See also *Ravi Veeraraghavulu v. Venkata Narasimha Naidu*(1). As regards the second question, the memorandum can be heard. In section 561, old Civil Procedure Code, there were the words 'upon the hearing of the appeal'. These words are now taken away in Order XLI, rule 22. Clause 4 of Order XLI, rule 22, was enacted to settle a conflict of decisions; Reference was made to *Kombi Achen v. Kochunni*(2). Order XLI, rule 33, newly enacts that, whether an appeal is filed or not by the respondent, the appellate Court can pass a decree in favour of the respondent. Even when an appeal is dismissed as barred by limitation, a memorandum of objection can be heard; *Venkadu v. Receiver of Nidadavole*(3) and *Dwibashyam Venkanna v. Peddenti Venkatramiah*(4). A person whose name is on the record of an appeal as respondent, is entitled to file a memorandum of objections even if the appeal is out of time, as such person fulfils all the requirements of Order XLI, rule 22. A respondent is entitled to take the objection that the appeal is out of time, as soon as he gets notice of the appeal. It is only one of the many objections that a respondent can take; though a memorandum of objections must be filed within thirty days. Cross-objections have been allowed as between respondents. *Munisami Mudaly v. Abbu Reddi*(5). Whether the appeal lies or not in law, if there is in fact an appeal, a memorandum of objections lies. *Kamat v. Kamat*(6) and *Shonkar Lal v. Sarup Lal*(7).

A. Venkatarayaliah in reply relied on *Madho Pershaud v. A. L. Walton*(8) for the first question and on *Ramjivan Mal v. Chand Mal*(9), *Kombi Achen v. Kochunni*(2), *Narayana Moosad v. Vasudevan Moosad*(10) for the second question.

The Court expressed the following OPINIONS :—

WALLIS, C.J.—Section 47 (1) of the Provincial Insolvency Act provides that, subject to the provisions of the Act, the

(1) (1914) I.L.R., 37 Mad., 442 (P.C.). (2) (1898) I.L.R., 21 Mad., 352.
(3) (1915) M.W.N., 792. (4) (1915) 19 M.L.T., 86 at p. 87.

(5) (1915) I.L.R., 38 Mad., 705 (F.B.).

(6) (1884) I.L.R., 8 Bom., 308 at 370.

(7) (1912) I.L.R., 34 All., 140. (8) (1913) 18 C.W.N., 1050 at p. 1052.

(9) (1888) I.L.R., 10 All., 587 at p. 601.

(10) (1910) 8 M.L.T., 447.

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Provincial Insolvency Court in regard to proceedings under the Act shall have the same powers and follow the same procedure as it has and follows in the exercise of Original Civil jurisdiction, thus making the provisions of the Civil Procedure Code clearly applicable, as far as may be, to original proceedings under the Act. This sub-section applies to District Courts in the exercise of original jurisdiction in insolvency. Sub-section (2) then applies exactly the same provisions in the same language to the High Courts and District Courts "in regard to proceedings under this Act in Courts subordinate to them" and the first question is, what is the effect of these words. Though not very happily expressed they are in my opinion wide enough to cover cases in the Subordinate Courts which come before the High Court or District Court on appeal or revision as well as on applications for transfer, etc., and there are sufficient indications that they were used by the legislature in this sense. The procedure prescribed in the Civil Procedure Code is the standard procedure, and no reason has been suggested why it should have been made applicable in insolvency cases only in the original court and not also to cases of appeal and revision provided for in the Act. There must be some procedure or other governing such proceedings, and, if it had been intended that it should be prescribed by rules made under section 51, it would have been specifically mentioned in sub-section (2) among the other important matters as to which rules were to be made under that section. So far as appeals to the High Court are concerned, the sub-section so construed may in my opinion be regarded as superfluous, because, under section 590 of the Code of 1882, now section 108, the procedure prescribed in Chapter XLI, which deals with appeals from original decrees was made applicable, as far as might be, to appeals from orders under any special or local law in which a different procedure is not provided. No different procedure is provided in the Provincial Insolvency Act as it was in the Insolvent Act, 11 & 12 Vict., c. 21, to which, for that reason, the provisions of section 590 were held inapplicable in *In the Matter of R. Brown*(1).

Clearly, therefore, in either view the procedure prescribed by the Code is applicable to appeals to the High Court under the

(1) (1886) I.L.R., 12 Cal., 629.

Provincial Insolvency Act, and it is unnecessary to refer to section 117 and sections 3 and 4 of the Code which were also relied on.

The next question depends on the construction of Order XLI, rule 22 (formerly section 561), Civil Procedure Code, which has given rise to much difference of opinion. In Calcutta it was held that section 561 did not generally entitle one respondent in an appeal to present a memorandum of objection against another respondent, and this was followed in *Banke Lal v. Jagat Narain*(1). On the other hand it was held by this Court to be permissible in *Timmayya v. Lakshmana*(2), approved in *Kulaikada Pillai v. Visvanatha Pillai*(3). In these circumstances the section was amended in 1908 by substituting in sub-section (1) "cross objection" for "objection" and in sub-section (3) "the party who may be affected by such objection" for "appellant," while the new sub-section (4) speaks of "such notice to the other parties as the Court thinks fit." The interpretation put upon these amendments has not been uniform. A Full Bench of this Court in *Munisami Mudaly v. Abbu Reddy*(4) relied mainly on the previous practice of this Court, but that consideration has less weight in a case like this where the legislature in making the amendments must be presumed to have intended to introduce uniformity of practice in place of the diversity prevailing in the different High Courts. While the Bombay High Court adheres to the view that cross-objections must be aimed at the appellant, *Nursej Virji v. Alfred H. Harrison*(5), it has been held in Calcutta in *Jadunandan Prasad Singh v. Koer Kallyan Singh*(6) that rule 22 (3) introduces a modification of the old rule in section 561, that the effect of the alteration is to leave no doubt that a respondent may prefer a cross-objection against a co-respondent, but that the limits of the rule are not attempted to be defined. The Allahabad Court takes a similar view; *Balgo-binda v. Ram Sarup*(7).

In none of these cases has the effect of the substitution of "cross-objection" for "objection" in rule 22 (1) been dealt

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| (1) (1901) I.L.R., 33 All., 93. | (2) (1884) I.L.R., 7 Mad., 215. |
| (3) (1905) I.L.R., 28 Mad., 229. | (4) (1915) I.L.R., 38 Mad., 705. |
| | (5) (1913) I.L.R., 37 Bom., 511. |
| | (6) (1911) 15 C.L.J., 61; s.c., 16 C.W.N., 622. |
| | (7) (1914) I.L.R., 36 All., 505. |

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with. *Prima facie* the intention would appear to have been only to allow objections which arose in some way out of the appeal whether aimed at the appellant or at another respondent. This discussion is not irrelevant to the present question, as the more widely rule 22 is interpreted, the more serious would be the consequences of answering the second question referred to us in the affirmative. At the time when the present Code was enacted in 1908 that question had been expressly decided in *Ramjivan Mal v. Chand Mal*(1), with reference to the terms of the section 561 of the old Code, where the Court held that, when the appeal was dismissed as out of time, the objection could not be heard, as the entertainment of the objections was contingent and dependent upon the hearing of the appeal. In the course of the judgment, MAHMOOD, J., observed that to decide otherwise would

"be practically holding that an appellant who prefers an appeal long after the prescribed period of limitation may confer upon the respondent the right of having the appeal of his own heard in the shape of objections under section 561, Civil Procedure Code, although, if the original appeal was barred by limitation, *a fortiori* such objections ought to be barred also."

The legislature of 1908 must be taken to have known of this decision, and it is exceedingly unlikely that they intended to overrule it by implication. The decision no doubt proceeded on the ground that the case fell within the *ratio decidendi* of the earlier cases in which it had been held that the objections could not be heard when the appeal had been withdrawn or dismissed for default. Those decisions were based on the language of section 348 of the Code of 1859 and section 561 of the Code of 1882 by which a respondent, although he had not appealed against any part of the decree, was entitled "upon the hearing" to take any objection to the decree which he could have taken by way of appeal. The view taken by the Courts when the section was so worded was, as explained by SIR CHARLES SARGENT, C.J., in *Dhondi Jagannath v. Collector of Salt Revenue*(2), that when once the hearing of the appeal had commenced, the respondent's right to take his objections, which up to the time of hearing was an

(1) (1888) I.L.R., 10 All., 587.

(2) (1885) I.L.R., 9 Bom., 28 at p. 30.

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inchoate right, became perfected. The legislature has now removed from this the words "upon the hearing" upon which these decisions rested, and has expressly overruled the decisions themselves in the case of withdrawal or dismissal of the appeal by enacting in sub-section (4), "Where in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit." It does not however follow that *Ramjivan Mal v. Chand Mal*(1) was also intended to be overruled. If that had been the intention of the legislature, it would probably have added some such words as "or is dismissed as having been filed out of time."

There are moreover strong reasons for not attributing any such intention to the legislature. The right of parties to a suit to treat the decree as final when no appeal has been filed within the prescribed period of limitation is a substantive right of great value as pointed out by the Privy Council in *Colonial Sugar Refining Co. v. Irving*(2) and in *Krishnasami Panikondar v. Ramasami Chettiar*(3) and there is a strong presumption against any intention on the part of the legislature to interfere with it unnecessarily. It is no doubt impaired to some extent by rule 22 which may have the effect of extending the respondent's time for appealing or even giving a fresh starting point. Provided however the original appeal is required to be filed in time, the interference is a very limited one, and may be defended as necessary to enable the Court to do full justice in disposing of the case on appeal and as governed by the same considerations as have led to the enactment of the new rule 33 which gives the Court a discretionary power to interfere in appeal even as regards parties who have not been made respondents, and respondents who have not filed any memorandum of objection. It would however largely and unnecessarily impair this valuable right to hold that the filing of an appeal by one party, even though out of time, has the effect of enabling the respondents to file appeals not only against the appellant but as against one another. The objections

(1) (1888) I.L.R., 10 All., 587.

(2) (1905) A.C., 369.

(3) (1918) I.L.R., 41 Mad., 412 at p. 416 (P.C.).

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urged by MAHMOOD, J., in *Ramjivan Mal v. Chand Mal*(1) against such a course have lost none of their force, and there is no reason to suppose that the legislature intended to disregard them. Even greater difficulties arise if the present rule is treated as giving respondent an unrestricted right of filing memoranda of objections, because the decision on a question raised by a respondent in the same interest as the appellant may give occasion under rule 33 for the modification of the decree in favour of the appellant himself whose appeal is *ex hypothesi* barred.

The true rule would appear to be that the right of respondents to proceed by way of memorandum of objection is strictly incident to the filing of the original appeal in time, and that it is open to a party against whom a memorandum of objection has been filed to set up the bar that the original appeal was filed out of time. It is no doubt true that a respondent who is served with a notice of appeal cannot always be sure whether the appeal was filed in time or not, and, if so, whether or not the delay will be excused, and that he may therefore feel bound to file a memorandum of objection and incur the cost of court-fees and briefing counsel in support of the memorandum. That in my opinion is not a sufficient reason for taking the other view. Moreover in a proper case the hardship may be met by ordering the appellant to pay the costs of the memorandum. I answer the second question in the negative.

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SADASIVA AYYAR, J.—In the Order of Reference, I indicated my inclination to answer the first question referred in the affirmative. In other words, while expressing no final opinion, I gave some reasons for holding that a respondent was entitled to file a memorandum of objections in an appeal against a decision under the provisions of the Insolvency Act. My Lord, in the opinion just now pronounced by him, has come to the conclusion that that question should be answered in the affirmative and I agree entirely therewith and have nothing to add to what I have said already.

The second question referred has caused me more difficulty. I expressed no opinion whatever upon that question in the Order of Reference. The right to prefer an appeal cannot be claimed by a

(1) (1888) I.L.R., 10 All., 587.

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litigant as a matter of course but should be given by statute law. The right to prefer an appeal by way of memorandum of objections is an extension of the right of appeal which must therefore also be given by statute. Statutory provisions relating to such rights should be strictly construed. Order XLI, rule 22, corresponding to old section 561, must, if possible, therefore not be extended in favour of the right of a respondent to file a memorandum of objections so as to prejudice parties who have obtained a decree in their favour in the lower Court and who might reasonably entertain the belief that as the time for preferring an appeal has expired the rights which have been established in their favour under the decision of the Court of first instance had become finally secure. This Court has no doubt in *Munisami Mudaly v. Abbu Reddy*(1) allowed one respondent to file cross-objections against another and this is a further reason for strictly confining the right to file such objections. Supposing the plaintiff is the appellant and the defendants Nos. 1 and 2 are the respondents in an appeal and the plaintiff and the second defendant are in collusion and the suit was dismissed by the District Munsif, upholding the first defendant's contentions. The plaintiff appeals out of time to the District Court. The Sarishtadar's office does not discover that the appeal is out of time and sends notice to both the respondents. The colluding second defendant files his memorandum of objections within one month of the receipt of the notice of appeal on the same grounds on which the plaintiff filed his appeal, the second defendant's objections and the plaintiff's appeal being both thus directed against the first defendant. The result of answering the second question in the affirmative would be that while the plaintiff's appeal at the final hearing of the appeal is dismissed as barred by limitation, his friend, the second defendant, by having his memorandum of objections heard, compels the Court to hear the appeal also, and the first defendant who thought that the decision of the District Munsif was safe owing to no appeal having been filed in time finds that he was living in a fool's paradise.

I do not see that the omission in Order XLI, rule 22 (1) of the words "upon the hearing" which found a place in the old

(1) (1915) I.L.R., 38 Mad., 705.

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section 561 is of much importance, though some of the decisions under the old section 561 (which decisions denied the right of the respondent to have his memorandum of objection heard where the appeal itself was dismissed as out of time) attached importance to those words. I think that much weight attaches to the argument based on the new sub-rule 4 of Order XLI, rule 22, which makes an express provision for hearing the memorandum of objections only in cases where the original appeal is withdrawn or is dismissed for default and does not expressly allow the hearing of the objections where the appeal is dismissed as barred by limitation or dismissed on other preliminary grounds. Another consideration which has weighed with me is that the right of a respondent to file an objection depends, if the second question is answered in the affirmative, on what I may call the accident of the Court or the Sarishtadar discovering at once whether the appeal is barred. If the bar is discovered at once and the appeal rejected, then no notice is issued to any respondent and hence no respondent is entitled to file a memorandum of objections but if it is not so discovered and notice is issued then he gets valuable rights.

I therefore agree with my Lord in the answer to the second question also.

SPENCER, J. SPENCER, J.—I agree that the first question referred to us should be answered in the affirmative and the second question in the negative.

The fact that rule 22, which confers upon respondents the right of taking cross-objections falls under that portion of Order XLI which is headed "Procedure on hearing", supports the latter view and justifies, if I may say so, the observation of Sir CHARLES SARGENT, C.J., in *Dhondi Jagannath v. Collector of Salt Revenue*(1), where he speaks of the respondent's right to take his objections, which up to the time of the hearing was an inchoate right, becoming perfected at the commencement of the hearing of the appeal. 'Hearing' would then mean hearing on the merits. The words "upon the hearing" in section 561 of the old Code were probably omitted from the present Code as being redundant, seeing that in both Codes the heading "Procedure on hearing" preceded this provision, and in order that

(1) (1885) I.L.R., 9 Bom., 28.

clause (1) of rule 22 should be consistent with the newly introduced clause (4) of the same rule. The retention of the words "upon hearing" in the side note to the section indicates that this change was not intended to have any legal significance. *Dwibashyam Venkanna v. Peddenti Venkatramiah*(1) should be treated as now overruled.

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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

RAMASAMI NAIDU (APPELLANT), FIRST
DEFENDANT,

v.

MUTHUSAMI PILLAI (RESPONDENT), PLAINTIFF.*

1918,
February 20,
21 and 22 and
March 13.

Provincial Insolvency Act (III of 1907), sec. 16 (1)—Adjudication by Official Receiver—No order vesting property in Receiver, effect of—Action for money had and received, scope of—Privity of plaintiff and defendant, necessity for—Nature of privity.

The Official Receiver in the insolvency of R put up for sale the debts of a firm in which R and the second, third and fourth defendants were partners, and the first defendant purchased them from the Receiver and afterwards recovered a debt due to the firm.

The plaintiff having attached three-fourths of the money so recovered by the first defendant in execution of a decree obtained by him against the second, third and fourth defendants for a debt due by the firm and having been appointed Receiver in the execution proceedings, sued the first defendant to recover the said three-fourths of the money as money had and received to the use of the second, third and fourth defendants.

Held, that the plaintiff had no cause of action against the first defendant, because in an action for 'money had and received,' there must be, as shown by the English decisions, privity of a legally recognizable nature between the plaintiff and the defendant and no such privity existed in this case, and that the suit also failed as regards the shares of the second and third defendants by reason of their adjudications as insolvents prior to the attachment.

Scope of the action for money had and received, pointed out; English and Indian cases reviewed.

Sinclair v. Brougham (1914) A.C., 398, explained.

Sankunni v. Govinda (1914) 37 Mad., 381, referred to.

Per SADASIVA AYYAR, J.—While privity of contract between the parties is of course not necessary to sustain an action for money had and received, there must be what might be called some privity of a legally recognizable nature such as

(1) (1915) M.L.T. 86.

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some knowledge of particular facts in the man who received the money and some mistake or ignorance of fact on the part of the man who paid the money or some relation of trust and confidence between them on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant.

Per OLDFIELD, J.—(*Obiter*) It may be permissible in India as it is in England to sue only the solvent members of a firm when a decree is sought against it.

Harkins v. Ramsbottom (1815) 6 Tannton, 179, referred to.

SECOND APPEAL against the decree of S. MAHADEVA SASTRI, Acting District Judge of Tinnevely, in Appeal No. 405 of 1916, preferred against the decree of R. VEMBU AYYAR, Acting District Munsif of Tuticorin, in Original Suit No. 185 of 1915.

The plaintiff obtained a decree for money in a small cause suit of 1910 against the second, the third and the fourth defendants. In execution of the decree, the plaintiff attached certain moneys in the hands of the first defendant, alleging that the latter had collected the amount from certain debtors of the above-said defendants. The debt which was collected by the first defendant was originally due to a partnership of which the second, third and fourth defendants and one Rajappa Mudali were partners. In 1908 the partnership was dissolved and in the same year Rajappa Mudali (and not the firm or the other partners) was adjudicated an insolvent and the Official Receiver of the Tinnevely District was appointed Receiver in respect of his insolvency. The latter put up for sale by public auction the whole of the outstandings due to the partnership and the same was purchased by the first defendant for Rs. 250 in 1910. The first defendant *bona fide* believed he was purchasing the entire partnership interest and not merely that of Rajappa Mudali only, though in law he could obtain only his interest therein. It also appeared in evidence that the second defendant released his interest in the outstandings in favour of the first defendant in 1910 and also purported to sell the interest of the third defendant under a power of attorney from the latter, which was however held by the lower Courts to be ineffectual to authorize him to sell such interest. The second defendant was adjudged an insolvent with effect from March 1911; the third defendant was adjudicated an insolvent by the Official Receiver of Madura but no distinct order vesting the property of the third defendant in the said Receiver was passed by the Court.

The first defendant recovered Rs. 450 in 1911 and Rs. 1,200 in 1912 from the debtor of the partnership in virtue of his pur-

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chase in the Official Receiver's sale. The plaintiff, in execution of his small cause decree against defendants Nos. 2 to 4, attached three-fourths of this amount in the hands of the first defendant. Being appointed a receiver in his own execution proceedings, the plaintiff brought this suit in 1915 to recover the amount from the first defendant and also impleaded his judgment-debtors as defendants Nos. 2 to 4. The first defendant pleaded that the plaintiff was not entitled to recover any amount because the second and third defendants had been adjudicated insolvents in 1911 long prior to the plaintiff's attachment, that he had a valid title to recover the debt under the Official Receiver's sale in 1910, that in any event he was a bona fide purchaser of the debt and that the plaintiff had no cause of action for money had and received against him as there was no privity of any sort between them. The lower Courts held that the plaintiff could recover the amount due in respect of the third and the fourth defendant's one-fourth share in the amount collected by the first defendant within three years prior to the suit. The first defendant preferred this second appeal to the High Court.

M. D. Devadoss for the appellant.

A. Krishnaswami Ayyar for the respondent.

The Court delivered the following JUDGMENT:—

OLDFIELD J.—The main facts of this case can be stated shortly. OLDFIELD, J. Plaintiff obtained a decree against second, third and fourth defendants and, after attaching money alleged to belong to them and to be in first defendant's possession, was appointed Receiver in his own execution and in that capacity is now attempting to recover from first defendant, the other defendants being impleaded as persons interested. The defence of first defendant, the appellant before us, is that (1) the money is a sum due to second, third and fourth defendants and one Rajappa Mudali, the right to collect which he acquired in a legal manner; (2) if his own title is bad, some at least of the money has vested in persons other than plaintiff, those who are administering second and third defendants' estates in insolvency.

The lower Appellate Court's judgment is mainly occupied with the second of these contentions. The facts relied on are that second defendant on 13th March 1911 and third defendant on 7th October 1911 became insolvents, the one in Tinnevely and the other in Madura, and their assets therefore vested for the benefit of all their creditors, before plaintiff attached this portion

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of them on 15th July 1914. The District Munsif's finding that this was so in the case of second defendant has not been attacked. He and the lower Appellate Court found otherwise in the case of third defendant, because he was adjudicated insolvent by the Official Receiver, Madura, and no distinct vesting order, such as *The Official Receiver of Trichinopoly v. Somasundram Chettiar*(1) requires, having been passed, the debtor's estate is still available to satisfy individual claims. But this is unsustainable. The authority cited may entail that the estate did not in the absence of a distinct order vest in the Official Receiver. The fact, which the lower Courts overlooked, remains that in any case it vested under section 16 (1) of the Provincial Insolvency Act in the Court and became divisible among the creditors from the date of the petition and that under section 16 (2) after the date of the adjudication, which related back to that of the petition, no creditor had any remedy against it. The cases of second and third defendants are therefore similar. Plaintiff can execute his decree only by proving in their insolvencies; and on this ground at least his claim to what is alleged to be in part their money in first defendant's hands must fail.

The lower Appellate Court has next held against first defendant's right to that money on the special ground that he obtained it in proceedings, which could not bind them or fourth defendant. It consists in a debt, which he has collected in virtue of his purchase at a sale held by the Official Receiver, Tinnevely, in the administration of the estate of Rajappa Mudali above referred to and of an assignment to him, Exhibit I, by second defendant. That sale is represented by first defendant as being of the debts due to a firm composed of Rajappa and second, third and fourth defendants. But, as Exhibit B, the auction list, shows, what was sold was only, "the right to arrears due to Rajappa Mudali, insolvent petitioner, as due under the day book and ledger of R. M. shop," R. M. N. being the firm above referred to. Exhibit K, the sale deed by the Official Receiver to first defendant, is no doubt for "the debts due to the joint shop conducted under the style of R. M. by Rajappa Mudali." But the insolvency was, it is not disputed, that of Rajappa, not the firm; and it is sufficiently clear that only his share, not second, third and fourth defendants', purported to be or could have been sold. How

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the Official Receiver could sell one partner's share of the debts due to the firm, instead of following the normal course and selling his share in its assets, as it might be ascertained, is not clear; but this irregularity appears to have gone unnoticed until the hearing in this Court and on the view I take, would not affect the conclusion. The sale in these circumstances giving no title to any portion of the debts except Rajappa's, first defendant has relied also on Exhibit I, the assignment of second and third defendants' shares, which he obtained shortly after. It is, I agree with the lower Court, ineffectual as regards third defendant's share, because Exhibit A, his power of attorney in second defendant's favour, authorized the latter only to collect debts due to the shop, not to realize their value or any part of it by selling them. The result so far is that first defendant's right to the debts has been established only in respect of second defendant's and Rajappa's shares, but that, as already found, plaintiff cannot be heard to deny it in respect of the former's. The question is next of the general objection, which has been made to his claim to the share of fourth defendant. That objection would, it may be observed, be available against his claim to the other shares also.

Before referring to this objection, I observe that plaintiff's decree which has been shown us during the hearing, was obtained against second, third and fourth defendants, Rajappa not being a party. It may be permissible in India, as it is in England (*Hawkins v. Ramsbottom*(1), to sue only the solvent members of a firm, when a decree is sought against it. But there is nothing in the decree, except the use of the vilasam R. M. N. before each defendant's name, and that is insufficient, to indicate that relief was sought or given against the firm's assets, not the defendants individually; and on such a decree plaintiff's proper course was after exhausting their separate property to proceed against their shares in those assets after they had been ascertained in proper dissolution proceedings, if necessary at his instance in defendants' insolvencies or otherwise. Again however this point has not been taken at any stage; and I therefore turn to the general argument already referred to.

It may for the present purpose be considered only as regards fourth defendant and it is that the suit will not lie, because plaintiff cannot recover from first defendant money, which he

(1) (1815) VI Taunt 179.

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received owing to a mistake from the debtors of fourth defendant, plaintiff's debtor. Certainly first defendant had no right to receive the money. But there is no finding that in doing so, he acted otherwise than honestly and in *bona fide* mistake as to his right. When or how he became aware of the invalidity of his title, as based on his purchase at the Official Receiver's sale or his assignment (in the case of third defendant), if he did become aware before collecting the money, has not been ascertained; but, the plaint containing no suggestion of fraud or collusion between him and the Official Receiver or any person concerned, no presumption can be made against him. And then, as plaintiff's position can be no better than that of his debtors, the question simplified is whether fourth defendant or either of the others could recover from first defendant what he has received mistakenly as due to them.

This question in terms of English Law is whether in the circumstances an action would lie against first defendant for money had and received for their use; that is for the use of plaintiff. The scope of this form of action and the considerations, which led to its extension, are discussed fully in *Sinclair v. Brougham*(1), although it is possible that the former has never been defined exhaustively. Plaintiff's argument has accordingly been that it comprehends all claims arising, in the words of Blackstone's definition (Comm. III 162), *ex aequo et bono* and "the justice of the case." First defendant contends, and I shall hold, that one test of its applicability to such facts, as those before us, is afforded by the existence of privity between the plaintiff and defendant, a test which those facts do not satisfy. For it is not suggested that plaintiff or second, third and fourth defendants had any knowledge of or connexion with the payment to first defendant. No doubt there are, as is to be expected in the circumstances referred to in *Sinclair v. Brougham*(1), decisions, in which this test was not applied clearly. But, so far as they cannot be distinguished, they must be regarded as discredited by the mass of cases, in which the general rule was enunciated.

To refer to cases, in which the question arose, as it arises here, in connexion with the recovery of payments mistakenly made to the defendant, not by the plaintiff directly, but by a

(1) (1914) A.C., 398.

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third person alleged to be liable to the plaintiff, and in which there was no direct or obvious fiduciary relation between the parties, reliance has been placed first on *Litt v. Martindale*(1), and it is certainly in plaintiff's favour. But, although the objection taken by the defendant was that money had and received would not lie, the judgments (which are laconic) indicate that the action was treated as founded on fraud, of which there is no question in the case before us. In *Littlewood v. Williams*(2), the point of privity was not dealt with distinctly, but would appear to have been decided in the plaintiff's favour on the ground of their previous relation with the defendant and their servant and his, from whom he received the money, the conclusion being that it was the plaintiff's money in his hands. These English cases therefore, the strongest on plaintiff's side, in no way detract from the insistence on the necessity for evidence of privity in others, to which I turn. In *Rogers v. Kelly*(3), the defendant received money due on plaintiff's bill from his bankers owing to a clerk confusing a bill which had been provided for with one which had not been; and the action was dismissed on the ground that whatever plaintiff's position as against his bankers or theirs against defendant, there was no privity between the parties before the Court. And so also in *Chambers v. Miller*(4), and *Aikin v. Short*(5), in which it was regarded as material that the mistake, owing to which the defendant received the money was one, with which he had nothing to do, since it was between the person who paid him, and the plaintiff. In these cases defendant was no doubt entitled to the money, though not from that person. But that was not so in *Rogers v. Ingham*(6), a suit between two persons claiming to be legatees of whom the defendant had been paid by the executor's mistake; and, though the action for money had and received was not in question, the principle now under discussion was applied, JAMES, L.J., observing that relief against mistake had never been given in the case of a simple money demand between the parties, there being no fiduciary relation between them and no equity to supervene by reason of the conduct of either. So also in *Mackersy v. Ramsays*(7),

(1) (1856) 18 C.B., 314.

(2) (1815) 6 Taunt, 277.

(3) (1809) 2 Camp, 123.

(4) (1862) 32 L.J., C.P.N.S., 30.

(5) (1856) 1 H. & N. 210.

(6) (1876) 3 Ch. D., 351.

(7) (1843) 9 Cl. and F., 818.

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where it was held that, because privity existed between plaintiff and defendant, his banker who had undertaken to collect the amount of his bill and had agreed to credit him with the amount received, the latter was liable to him; and that, because privity did not exist between him and the banker's agents, whose insolvency caused loss of the money, those agents were not. And in *Prince v. Oriental Bank Corporation*(1), in which *Mackersy v. Ramsays*(2), was approved, the absence of privity again afforded a ground of decision. It is to be observed that the language in *Sinclair v. Brougham*(3), on which plaintiff's claim to a liberal view of the action for money had and received mainly rests, was used rather of its early development than of its scope as settled at the present time by authority. It is no doubt still to be regarded, as it was originally, as based on an implied or fictional promise (see the judgments of Lords HALDANE and DUNEDIN). But *Sinclair v. Brougham*(3), is completely in accordance with the great body of other authority in negating the possibility of such a promise being deduced, as plaintiff here would deduce it, from the *aequum et bonum*, as it may appeal to the sympathy of the Court in the particular case, or from circumstances, in which the defendant, having no privity with the plaintiff, when the money was received, need not be supposed to have given and had no duty to give any promise. Here first defendant was clearly under no such duty. For he collected the debts due to fourth defendant and others without reference to them and was not enabled to do so by reason of any fiduciary relation with them or in consequence of any fact independent of the willingness of their debtors to pay him.

The conditions, on which a plaintiff can sue for money received to his use, have been discussed in India more often with reference to the applicability of Article No. 62, Schedule I, Limitation Act than to the existence of a right of action; and, when the latter has been in question, the issue of privity has seldom arisen or been raised. The cases therefore are of little assistance. Plaintiff however relies on *Syad Lutf Ali Khan v. Mussamat Afzalunissa Begum*(4), and *Tellis v. Saldanha*(5), the latter being explained in *Vaidyanatha Aiyar v. Aiyasami Aiyar*(6). But in all these the parties were in the relation of joint tenants

(1) (1878) 3 A.C., 325.

(3) (1914) A.C., 398.

(5) (1887) I.L.R., 10 Mad., 69.

(2) (1843) 9 Cl. and F., 818.

(4) (1872) 9 Ben. L.R., 348 (P.O.).

(6) (1909) I.L.R., 32 Mad., 191.

or co-owners and the principle of Section 90, Trusts Act, was applicable, the defendants having in each case received the money sued for as representing the plaintiffs and themselves; and a fiduciary relation was therefore in question. *Sankunni v. Gorinda*(1), was no doubt decided with reference to Blackstone's definition of the action and a very general statement that the defendant's obligation arose *ex aequo et bono*. But the suit was to recover money, for which no doubt defendant, a member of a tarwad, and plaintiff had given a promissory-note, apparently by way of acknowledgment, to the karnavan; and, when the money was returned from the Government deposit, for which defendant originally received it, his receipt of it was apparently regarded as part of the transaction, into which he had entered with the karnavan's concurrence for the tarwad's benefit. The decision therefore might, it would seem, have been based on a ground, narrower than the one adopted and consistent with the conclusion already reached on English authority. In it reference was made to *Mohomed Waheb v. Mahomed Ameer*(2), a case, in which the fiduciary relation between the parties, co-sharers, was clear and in which therefore nothing turned on the reference it contains to *Litt v. Martindale*(3), already cited, as an action for money had and received. This reference in fact merely reproduced that made in another case relied on by plaintiff, *Raghumoni Adhikari v. Nilmoni Singh Deo*(4), in which *Litt v. Martindale*(3), *Neate v. Harding*(5) and *Holt v. Ely*(6), were referred to. But the claim in the two last mentioned cases was for money taken wrongfully from the plaintiff, directly in the one and from his agent in the other; and the question of privity was therefore not raised in them. It has been pointed out that it was not discussed in the first mentioned; and in *Raghumoni Adhikari v. Nilmoni Singh Deo*(4), the claim being for money obtained fraudulently by the defendant from the Collector, who received it as plaintiff's deposit and apparently was holding it for him, it would probably have been useless to raise it. On the other hand, in *Ramaswami Aiyar v. Kunthayya*(7), also a case of withdrawal of money from a Collectorate, but not one in which

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(1) (1914) I.L.R., 37 Mad., 381.

(3) (1856) 18 C.B., 314.

(5) (1851) 6 Ex., 349.

(2) (1905) I.L.R., 32 Cal., 527.

(4) (1877) I.L.R., 2 Cal., 392.

(6) (1853) L. Bl. & L.L., 795.

(7) (1899) 9 M.L.J., 57.

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it was held as a deposit or withdrawn by fraud, although the relevancy of the reference to *Kendal v. Wood*(1), is not clear, the suit was held unsustainable, on the ground that the payment by the Collector and the receipt by defendants were *bona fide* and without notice of plaintiff's preferential right; and *Harihar Misser v. Syed Mohamed*(2) was a case, in which evidence of privity was insisted on and the suit was held to be governed by article 62 only because that evidence was sufficient. There is accordingly no reason for holding that the principle accepted in England has been rejected in this country. We must therefore decide that plaintiff's suit does not lie for any of the money claimed.

This conclusion renders it unnecessary to deal with the argument of Mr. A. Krishnaswamy Aiyar for plaintiff relating to fourth defendant's share of the amount received by the first defendant and based on Lindley on Partnership, sixth edition, page 692 or with the Memorandum of Objections. The result is that the appeal is allowed and the suit dismissed, plaintiff to pay the first defendant's costs throughout. The other defendants have not been made parties to the appeal. The Memorandum of Objections is dismissed with costs.

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SADASIVA AYYAR, J.—The material facts may be shortly stated thus:—The Official Receiver of the Tinnevely district sold by public auction the debts due to a partnership of four persons who carried on business in Tuticorin. The principal partner, Rajappa Mudali, was adjudicated an insolvent with effect from the 5th December 1908. The partnership business itself had been closed in February 1908 (see Exhibit I). I think it may be taken that the partnership had become dissolved between February 1908 when the business was closed and December 1908 when Rajappa was declared insolvent except, of course, that the rights and obligations of the partners continued in all things necessary for winding up the business of the partnership (section 263 of the Contract Act). When Rajappa Mudali was adjudicated an insolvent, he was entitled only to one-fourth share in the assets of the partnership which assets principally consisted of the outstandings due to the partnership by its debtors. The Official Receiver seems to have put up for auction sale the whole of the outstandings due to the partnership and the first defendant became the

(1) (1871) L.R. 6 Ex., 248.

(2) (1910) 20 C.W.N., 983.

purchaser thereof in October 1910 (see Exhibit K) for Rs. 250. I think it is clear that the first defendant (the appellant before us) never intended to purchase only Rajappa Mudali's one-fourth share in the outstandings and it follows that he never considered himself as a co-sharer with the other three partners of Rajappa Mudali (namely, the defendants Nos. 2, 3 and 4) of the right to recover those outstandings. He never recognized the fourth defendant as having been a partner at all, and the fourth defendant himself always repudiated that he was a partner, though the finding of the lower Courts (which is binding on us in Second Appeal) is that he was a partner.

The second defendant in November 1910 (within three weeks of the first defendant's purchase) admitted in Exhibit I that the whole of the outstandings belonged to the first defendant by his purchase at the Receiver's sale, and on receipt of a consideration released all his (second defendant's) right in, or in connexion with, the outstandings in favour of the first defendant. Thus the first defendant became legally entitled at least to half share in those outstandings whether his claim to the whole of the outstandings was well-founded or not.

The plaintiff got a decree for money against the defendants Nos. 2 to 4 in a Small Cause Suit of 1910. The first defendant persuaded a debtor of the firm to agree to pay about Rs. 1,650 to him in compromise of a suit brought by him against that debtor and afterwards received Rs. 450 more than three years before this suit and again Rs. 1,200 in 1912 within three years before this suit from that debtor. The plaintiff, in execution of his small cause decree against the defendants Nos. 2 to 4, attached three-fourths of this amount of Rs. 1,650 in July 1914, though meanwhile the second defendant had relinquished his rights to the first defendant in November 1910 and had even been declared insolvent in the Madura District Court with effect from March 1911. The third defendant also had been adjudicated insolvent in the same Court with effect from October 1911. Thus it is clear that the plaintiff's attachment in 1914 (assuming that the second and third defendants continued to have each one-fourth share in the outstandings of the firm, notwithstanding the Tinnevely Receiver's auction sale of the whole to the first defendant in October 1910) was wholly ineffectual so far as the second and the third defendants' shares were concerned as the said shares had become vested in the first defendant and the Official Receiver,

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respectively, or in the Official Receiver of Madura alone before the attachment of July 1914.

The plaintiff brought the present suit in April 1915 for recovery of three-fourths of Rs. 1,650 (Rs. 1,237-8-0) recovered by the first defendant in 1911-12 from the partnership-debtor. The plaintiff had been appointed Receiver in the suit in which the shares of the defendants Nos. 2 to 4 were attached in 1914. The suit was brought on the allegation that three-fourths share of the money so recovered by the first defendant was money had and received by the first defendant for the use of the defendants Nos. 2 to 4.

The lower Courts have given a decree in favour of the plaintiff for half of Rs. 1,200 (that is, Rs. 600) which the first defendant collected from the partnership-debtor in 1912 within three years of the suit, treating that Rs. 600 as the half share of the defendants Nos. 3 and 4 received by the first defendant for the use of the defendants Nos. 3 and 4. I shall at once dispose of one of the points that arise in the case by stating that the plaintiff's attachment of the third defendant's alleged one-fourth share in the Rs. 1,200 is legally ineffective as that share, assuming it to have existed in 1911, had become vested in the Official Receiver of Madura who was not a party to the plaintiff's execution proceedings of 1914. The Second Appeal has, therefore, to be allowed in any event to the extent of half the amount decreed in plaintiff's (respondent's) favour by the lower Court.

The only question, therefore, remaining is whether the first defendant received Rs. 300 being the one-fourth share (of the Rs. 1,200) due to the fourth defendant for the use of the fourth defendant and whether the first defendant is, therefore, liable to pay over that Rs. 300 with interest from 23rd April 1915 to the plaintiff. The question of law involved must be admitted to be one of very great difficulty. Suppose *A* and *B* are joint creditors of *C* who owe them Rs. 100. *D*, a stranger, purchases the whole debt from *A* believing that *A* was entitled to transfer the whole debt of Rs. 100 to *D*. *D* then is paid by *C* the debtor the whole of the Rs. 100. Can *B* the co-creditor treat Rs. 50 of the Rs. 100 as having been received by *D* for *B*'s use and sue to recover it from *D*? (It will be seen that I have tried in the above illustration to eliminate as far as possible unnecessary incidents appearing in the facts of the present case but not bearing on the question of law.)

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Now it is clear that if *A* himself received the whole of the Rs. 100 from the debtor *C*, *B*, his co-creditor, could treat Rs. 50 as money had and received by *A* for *B* and sue *A* for it. The question is whether, when *D* got the transfer of the debt from *A* believing that *D* got the title to it free from any claim to any portion of it on the part of anybody else and when *D* recovered the whole of the money from the debtor *C* on that footing, *D* could be treated as having received half of it on behalf of *B*. In *Sinclair v. Brougham*(1), Lord CHANCELLOR HALDANE, Lord DUNEDIN and Lord SUMNER have considered the nature of the action for money had and received. The Lord CHANCELLOR says (see pages 415 to 417):—

"Broadly speaking, so far as proceedings *in personam* are concerned, the common law of England recognized only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions *quasi ex contractu* it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law. . . . The action for money had and received was in principle one which rested on a promise to pay, either actual or imputed by law."

Lord MANSFIELD explained: "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action founded on the equity of the plaintiff's case, as it were upon a contract. . . . The form of the common *indebitatus assumpsit* count was a form of a claim which had been very gradually evolved. The researches of recent writers appear to me to have placed its origin in its true light. The basis of actions of this kind was originally tort, a writ having been framed in *consimili casu* under the provisions of Chapter 24 of the Statute of Westminster (13 Edw. I). By degrees, out of this action on the case and as one of its forms, a new form which was soon to diverge wholly from tort, the action of *assumpsit* arose. . . . HOLT, C.J., is reported to have said: "That the notion of promises in law was a metaphysical notion for the law makes no promise, but where there is a promise of the party." Yet the observation of HOLT, C.J., notwithstanding, a little later on this "metaphysical notion" became firmly established. For it was just the fiction of attributing a promise in a multitude of cases where in reality there was none which finally gave the action its comprehensive range and made it available even where no fact importing or implying privity of contract could be proved. The history of the action of the

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assumpsit has been described by a writer to whom lawyers and historians alike owe much, the late Professor Ames of Harvard University, in language which shows how easily the fiction of a promise grew into part of the law. Speaking of the action of assumpsit generally, he says:—

"In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warranty, and bills of exchange, and competed with equity in the case of the essentially equitable *quasi* contract growing out of the principle of unjust enrichment."

Lord DUNEDIN says at pages 431 to 433:—

"The familiar case is the paying of money by *A* to *B* under the mistaken impression in fact that a debt was due, when in truth there was no debt due. It was to fit cases of this sort that the common law evolved the action for money had and received. I think one cannot help feeling that this action was truly the putting of an equitable doctrine under a legal form. I am using the word equitable in a non-technical sense, for I am not suggesting for a moment that the action was borrowed from technical equity. My noble and learned friend Lord SUMNER, in his opinion, which I have had the advantage of seeing, has conclusively shown that it was not. Being a legal form, it does not admit, in spite of Lord MANSFIELD's dictum, that such an action was very beneficial and to be encouraged, of being stretched beyond its capacity. . . . My Lords, I confess that for a person not bred to the common law to express an opinion as to the true meaning and extent of common law actions is to handle *periculosae plenum opus aleae*."

Lord SUMNER says at pages 453 to 456:—

"The action for money had and received cannot now be extended beyond the principles illustrated in decided cases, and although it is hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use, I think it is clear that no authority extends them far enough to help the appellants now."

Then the noble Lord referred to the argument invoking Lord MANSFIELD's authority that

"Whenever it is *ex aequo et bono* for *A* to repay money which he has received from *B* and would be against conscience for *A* to

keep it, then *B* has an equity to have *A* decreed to repay it." and proceeded:

"My Lords, I cannot but think that Lord MANSFIELD's language has been completely misunderstood . . . Even the decision in *Moses v. Macferlan*(1), which has since been dissented from, for sometime unsettled the law (see Smith's Leading cases, Notes to *Marriot v. Hampton*(2), 2 Sm.L.C., 421, 11th Edition, and this last-mentioned case is one which illustrates the proposition that money is not thus recoverable in all cases where it is unconscientious for the defendant to retain it, for no one could doubt that Hampton's retention of the money in that case was very likely sharp practice." "With whatever complacency the Court of King's Bench might regard the views expressed in *Moses v. Macferlan*(1) protests were very early made against it in the Common Pleas (*Johnson v. Johnson*(3)), and in *Miller v. Atlee*(4), POLLOCK, C.B., bluntly declared the notion that the action for money had and received was an equitable action to be 'exploded' and PARKE, B., sitting by him, did not say him nay. This episode is reported only in 13 Jurist, but it smacks of truth. . . . There is now no ground for suggesting as a recognizable equity the right to recover money in *personam* merely because it would be the right and fair thing that it should be refunded to the payer."

I have quoted thus at a length which may be called wearisome to show how dangerous it would be for an Indian Judge like myself to deal in my own language with the nature, scope and extent of the action for money had and received or to classify accurately and exhaustively the circumstances which would entitle a person to bring an action for money had and received against another, especially when Latin phrases like *ex aequo et bono* have to be freely used by Judges and Counsel to explain themselves fully. Lord SUMNER at page 458 says:

"Of equitable principles I hesitate to speak confidently."

Lord DUNEDIN has, in a passage which I have already quoted, expressed himself even still more diffidently as "a person not bred to the common law" about his ability to express an opinion as to the true meaning and extent of common law actions. In *Sankunni v. Govinda*(5), BENSON, J., and myself did quote Blackstone to indicate the wide nature of the common law action for money had and received in the olden days. But the scope

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(1) 2 Burr. 1006.

(2) (1797) 7 T.R., 269.

(3) (1802) 3 Bos. 162, at 169.

(4) (1849) 3 Ex., 799.

(5) (1914) I.L.R., 37 Mad., 381.

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of that action ought not to be extended beyond what would be covered by the principles governing the numerous decisions which have laid down what kinds of actions do come within it and what kinds of actions do not. In the case in *Sankunni v. Govinda*(1) the defendant who received the money knew from the beginning that the money belonged to his tarwad and not to himself and the person who paid it did not know it. While privity of *contract* between the parties is of course not necessary to sustain such an action, I think there must be what might be called some privity of a legally recognizable nature such as some knowledge of particular facts in the man who received the money and some mistake or ignorance of fact on the part of the man who paid the money or some relation of trust and confidence between the person who received the money and the person claiming the money or a portion thereof on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant. I shall try to illustrate what I mean by a simple example. *B* owes money to *A*. *A* dies. There is a dispute between *C* and *D*, each claiming to be the sole heir of *A*. *B* pays the money to *C*. Can *D* sustain an action for money had and received against *C* even if he establishes against *C* that he is the rightful heir and not *C*? I am clearly of opinion that he cannot do so, his only remedy being against the debtor *B*. In the present case, it is not shown that when the partnership-debtor paid money to the first defendant, the first defendant knew that he had not a right to the whole of the money paid to him and it is also not shown that he was ever in a position of trust or confidence towards the fourth defendant and it is also not shown that the debtor had any fraudulent motive in paying the whole money to first defendant. A co-sharer may, by a stretch of language, be treated as standing in a position of confidence towards his co-sharers, but a person who ignorantly purchases from a co-sharer the whole of the claim of all the co-sharers cannot be said to be in such a position. I therefore agree that the plaintiff has no cause of action against the first defendant and I concur in the order proposed by my learned brother.

K.R.

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by Sessions Judge—Quashing of commitment by High Court—Jurisdiction of District Magistrate.] Where a Subordinate Magistrate took cognizance of a case on a police charge-sheet charging the accused with offences of assault and hurt under sections 354 and 323, Indian Penal Code, but no charge was made therein of the offence of attempt to rape, under sections 376 and 511, Indian Penal Code, and the prosecution did not press for the framing by the Magistrate of a charge in respect of that offence, but the District Magistrate purporting to act under section 436, Criminal Procedure Code, directed the Subordinate Magistrate to commit the accused to the Sessions for an offence under sections 376 and 511, Indian Penal Code, and the accused was so committed. *Held* (on a reference by the Sessions Judge), that the proceedings of the Subordinate Magistrate did not amount to an order of discharge on the major offence and the District Magistrate had no jurisdiction to pass an order under section 436 of the Criminal Procedure Code directing the Subordinate Magistrate to commit the accused to the Sessions for the offence under sections 376 and 511, Indian Penal Code. Commitment quashed and the Subordinate Magistrate directed to proceed with the trial of the minor offences. *Krishna Reddi v. Subbamma* (1901) I.L.R., 24 Mad., 186 (F.B.), distinguished.

Sessions Judge of Coimbatore v. Murappa Goundan. (1918) I.L.R., 41 Mad., 982
ESTATES LAND ACT (MADRAS ACT I OF 1908), SEC. 3 (2) (d)—Grant in inam of an aghaharam by an ancient king—Presumption as to rights conveyed—Aghaharam granted, whether an 'estate'—Right of aghaharamdar to sue in ejectment in Civil Court.] There is no presumption in law that the grant of an inam by a Native ruler prior to British rule conveyed only the melvaram (revenue due to the State). *Held* accordingly, that a grant of an aghaharam in inam made by a Reddi king of Nellore more than 400 years ago and validated under section 15 of Madras Regulation XXXI of 1802 conveyed both the melvaram and kudivaram rights. *Held* further, that the aghaharam was not an 'estate' within section 3 (2) (d) of the Madras Estates Land Act and the aghaharamdar was entitled to sue the tenants in ejectment in a Civil Court.

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HINDU LAW—Adoption—Assent of nearest sapindas not sought—Consent of remote sapindas whether sufficient—Knowledge that sapinda will refuse, whether a good ground for not asking for his consent.] In the Dravida country an adoption by a Hindu widow having no authority from her deceased husband to adopt, made with the consent of remote sapindas but without asking for the consent of the nearest sapindas is invalid. It is immaterial that the widow knew that the nearest sapindas, if asked for their consent, would have refused it. *Collector of Madura v. Mootoo Ramalinga Sathupathy* (1868) 12 M.I.A., 397 (400, 440, 411), *Venkata Krishna Rao v. Venkata Rama Lakshmi* (1876) I.L.R., 1 Mad., 174 (190); L.R., 4 I.A., 1 (13, 14) and *Raghunada Deo v. Brozo Kishore Patta Deo* (1876) I.L.R., 1 Mad., 69; s.c., L.R., 3 I.A., 154, discussed and followed. *Quære*, whether the widow of a coparcener, who died in or before 1853 could adopt a son in 1896 after the joint family property had vested in the widow of his brother's son?

Veerabasuvaraju v. Balasurya Prasada Rao. (1918) I.L.R., 41 Mad. (P.C.), 999
INAM, grant of, prior to British rule—Conveyance of melvaram:—See ESTATES LAND ACT (MADRAS ACT I OF 1908), SEC. 3 (2) (d).

LAND ACQUISITION ACT (I OF 1894):—AWARD, WHETHER A DECREE:—See LETTERS PATENT, CLAUSES (15) AND (36).

LETTERS PATENT, CLAUSES (15) AND (36)—Appeal to High Court from award under Land Acquisition Act (I of 1894)—Bench of two Judges—Difference of opinion—Appeal under clause (15) of the Letters Patent, whether maintainable—Section 98 (2), Civil Procedure Code (V of 1908) and clause (36), Letters Patent, applicability of, to appeals in Land Acquisition cases—Rule 2 of Appellate Side Rules, applicability of, to such appeals.] The decision of the High Court in a Land Acquisition appeal is not a 'judgment' within clause (15) of the Letters Patent so as to enable a party to file a further appeal to the High Court under that article. *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon* (1914) I.L.R., 40 Cal., 21 (P.C.) and *The Special Officer, Salsette Building Sites v. Dessabhai Basanji Motiwala* (1913) 17 C.W.N., 421 (P.C.), followed. Section 98 of the Civil Procedure Code applies to Land Acquisition appeals and if a bench of two Judges hearing an appeal differ as to the amount of additional compensation awardable, the proper order to pass on the appeal is to confirm the award of the lower Court under that section and not to give a decree up to the lower limit of additional compensation. *Kishen Dayal v. Irshad Ali* (1915) 23 C.L.J., 525, distinguished. An award is a decree or order of a Civil Court within Rule 2 of the Appellate Side Rules of the High Court. *Per* SESHAGIRI AYYAR, J.—Section 98, Civil Procedure Code, is not strictly applicable to the facts of the case.

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PARTNERSHIP—Boat, co-owners of—Employment of boat to earn freight—Partnership in freight—Suit for dissolution, whether maintainable—Section 239, Indian Contract Act (IX of 1872).] Where the co-owners of a boat employ it to earn freight, they become partners in respect of such earnings and a suit for dissolution of such partnership is maintainable although the plaintiff being only a co-owner is not entitled to a decree for the sale of the boat employed by the partnership.

Vanamati Battiraju v. Bollapragada Pallamaraju ... (1918) I.L.R., 41 Mad., 989

INDIAN PENAL CODE (ACT XLV OF 1860), SEC. 295—'Defile,' meaning of—Moothans, presence of, inside a temple, whether defilement.] The presence of Moothans, a sub-caste of Sudras, whose status is equal to, if not higher than, that of Nairs, in such portions of a Hindu temple as are open to non-Brahmans is not a 'defilement' within section 295, Indian Penal Code.

Kuttichami Moothan v. Rama Pattar ... (1918) I.L.R., 41 Mad., 980

REVENUE RECOVERY ACT (MADRAS ACT II OF 1864), ss. 37 (A), 38 AND 59—Sale for arrears of revenue—Applications under ss. 37 (A) and 38—Dismissal by Deputy Collector and Collector—Confirmation of sale, whether final—Application to Board of Revenue—Powers of general supervision of Board of Revenue—Power to direct Collector to cancel sale—Cancellation by Collector—Validity of—Title of purchaser, whether affected—Suit by purchaser for possession—Limitation—Material irregularity—Proof of substantial loss—Madras Regulations I, II of 1803 and VII of 1828.] The plaintiff purchased the suit lands in a revenue auction sale held under the Madras Revenue Recovery Act (II of 1864). A petition to set aside the sale under section 37 (A) of the Act was filed by the defaulter before the Deputy Collector and was dismissed; another petition under section 38 (1) of the Act was

also dismissed by the Deputy Collector who confirmed the sale; the District Collector also confirmed the sale; the first defendant then filed a petition before the Board of Revenue to set aside the sale. The Board of Revenue, in the exercise of their powers of general supervision, directed the Collector to cancel the sale which was accordingly cancelled by him. The plaintiff thereupon instituted this suit to recover possession of the suit lands more than six months after the order cancelling the sale. The first defendant pleaded that the sale was validly cancelled by the Collector, that the suit was barred by limitation under section 59 of Act II of 1864, and that the sale should have been set aside on account of material irregularity. *Held*, that when a Collector is empowered by a statute to pass a certain order, it is not open to the Board of Revenue having only general powers of supervision over him to direct him to pass a special order contrary to that he had already passed; that the order cancelling the sale, though purporting to be passed by the Collector, was really the order of the Board of Revenue who had no power under Act II of 1864 to pass such an order; that after an order under section 38 (3) was passed by the Deputy Collector and confirmed by the Collector, it became final under that section, and neither of them had power under the Act to pass any further order; that the suit was not barred by limitation as section 59 of Act II of 1864 was not applicable for the reason that the order complained of was passed wholly without jurisdiction and not under any power conferred by the Act; and that, on the merits, the sale should not have been set aside, as no substantial loss was proved to be due to the irregularity.

Sundaram Ayyangar v. Ramaswami Ayyangar ... (1918) I.L.R., 41 Mad.,

Specific performance of unregistered agreement to mortgage on which an advance has been paid, whether enforceable - Swamibhogam, whether lease or mortgage. The plaintiff sued for specific performance of an agreement in writing but not registered by which the first defendant agreed *inter alia* to execute a deed of swamibhogam in respect of the suit lands to be enjoyed by the plaintiff for twenty years for a consideration of Rs. 5,000 which could however be repaid at defendants' option, after eight years from its date. The plaintiff having advanced about Rs. 4,000 and not having obtained possession or a mortgage-deed sued for specific performance. The first defendant pleaded that the agreement was one to execute a lease and as such required registration and, not being registered, could not form the basis of a suit for specific performance; he further contended that even if the agreement were one to execute a mortgage, no suit for specific performance to enforce an agreement to grant a mortgage was sustainable. *Held*, that the agreement was one to grant a mortgage and as such did not require registration; and that a Court will not specifically enforce an agreement to lend or borrow money whether on security or not; but where money has been advanced either wholly or in part, if the debtor is prepared to pay off the advance at once, the Court will not decree specific performance, but if the borrower is not prepared to pay off the advance, the Court should decree specific performance. *South African Territories v. Wallington* (1898) A.C., 309, referred to. *Adilton v. Corrigan* (1871) L.R., 13 Eq., 76 and *Herman v. Hodges* (1876) L.R., 18 Eq., 18, followed.

Meenakshisundara Mudaliar v. Rathnasami Pillai ... (1918) I.L.R., 41 Mad.,

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Coutts Trotter.

VANAMATI SATTIRAJU (PLAINTIFF), APPELLANT,

v.

BOLLAPRAGADA PALLAMRAJU AND TWO OTHERS
(DEFENDANTS), RESPONDENTS.*

1918,
March, 26.

Partnership—Boat, co-owners of—Employment of boat to earn freight—Partnership in freight—Suit for dissolution, whether maintainable—Section 239, Indian Contract Act (IX of 1872).

Where the co-owners of a boat employ it to earn freight, they become partners in respect of such earnings and a suit for dissolution of such partnership is maintainable although the plaintiff, being only a co-owner, is not entitled to a decree for the sale of the boat employed by the partnership.

SECOND APPEAL against the decree of GANGADHARA SOMAYAJULU, the Subordinate Judge of Cocanada, in Appeal No. 92 of 1916, preferred against the decree of C. RANGANAYAKULU NAYUDU, the District Munsif of Cocanada, in Original Suit No. 383 of 1915.

Plaintiff and first defendant were co-owners of a boat, each advancing a certain sum towards its construction. Plaintiff alleged *inter alia* that they agreed that a licence to ply the boat for hire was to be applied for and got in the name of the first defendant, that the first defendant should keep an account of all the earnings of the boat and that the first defendant refused to account for such earnings. The second and third defendants were the sons of the first defendant. Plaintiff prayed (a) for a dissolution of partnership, (b) for an account of the earnings and (c) for the sale of the boat. The defendants denied the agreement of partnership. The Court of first instance gave a decree as prayed for. The Subordinate Judge, on appeal, without going into the merits of the case, dismissed the suit on the ground that the facts alleged by the plaintiff, even if true, did not in law constitute plaintiff and first defendant partners but constituted them only co-owners. Plaintiff preferred this second appeal.

A. Krishnaswami Ayyar for appellant.

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P. Narayanamurti for respondent.

The Court delivered the following JUDGMENT:—

COUTTS TROTTER, J.—In this case the plaintiff sued for a decree for the dissolution of his partnership with the defendants, and the learned Subordinate Judge dismissed the plaintiff's suit on a point taken for the first time in his Court, namely, that the suit was not maintainable, as, assuming the facts alleged in the plaint to be true, there was in law no partnership.

These facts are contained in the third, fourth and fifth paragraphs. Paragraph 3 says that the plaintiff and the first defendant entered into an agreement in or about December 1907 to construct at their joint expense a boat and another smaller boat attached to it, the plaintiff making certain advances towards it, among certain other stipulations which need not be gone into in detail, and agreeing that the licences, when the boat was completed, should be taken in the name of the first defendant, that the boats should be plied for hire, that the first defendant should keep the accounts and that the net profits and losses derived from the user of the boats should be shared equally between the plaintiff and the defendants. Paragraph 4 sets out the amounts advanced by the plaintiff towards the capital and paragraph 5 states that the first defendant had been letting the boat for hire and managing the whole business and had earned large sums of money by way of profit from her use for which he had not accounted to the plaintiff.

Now the learned Subordinate Judge, having perused a section in Lindley on Partnership on this extremely difficult subject, apparently has come to the conclusion that people who own a ship in common in no circumstances are partners. The law of England is no doubt that a mere co-ownership of a ship does not constitute the relation of a partner. That is clearly stated in all the books and in all the cases. And there is no doubt that section 239 of the Indian Contract Act has tended to import into the law of this country some of the very fine distinctions derived from the law of England where special reasons or public policy led to the making of these close distinctions between mere co-ownership and co-partnership in regard to vessels. Although it is quite true that co-ownership in a vessel does not constitute the relation of partners but merely that of tenants-in-common, yet when the ship begins to be put to use to earn freight a very

different state of things exists. Abbott, on Merchant Shipping, Part I, Chapter III, page 132, of the Fourteenth Edition, says this:

"Firstly, co-owners are as such, tenants-in-common of their ship; and secondly, if they employ their ship in earning freight, or otherwise as a money-making machine, they become joint adventurers or partners in the employment."

And for that proposition *Green v. Briggs*(1) is cited. That is a very long judgment of WIGRAM, V.C., and he cites *Holder-ness v. Schakel*(2) and says this:

"The Court distinguished there between the ship itself and her earnings, and held, in that case, that, although part-owners were tenants-in-common of the ship, they were jointly interested in the use and employment of the ship, and that the law as to earnings must follow the law in partnership cases."

And in *Ex parte Hill*(3) the Vice-Chancellor said:—

"Here is no lien on the ship, because that was not joint property; but the earnings of the ship would have been joint property, and liable to the joint creditors; not from any doctrine peculiar to the earnings of a ship, but on the general principle applicable to the joint property of every partnership. If, in this case, the *Thames* had been employed on a whaling voyage, and the money now at the Bank represented the cargo, no dispute could have arisen. Then is freight, *qua* earnings, distinguishable from other earnings of a ship, for the purpose under consideration? In the absence of authority establishing such distinction, or a clear principle requiring me to admit it, I will not adopt it."

In *Ex parte Young*(4), one of the cases relied on by the respondents' vakil, in which Lord ELDON's mind was distinctly called to the distinction between the ship and her earnings, he said:—

"I have no doubt that freight is liable to the joint demand. As to the ship, it stands upon the nice distinction of a tenancy-in-common."

And I notice that Lord LINDLEY points out that there are two cases under the English law of employment of a ship: one is where she is employed by some only of the total co-owners which in English law can be done against the will of the rest; for reasons of public policy it has been held that the majority of the co-owners of the ship who wish to employ her may force the hand of the others. Therefore one sees that if a ship is

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(1) (1847) 17 L.J. Ch., 323.
(3) (1815) 1 Mad., 61 at p. 66.

(2) (1828) 8 B. & C., 612.
(4) (1813) 2 V. & B., 242.

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employed under those conditions it may very well be right that the law should guard the unwilling co-owners from being made co-adventurers in an employment which they did not approve of. With regard to the second case what Lord LINDLEY in his treatise on Partnership, Eighth Edition, says (at page 37) is this :

“Where a ship is employed by all the part-owners, or by some of them, but not against the will of the others, they all share her gross earnings, and contribute to the expenses incurred in obtaining them ; and in such a case there is little, if any, difference between the account which is taken between the part-owners and that which would be taken if they were actually partners.”

And similarly Abbott lays it down quite plainly at page 133 that

“Each part-owner, who does not, before the commencement of an adventure, effectually withdraw authority from his co-owners to sail the ship on his behalf, is liable, as a partner, for the whole of the expenses of that adventure.”

We, therefore, hold that, so far as the earnings of the ship go, as regards the freight that she earns, on the allegations in the plaint there exists a partnership between the plaintiff and the defendants and the plaintiff, if he can prove those allegations, will be entitled to a dissolution of partnership and taking of accounts as regards freight. But he is not a partner but only a co-owner in respect of the actual hull of the ship and he will not be entitled in any event to have his prayer granted as regards the sale of the boat or boats used by the partnership.

The preliminary objection on which the learned Subordinate Judge dismissed the case was due to a misapprehension and it must be remanded to him for disposal upon the merits. The appellant will have the costs in this Court. The costs in the Courts below will be costs in the cause.

N.R.

APPELLATE CIVIL.

*Before Mr. Justice Abdur Rahim, Mr. Justice Oldfield and
Mr. Justice Seshagiri Ayyar.*

MANAVIKRAMAN TIRUMALPAD (CLAIMANT), APPELLANT,
v.
THE COLLECTOR OF THE NILGIRIS (RESPONDENT),
RESPONDENT.*

1918,
March, 18, 19
and April 3.

Letters Patent, clauses 15 and 36—Appeal to High Court from award under Land Acquisition Act (I of 1894)—Bench of two Judges—Difference of opinion—Appeal under clause 15 of the Letters Patent, whether maintainable—Section 98 (2), Civil Procedure Code (V of 1908), and clause 36, Letters Patent, applicability of, to appeals in land acquisition cases—Rule 2 of Appellate Side Rules, applicability of, to such appeals.

The decision of the High Court in a land acquisition appeal is not a ‘judgment’ within clause 15 of the Letters Patent so as to enable a party to file a further appeal to the High Court under that article.

Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon (1913) I.L.R., 40 Cal., 21 (P.C.) and *The Special Officer, Salsette Building Sites v. Dassabhai Bazarji Motiwala* (1913) 17 C.W.N., 421 (P.C.), followed.

Section 98 of the Civil Procedure Code applies to land acquisition appeals and if a Bench of two Judges hearing an appeal differ as to the amount of additional compensation awardable, the proper order to pass on the appeal is to confirm the award of the lower Court under that section and not to give a decree up to the lower limit of additional compensation.

Kishen Dayal v. Irshad Ali (1915) 22 C.L.J., 525, distinguished :

An award is “a decree or order of a Civil Court” within Rule 2 of the Appellate Side Rules of the High Court.

Per SESHAGIRI AYYAR, J.—Section 98, Civil Procedure Code, is not strictly applicable to the facts of the case.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of AYLING and SADASIVA AYYAR, JJ., in *Manavikraman Tirumalpad v. The Collector of the Nilgiris*(1).

The facts are given in the first paragraph of the judgment of ABDUR RAHIM, J.

T. R. Ramachandra Ayyar for appellant.

V. Ramesam, acting Government Pleader, for respondent.

V. Ramesam took a preliminary objection that no Letters Patent Appeal lies when two Judges differ in land acquisition

* Letters Patent Appeal No. 98 of 1917.

(1) Appeal No. 245 of 1916.

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appeals. This present appeal has been filed under clause 15 of the Letters Patent on such difference of opinion. I contend that the matter appealed against is not a "judgment" within clause 15 of the Letters Patent, but is an "award"; see *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon*(1) which decides that the award of Chief Court of Lower Burma is not a "judgment" under section 109, Civil Procedure Code, and *The Special Officer, Salsette Building Sites v. Dossabhai Bezonji*(2) which held that a decision on appeal by a Chartered High Court is not a "judgment" within clause 39 of Letters Patent. In the appeal to the Privy Council from the latter case, reported in *The Special Officer, Salsette Building Sites v. Dassabhai Basanji Motiwala*(3) the notes of arguments show that Lords MACNAGHTEN and MOULTEN considered that in their view the decision of the Bombay High Court in *The Special Officer, Salsette Building Sites v. Dossabhai Bezonji*(2) was correct. See also *Ram Shoshi Roy v. C. E. Grey*(4) and *Mulambath Kunhammed v. Parakat Kadirikutti*(5), and also the opinion of the majority of the Judges in *Mrs. Besant v. Emperor*(6) (Petition for leave to appeal to the Privy Council against *Mrs. Besant v. Emperor*(7)). In *Secretary of State for India v. Chellikani Rama Rao*(8), the Privy Council distinguish land acquisition cases as arbitration proceedings. Clause 39 of Letters Patent refers to "judgment" in clause 15 showing that "judgment" is used in the same sense in both clauses.

T. R. Ramachandra Ayyar distinguished *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon*(1) on the ground that the Chief Court of Lower Burma was an original Court for Rangoon. In *The Special Officer, Salsette Building Sites v. Dassabhai Basanji Motiwala*(3) the judgment does not contain anything. The report cited is a non-official one.

[*V. Ramesam*.—Mr. Dube, a practising Barrister, has reported the case.]

Under the Appellate Side Rules there is no provision for a Bench hearing an appeal from an award; hence my original

- (1) (1913) I.L.R., 40 Cal., 21 (P.C.).
 (2) (1913) I.L.R., 37 Bom., 506. (3) (1913) 17 C.W.N., 421 (P.C.).
 (4) (1913) 27 I.C., 427 (Cal.). (5) (1916) 31 M.L.J., 827.
 (6) (1917) C.M.P. No. 29 of 1917 (unreported).
 (7) (1916) I.L.R., 39 Mad., 1085. (8) (1916) I.L.R., 39 Mad., 617 (P.C.).

appeal to the High Court itself was not heard by a proper Court. The procedure applicable on a difference of opinion such as arose in this case is laid down by *Krishen Dayal v. Irshad Ali*(1).

V. Ramesam in reply :—Section 98 (2) applies when there is no majority of the Judges of the same opinion; *Narayanawami Reddi v. Osuri Reddi*(2). In this view the appellant has now got more than what the first Court gave him.

The Court delivered the following JUDGMENT :—

ABDUR RAHIM, J.—Under section 54 of the Land Acquisition Act, an appeal from the award of the District Court of Coimbatore was heard by a Bench consisting of AYLING and SADASIYA AYYAR, JJ. Both the learned Judges differed, generally speaking, from the Land Acquisition Judge and among themselves on some questions relating to the principle on which the value of the property was to be assessed. The total amount claimed by the owner was eight lakhs. The Land Acquisition Judge, confirming the valuation of the Collector, made an award of one lakh and seventy-two thousand rupees in round figures. AYLING, J., on the basis on which he proceeded held that the amount of the award should be enhanced by Rs. 7,000 and SADASIYA AYYAR, J., on the method of valuation adopted by him was for awarding on the whole an additional sum of about Rs. 56,000. We understand that a question was then raised before the learned Judges as to what should be the order of the High Court under such circumstances. The learned Judges thereupon agreed upon the order in the appeal being that the decree of the District Judge should be modified by adding Rs. 8,050 to the award. In other words, they thought that that was the least amount to which the appellant was entitled, as that was the additional amount, which AYLING, J., wanted to award, and, according to SADASIYA AYYAR, J., the appellant was entitled to something more and not less.

The appeal before us is filed under clause 15 of the Letters Patent and the preliminary objection taken is that no such appeal is allowed by the law. That depends upon whether the decision of the High Court in an appeal under section 54 of the Land Acquisition Act can be said to be a "judgment" within

(1) (1915) 22 C.L.J., 525.

(2) (1902) I.L.R., 25 Mad., 548 (F.B.).

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the meaning of clause 15 of the Letters Patent. It seems to me that the matter is not involved in any doubt in view of the decision of the Privy Council in *Rangoon Botatoung Company Ltd. v. The Collector, Rangoon*(1) and the judgment of the Bombay High Court in *The Special Officer, Salsette Building Sites v. Dossabhai Bezonji*(2) confirmed as it was by the Privy Council as reported in *The Special Officer, Salsette Building Sites v. Dassabhai Basanji Motiwala*(3). In the first case, their Lordships described an award made under the Land Acquisition Act as "the determination of arbitrators as to the value of land" taken for public purposes; and upon that ground they refused to accept the argument that once the claimant is admitted to the High Court as appellant under section 54 of the Act, he has all the rights of an ordinary suitor including the right to carry the award up to the Board as if it were a decree of the High Court made in the exercise of its ordinary civil jurisdiction. It will be seen from the report of the argument of BUCKMASTER, K.C., the present LORD CHANCELLOR, that almost his whole argument against the maintainability of the appeal was based on the use of the word "award" in the Act. His contention was that the legislature wanted the determination of the land acquisition tribunal to be distinguished from an "order" or "decree" of an ordinary civil Court.

In the case in the Bombay High Court the learned Judges had to consider whether clause 39 of the Letters Patent of the Bombay High Court, which is in the same language as clause 39 of the Letters Patent of the Madras High Court, allowed an appeal to the Privy Council; for no arguments were or could have been based in the Rangoon Company's case on any such clause as the Chief Court of Lower Burma was not constituted under Letters Patent. The Letters Patent allow an appeal from a "final judgment," "decree" or "order" of the High Court. Mr. Justice BATCHELOR and Mr. Justice HEATON, interpreting the ruling of the Privy Council in the Rangoon case as laying down that an award in a land acquisition case is more in the nature of an award of an arbitrator than a "judgment, decree or order of civil Court," held that the parties have no further or

(1) (1913) I.L.R., 40 Calc., 21 (P.C.). (2) (1913) I.L.R., 37 Bom., 506.
(3) (1913) 17 C.W.N., 421 (P.C.).

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other right of appeal than that expressly given by the legislature. On the matter being taken to the Privy Council, they refused to grant leave to appeal, and if the arguments at the bar and the observations of the learned Lords of the Privy Council are correctly reported in *The Special Officer, Salsette Building Sites v. Dassabhai Basanji Motiwala*(1), it would appear that the Judicial Committee refused to regard the decision of the Bombay High Court in an appeal under section 54 of the Land Acquisition Act as a "judgment," "decree" or "order" of a High Court within the meaning of clause 39 of the Letters Patent. The attempt therefore of Mr. T. R. Ramachandra Ayyar to distinguish the ruling of the Privy Council in *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon*(2), on the ground that the appeal to the Privy Council was from the decision of a Judge of the Rangoon Chief Court acting as the land acquisition Judge and not of the Chief Court as an appellate tribunal hearing an appeal under section 54, must fail. It is not suggested that the word "judgment" in clause 15 of the Letters Patent is used in a different or wider sense than in clause 39. As for *Secretary of State for India v. Chellikani Rama Rao*(3) which was also referred to at the bar, I do not think that there is anything in the judgment of the Privy Council in that case which can be said to have modified the law enunciated in *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon*(2).

We have then been asked to consider whether section 98 of the Civil Procedure Code applies to this case. In my opinion, it does. Section 54 of the Land Acquisition Act says that the appeal to the High Court shall be subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees; and it seems to me that section 98 is one of the provisions of the Code which is so made applicable, for apart from it, there is no procedure prescribed, by which the order to be passed in the cases of difference of opinion contemplated there, could be ascertained. No doubt in sub-section 2 of that section the words "decree" and "judgment" are used, but these are the ordinary terms used in Part VII of the Code dealing with appeals from original decrees, as also elsewhere throughout the Code. But sub-sections 1 and 2 of section 98 do not confer any right of

(1) (1913) 17 C.W.N., 421 (P.C.).

(2) (1913) I.L.R., 40 Calc., 21 (P.C.). (3) (1916) I.L.R., 39 Mad., 617 (P.C.).

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appeal; they only lay down how an appeal heard by a Bench of two or more Judges is to be disposed of in certain contingencies. The principle governing the question as to the right of appeal to the Privy Council or to the High Court under clause 15 of the Letters Patent has no application to section 98. The provisions of the Civil Procedure Code relating to appeals from original decrees as laying down the procedure for the hearing and disposal of such appeals are made applicable to appeals under section 54 of the Land Acquisition Act by express reference. The application of those provisions cannot therefore be excluded because of the use of the words "judgment" and "decree" in the sections, orders and rules bearing on the subject.

Sub-section 2 of section 98 provides that "where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed", and this in terms applies to what has happened in this case. I should say therefore that the result of the hearing before AYLING and SADASIVA AYYAR, JJ., must be taken to be that the award of the District Judge was confirmed. But Mr. Ramesam appearing for the Government, the respondent in the appeal, is content to accept the award proposed by AYLING, J., and which to that extent was accepted by SADASIVA AYYAR, J. It thus becomes unnecessary to decide whether the order of the Court consisting of AYLING and SADASIVA AYYAR, JJ., was a proper order. We have in this connexion been referred to a decision of the Calcutta High Court in *Krishen Dayal v. Irshad Ali* (1), but I do not think that the circumstances of that case afford a very close parallel to the present case. If necessary, the Calcutta ruling could be distinguished on the ground that the learned Judges who heard the appeal in this case differed from each other and from the land acquisition Judge on matters relating to the principle of valuation and not merely on a question of figures, and I should be inclined to think that the order of the High Court was not in accordance with sub-section 2 of section 98.

I may also mention that Mr. Ramachandra Ayyar drew our attention to rule 2 of the Appellate Side rules under which the Bench composed of AYLING and SADASIVA AYYAR, JJ., was constituted and under which other benches are ordinarily constituted

for the hearing of appeals under section 54 of the Land Acquisition Act. The rule provides for a Bench of two Judges who are ordinarily to hear and determine appeals from "the decree or order of a civil Court" and Mr. Ramachandra Ayyar's argument was that if we hold that the decision of the High Court in an appeal under section 54 is not a decree or order of a civil Court, we must also hold that AYLING and SADASIVA AYYAR, JJ., had no jurisdiction to hear the appeal at all. I am not prepared to hold that there is force in this contention though the argument is not without an appearance of plausibility. The rules are framed under the powers vested in the High Court not merely by the Charter Act and the Letters Patent but also by the Civil Procedure Code, and as the provisions of the Civil Procedure Code relating to appeals from original decrees are expressly made applicable to appeals to the High Court from the award of a land acquisition Judge, I should think that the words "decree or order of a civil Court" in clause (a), sub-rule 2 of rule 2 of the Appellate Side rules do not preclude the application of this rule to cases of appeals under section 54 of the Land Acquisition Act. The District Judge, against whose award the appeal was heard, tried the case as the tribunal designated as "the principal civil Court of original jurisdiction," and in my opinion, it would not be unduly straining the language of rule 2 (Appellate Side Rules) to say that the award of such a Court is "a decree or order of a civil Court" for purposes of the procedure to be followed in the hearing and disposal of an appeal from an award of that Court as prescribed by the provisions of the Code of Civil Procedure which are expressly referred to in section 54. I hold that the preliminary objection is valid and the appeal must be dismissed with costs.

OLDFIELD, J.—I agree.

SESHAGIRI AYYAR, J.—In my opinion the preliminary objection is well founded. The decision against which the Letters Patent Appeal has been preferred is practically the result of a compromise. Mr. Justice AYLING was for giving Rs. 7,000 more to the claimant than was awarded by the District Judge. Mr. Justice SADASIVA AYYAR was prepared to increase it by over Rs. 50,000. Neither of them was for confirming the award of the District Judge. Both of them were for varying it, one learned Judge to a small extent, the other to a larger extent.

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In the result, the Court's order was that the award should be increased by Rs. 7,000 plus the usual 15 per cent. To such a state of affairs, the language of section 98 of the Code of Civil Procedure seems inapplicable. Clause (1) contemplates the concurrence of the Judges or a majority. There is neither in this case. Clause (2) provides for confirmation of the lower Court's decision when the Judges are not agreed. That has not been done in this case. The proviso, as is very often the case in Indian enactments, introduces an exception to the rule requiring the confirmation, and only applies where the Judges differ on a question of law. *Ex facie*, therefore, the conclusion come to by the learned Judges in this case does not appear to be within the letter of the section, although if the District Judge's judgment were confirmed, the section would have been satisfied.

Mr. T. R. Ramachandra Ayyar contended that the conclusion is in accordance with the view taken by a bench of three Judges in *Krishen Dayal v. Irshad Ali* (1). Mr. Justice MOOKERJEE alone deals with the present question. In substance, what the learned Judge says amounts to dividing the judgment of a lower Court into compartments, and to appropriating the differing Judges' views *pro rata* to such of them as are concurred in and to others which are not approved of. Such a procedure is hardly compatible with the avowed policy of the legislature. In effect, the view leads to countenancing the splitting up of a single judgment into a number of judgments. If this process is logically applied, whenever there is a concurrence with the decision of a Court below on one of the issues, to that extent there must be a confirmation leaving the other issues, on which there is a difference of opinion to be adjusted otherwise. If there is a judgment relating to a number of items of land or accounts, the final result as to each of the items will have to be settled in the same way. By parity of reasoning, when there is a judgment for Rs. 10,000 the decision must, for purposes of section 98, be regarded as having been given in respect of each rupee or groups of tens or hundreds of rupees. With all respect, I am unable to uphold such a piecemeal apportionment of a single decree. I am not losing sight of the fact

that there were practically distinct subject matters in the suit from which the appeal was heard in the Calcutta case. None the less, the logical application of the principle of that decision to cases of money claims shows that the section was not intended to be construed as suggested. Mr. Justice CHATTERJEE, in the original judgment from which there was the Letters Patent Appeal, says that clause (1) of section 98 justifies the procedure adopted by him. That clause speaks of the appeal in its entirety, and of its confirmation or variation as a whole. I am unable to construe the clause as reading "the appeal or such portion of it as is concurred in by the Judges" shall be decided in accordance with the opinion of such Judges.

In the present case there is greater difficulty than was present in the Calcutta case. The conclusion to increase the award by Rs. 7,000 was not based on any point on which the learned Judges agreed. Mr. Justice AYLING and Mr. Justice SADASIVA AYYAR proceeded to award compensation on different principles. Both of them to a certain extent disagreed with the Court below and with each other. To such a decision I find it difficult to apply the language of section 98 of the Code. The result is that there is no judgment which attracts the provision of section 15 of the Letters Patent, and consequently no appeal lies under it.

Mr. Ramachandra Ayyar next suggested that the final decision may be regarded as that of Mr. Justice AYLING, the senior Judge, so as to invite clause 36 of the Letters Patent. There are two difficulties in the way. In the first place, the recorded note speaks of the final award as that of the Court of the two Judges. In the second place, it seems clear, as contended by the learned Government Pleader, that it is not a case to which any clause of the Letters Patent can apply.

Before dealing with the larger question whether an award in a Land Acquisition case is a judgment, I shall consider the shorter point whether clause 36 of the Letters Patent applies. Section 44 says that the provisions are subject to the legislative powers of the Governor-General in Council. The Code of Civil Procedure enacted by this authority makes provision for cases of difference of opinion by section 98. But that provision is defective and has not taken into account differences like the present one. Therefore it is open to argument that the

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Letters Patent must at least be taken to be supplementary of the Code. Although I was at first inclined to the view that clause 36 of the Letters Patent should be confined to appeals from the original side, as such a provision exists, as pointed out by Mr. Justice OLDFIELD in the course of the argument, in the Allahabad Patent which did not contemplate an Original Civil jurisdiction, I have come to the conclusion that the clause is applicable to mufassal appeals as well. In practice this conclusion may lead to difficulties. Whether section 98 of the Code or clause 36 of the Letters Patent applies to a given case may not easily be determined. One rule may be acted upon, namely, that the Letters Patent should be invoked only in cases which are not covered by the Code.

As regards decided cases, in *Narayanasami Reddi v. Osuru Reddi*(1), a Full Bench of this Court held that clause 36 of the Letters Patent cannot apply to mufassal appeals. In *re Karri Venkanna Patrudu*(2) takes a different view, although it should be noted that the Full Bench case was not quoted before the learned Judges. *Roop Laul v. Lakshmi Doss*(3), lays down the converse of the proposition enunciated in *Narayanasami Reddi v. Osuru Reddi*(1). In *Surjmal v. Horniman*(4), reported since we heard the arguments in this case, Sir BASIL SCOTT, C.J., refers to sections 4 and 129 of the Code of Civil Procedure as pointing to the conclusion that clause 36 of the Letters Patent is alone applicable to appeals from the original side. This does not affect the question whether that section, subject to any law that may be passed by the Governor-General in Council, is not intended to provide for differences of opinion in mufassal appeals. Mr. Justice CHATTERJEE says in *Krishen Dayal v. Irshad Ali*(5) that clause 36 of the Letters Patent is applicable whenever section 98 of the Code is not applicable. That seems to be the better view. I have therefore come to the conclusion, though not without hesitation, that clause 36 of the Letters Patent applies to this case if otherwise the decision is within its terms.

The last question is whether the pronouncement of the two learned Judges in this case amounts to a "judgment" within the

(1) (1902) I.L.R., 25 Mad., 548 (F.B.).

(3) (1906) I.L.R., 29 Mad., 1.

(2) (1915) 18 M.L.T., 591.

(4) (1917) 20 Bom. L.R., 185.

(5) (1915) 22 C.L.J., 528.

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meaning of clauses 15 and 36 of the Letters Patent. If the matter were *res integra* I would have agreed with Mr. Ramachandra Ayyar on this point. There is great force in the learned vakil's contention that a conclusion come to by the tribunals exercising jurisdiction under the Land Acquisition Act is not an award like that given by an arbitrator or by an umpire. In the Land Acquisition Act I of 1894, first of all there is a proposal by the acquiring officer in which he fixes the amount of compensation which he is prepared to give to the claimant. If the claimant accepts the proposal there is a concluded bargain. If the claimant disputes the correctness of the acquiring officer's valuation, he is entitled to ask that the question be referred for the decision of a Civil Court. The Judge of the Civil Court exercises all the functions and privileges of a Judge who is hearing a contested case. The Government on the one hand, and the claimant on the other, adduce evidence of their respective contentions. The Judge gives his decision on weighing the evidence placed before him. There is no provision in the Act by which finality is given to the decision thus arrived at. It is open to appeal under section 54 of the Act. Moreover the question may arise, and very often does arise, as to whether A or B is entitled to the compensation which may be fixed by the acquiring officer or by the Court. Thus there will be a tripartite contest. The tribunal will have to decide first between the contesting claims of the rival claimants, and then fix the amount of valuation.

Further, there may be cases in which the mode of apportioning the compensation between rival claimants, as in the case of a landlord and tenant, will have to be inquired into by the tribunals. There will thus be difficult questions relating to title, questions relating to mode of apportionment and questions relating to the mode of valuation cropping up in the course of a land acquisition case. The Judge who determines these questions is not acting as an arbitrator, in the proper significance of that term. Therefore there is considerable force in the contention of the learned vakil for the appellant that the decision arrived at under these circumstances is a "judgment" in its most accepted sense. But, however, speculation is not possible on a question of this kind. The Judicial Committee of the Privy Council have said the last, if not the final, word on the subject. In

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Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon(1), they first propounded the view that the conclusion come to by the Appellate Court under section 54 of the Land Acquisition Act is not a judgment, but partakes the character of an award. In a later case, *The Special Officer, Salsette Building Sites v. Dassabhai Basanji Motiwala*(2), there are observations of the members constituting the Board which undoubtedly point to the conclusion that in the opinion of their Lordships the decision on appeal in a land acquisition case is not a judgment. It is true, as Mr. Ramachandra Ayyar argued, that the report of the observations is not authentic in the sense that they appear in a publication sanctioned by the Judicial Committee. But there is no reason for supposing that these observations were invented. Moreover, if we bear in mind that the application for special leave was made to the Judicial Committee after the refusal of the learned Judges who heard the case to grant a certificate under the Code of Civil Procedure [vide *The Special Officer, Salsette Building Sites v. Dassabhai Bezoni*(3)] there can be no doubt that the Judicial Committee did intend to lay down the proposition contended for by the learned Government Pleader.

Lastly we have the latest Privy Council decision in *The Secretary of State for India v. Challikani Rama Rao*(4); that was a case under the Forest Act; it was there pointed out that when under a local or special enactment an appeal is preferred to a District Court, the provisions of the Code relating to appeals and to further appeals therefrom ordinarily govern such an appeal; but that appeals in land acquisition cases stand on a different footing. The inference is irresistible that the Judicial Committee have definitely come to the conclusion that no appeal lies to them from a judgment of the High Court in a land acquisition proceeding. It may be that His Majesty the King's unlimited prerogative of hearing appeals from any judicial proceedings may induce the Judicial Committee to grant special leave in this case. But we are not concerned with that question. It seems to us that the conclusion is forced on us that the

(1) (1913) I.L.R., 40 Cal., 21 (P.C.).
(2) (1913) 17 C.W.N., 421. (3) (1913) I.L.R., 37 Bom., 506.
(4) (1916) I.L.R., 39 Mad., 617 (P.C.).

decision in the present case is not a "judgment" within the meaning of that expression in clause 15 or 36 of the Letters Patent. The preliminary objection must prevail and the appeal should be rejected with costs.

N.R.

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APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Krishnan.

SUNDARAM AYYANGAR, APPELLANT (LEGAL REPRESENTATIVE
OF THE FIRST DEFENDANT),

1918,
April, 19.

RAMASWAMY AYYANGAR AND THE SECRETARY OF
STATE FOR INDIA, RESPONDENTS
(PLAINTIFF AND SECOND DEFENDANT).*

Revenue Recovery Act (Madras Act II of 1864), ss. 37 (A), 38 and 59—Sale for arrears of revenue—Applications under ss. 37 (A) and 38—Dismissal by Deputy Collector and Collector—Confirmation of sale, whether final—Application to Board of Revenue—Powers of general supervision of Board of Revenue—Power to direct Collector to cancel sale—Cancellation by Collector—Validity of—Title of purchaser, whether affected—Suit by purchaser for possession—Limitation—Material irregularity—Proof of substantial loss—Madras Regulations I, II of 1803 and VII of 1828.

The plaintiff purchased the suit lands in a revenue auction sale held under the Madras Revenue Recovery Act (II of 1864). A petition to set aside the sale under section 37 (A) of the Act was filed by the defaulter before the Deputy Collector and was dismissed; another petition under section 38 (1) of the Act was also dismissed by the Deputy Collector who confirmed the sale; the District Collector also confirmed the sale; the first defendant then filed a petition before the Board of Revenue to set aside the sale. The Board of Revenue, in the exercise of their powers of general supervision, directed the Collector to cancel the sale which was accordingly cancelled by him. The plaintiff thereupon instituted this suit to recover possession of the suit lands more than six months after the order cancelling the sale. The first defendant pleaded that the sale was validly cancelled by the Collector, that the suit was barred by limitation under section 59 of Act II of 1864, and that the sale should have been set aside on account of material irregularity.

Held, that where a Collector is empowered by a statute to pass a certain order

* Second Appeal No. 1311 of 1917.

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it is not open to the Board of Revenue having only general powers of supervision over him to direct him to pass a special order contrary to that he had already passed;

that the order cancelling the sale, though purporting to be passed by the Collector, was really the order of the Board of Revenue who had no power under Act II of 1864 to pass such an order;

that after an order under section 38 (3) was passed by the Deputy Collector and confirmed by the Collector, it became final under that section, and neither of them had power under the Act to pass any further order;

that the suit was not barred by limitation as section 59 of Act II of 1864 was not applicable for the reason that the order complained of was passed wholly without jurisdiction and not under any power conferred by the Act;

and that, on the merits, the sale should not have been set aside, as no substantial loss was proved to be due to the irregularity.

SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, the Temporary Subordinate Judge of Salem, in Appeal No. 185 of 1916, preferred against the decree of P. G. RAMA AYYAR, the Additional District Munsif of Salem, in Original Suit No. 578 of 1914.

The plaintiff purchased the suit lands in revenue auction held under the Madras Revenue Recovery Act (II of 1864). An application was made by the defaulter (the first defendant herein) under section 37 (A) to set aside the sale before the Deputy Collector who dismissed the petition and confirmed the sale; an application was made to the Collector to set aside the order and was dismissed; another application was made under section 38 (1) of the same Act and was dismissed by the Deputy Collector and his order of confirmation of sale was again confirmed by the Collector under Regulation VII of 1828. The first defendant then preferred a petition to the Board of Revenue to cancel the sale. The Board in the exercise of their powers of general supervision under Regulations I and II of 1803 passed an order on 20th March 1913, directing the Collector to cancel the sale, and this was accordingly done by the latter officer. The plaintiff brought this suit on 26th March 1914 to recover possession of the suit lands which had been delivered over to the first defendant subsequent to the cancellation of the sale. The plaintiff prayed in the alternative for refund of the purchase-money in case the cancellation of the sale should be held to be valid. The first defendant pleaded, *inter alia*, that the cancellation of the sale was not *ultra vires* but binding on the plaintiff, that the suit was barred by

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limitation under section 59 of the Revenue Recovery Act, and that in any event the sale should have been set aside, as it was vitiated by material irregularity which caused substantial loss. The lower Appellate Court overruled the contentions of the defendant and gave a decree to the plaintiff for possession of the suit lands. The first defendant preferred this second appeal.

K. Bashyam Ayyangar and V. Parthasarathi Ayyangar for the appellant.

The Government Pleader (V. Ramesam) for the second respondent.

B. Somayya for the first respondent.

The JUDGMENT of the Court was delivered by—

PHILLIPS, J.—In this case a revenue sale was held in which PHILLIPS, J. first defendant's land was sold under the Revenue Recovery Act (Act II of 1864). A petition under section 37 (A) of that Act to set aside the sale was dismissed and also a petition under section 38 (1) of Act II of 1864. These two orders were passed by the Deputy Collector, and his order of confirmation of sale was approved by the District Collector under the powers conferred on him by section 3 of Madras Regulation VII of 1828. By this confirmation the order of confirmation under section 38 (3) of Act II of 1864 became final. Later on, however, the Board of Revenue directed the Collector to cancel the sale and he cancelled it accordingly. Plaintiff's suit to set aside this last order and to recover possession of the property purchased by him at the revenue sale has been decreed by the Subordinate Judge. The first objection taken is that under Madras Regulations I and II of 1803 which give the Board of Revenue power of general superintendence over Collectors, the Board had the power to set aside the sale. When a certain power is given to the Collector by Statute, it is not open to the authority having only general powers of revision over him to direct him to pass a special order contrary to what he had already done. In this case the order cancelling the sale, though purporting to be passed by the Collector, was really the order of the Board of Revenue who had no such power under Act II of 1864. We have not been referred to any authority in support of this contention and we cannot accept it.

It is next argued that, as the District Collector has powers of revision over Assistant Collectors exercising the powers of a

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Collector under Madras Regulation VII of 1828, he had under section 38 (3) of Act II of 1864 power to pass the final order cancelling the sale. The order under section 38 (3) of Act II of 1864 was, however, passed in this case by the Deputy Collector, and when his order was confirmed by the District Collector it became a final order passed by the Collector within the meaning of section 38 (3) and neither he nor the District Collector had himself power under the Act to pass any further order. We cannot accept a further contention that the proviso clause of section 38 gives power to set aside a sale after it has been confirmed under the first part of the section. The power given under that clause is one that must be exercised in lieu of the confirmation of sale.

The third point is that this suit is barred by limitation. Under section 59 of Act II of 1864 as it has not been brought within six months of the order complained against. The order setting aside the sale was in effect a review of the previous order confirming the sale and therefore following *David Nadar v. Manikka Vachaka Desika Gnana Sambanda Pandara Sannadhi* (1) we think that section 59 is inapplicable, for it was an order passed wholly without jurisdiction, and not under any power conferred by the Act. In this view *Venkata v. Chengadu*, etc. (2), and *Raman Naidu v. Bhassoore Sanyasi* (3) and *Iswara Patter v. Karuppan* (4), can be distinguished.

The last argument is that on the merits the sale should have been set aside. The finding of the Subordinate Judge that no substantial injury was proved to be due to the only irregularity in the conduct of the sale, concludes this point.

The second appeal is accordingly dismissed with costs of the first respondent.

K.R.

(1) (1910) I.L.R., 33 Mad., 65.

(3) (1903) I.L.R., 25 Mad., 688.

(2) (1889) I.L.R., 12 Mad., 168.

(4) (1893) 3 M.L.J., 255.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice
 Seshagiri Ayyar.

MEENAKSHISUNDARA MUDALIAR *alias* THIAGARAJA
 MUDALIAR AND ANOTHER, APPELLANTS (DEFENDANTS),

1918,
 April 2, 3
 and 25.

v.

RATHNASAMI PILLAI, RESPONDENT (PLAINTIFF).*

Specific performance of unregistered agreement to mortgage on which an advance has been paid, whether enforceable—Swamibhogam, whether lease or mortgage.

The plaintiff sued for specific performance of an agreement in writing but not registered by which the first defendant agreed *inter alia* to execute a deed of swamibhogam in respect of the suit lands to be enjoyed by the plaintiff for twenty years for a consideration of Rs. 5,000 which could however be repaid at defendants' option, after eight years from its date. The plaintiff having advanced about Rs. 4,000 and not having obtained possession or a mortgage-deed sued for specific performance. The first defendant pleaded that the agreement was one to execute a lease and as such required registration and, not being registered, could not form the basis of a suit for specific performance; he further contended that even if the agreement were one to execute a mortgage, no suit for specific performance to enforce an agreement to grant a mortgage was sustainable.

Held, that the agreement was one to grant a mortgage and as such did not require registration; and

that a Court will not specifically enforce an agreement to lend or borrow money whether on security or not; but where money has been advanced either wholly or in part, if the debtor is prepared to pay off the advance at once, the Court will not decree specific performance, but if the borrower is not prepared to pay off the advance, the Court should decree specific performance.

South African Territories v. Wallington (1898) A.C., 809, referred to.

Ashton v. Corrigan (1871) L.R., 13 Eq., 76 and *Herman v. Hodges* (1876) L.R., 16 Eq., 18, followed.

APPEAL against the decree of C. V. VISVANATHA SASTRI, the Subordinate Judge of Kumbakonam, in Original Suit No. 17 of 1917.

The plaintiff obtained an agreement, in writing but not registered, executed by the first defendant, by which the latter agreed to execute a swamibhogam deed of the suit lands which were to be left in the possession of the plaintiff and enjoyed by him for

* Appeal No. 271 of 1917.

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twenty years, for a consideration of Rs. 5,000 to be advanced by the plaintiff with a stipulation that the transaction should be cancelled in case the first defendant should redeem the lands at any time after eight years from the date of agreement. The material terms of the agreement were as follows:—

“ The agreement executed on the 21st October 1914, in favour of Ratnasami Pillai, son of Ayyasami Pillai, Vellala by caste, Saivite, miras, residing in Sarvamaniam Puliyur in Perunthalakkudi vattam in Kulikkari Mahanam, in Nannilam taluk, by Meenakshi Sundaram alias Thiagaraja Mudaliyar, grandson of Kizavalanu Thiagaraja Mudaliyar and son of Apathsahaya Mudaliyar, Muthanmaiar by caste, Saivite, miras, residing in said Kulikkari is as follows:—

Having agreed to give you in swamibhogam, for twenty years, from the 1st of May 1915 coming, the nanja, punja, etc., properties answering to the description given hereunder out of the properties situated in Thenpiliyur village, in Perunthalaikkudi vattam, in Kulikkari Mahanam in Nannilam taluk under the Sub-Registrar of Tiruvālūr in Tanjore district, obtained by me as the self-acquisition of my maternal grandfather and enjoyed by me as my own, I have settled that I should receive Rs. 5,000 from you for the same. Out of this sum of rupees five thousand, I have received this day from you in cash Rs. 250 (Rupees two hundred and fifty) as earnest money (as advance). I will receive Rs. 4,750 (Rupees four thousand seven hundred and fifty) in cash from you within the 15th of April 1915 at the time when the said swamibhogam deed is finished. Thus the said Rs. 5,000 (Rupees five thousand) in all for the two items and the interest thereon shall be realized from the enjoyment of the said swamibhogam till the expiry of the said twenty years. You should yourself pay the Government kist of the lands mentioned in the said swamibhogam deed, should give me in my house within the 15th of March 1916 next and similarly within the 15th of March in every year, 100 kalams (one hundred kalams) of *samba* paddy without moisture or chaff and by the stamped *marakkal*, Rs. 300 (Rupees three hundred) in cash and 300 (three hundred) bundles of straw for each year for the said swamibhogam without any reference to act of State or act of God and obtain a receipt from me and you should also have it entered in the said swamibhogam deed. If you fail to give me the paddy, money and straw according to the said time limit, you should pay, whenever I want, the amount found to be due on account of the paddy and straw, at the price at which they are sold at the time and the cash with interest at rupee one and annas eight per cent per mensem from

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the due date on which default was made. When the said period of twenty years is over, you should deliver the said lands to me without any objection. If there be a failure to so deliver, I am to get possession. I will execute the said swamibhogam deed to you containing the aforesaid particulars, within the 30th of March 1915 next, at your cost, in the presence of Velayudham Pillai, the village munsif of Perunthalaikkudi vattam. If there be a delay on my part to execute the swamibhogam deed as stated above, I will execute a swamibhogam deed to you yourself for Rs. 4,000 (Rupees four thousand) deducting Rs. 750 out of the Rs. 4,750 shown as receivable by me. If there be a delay due to you, in getting it as aforesaid, you should yourself get a swamibhogam deed written for Rs. 5,500 adding Rs. 750 more to Rs. 4,750 aforesaid and get it finished and registered. I am to leave to you in swamibhogam all the properties belonging to me other than the lands punja, etc., bounded within the four-fold boundaries and mentioned in the agreement that I have executed to you to the effect that I would execute a sale-deed to you on this day for Rs. 18,000. You must get done for me work that can be done by fifty persons every year by supplying workmen. If you fail to do so for all the twenty years, you should compensate me for the loss.”

The plaintiff paid Rs. 250 on the date of the agreement and also undertook to discharge a debt of the first defendant for Rs. 2,000 as well as two other instalments amounting to Rs. 1,170, the total amount together with interest came up to over Rs. 4,000 at the date of this suit according to the finding of the lower Court. The plaintiff sued for specific performance of the above agreement, by execution of a mortgage deed as agreed and for recovery of possession of the suit lands. The first defendant pleaded *inter alia*, that the transaction amounted to a lease, that the agreement to give a lease itself required to be registered, and, not being registered, could not form the basis of a suit for specific performance; he further contended that even if the agreement were one to grant a mortgage, no suit would lie for specific performance of an agreement to give a mortgage. The lower Court passed a decree for specific performance by execution of a swamibhogam deed and for recovery of possession of the suit lands. The first defendant preferred this appeal to the High Court.

A. Krishnaswami Ayyar and K. Balasubrahmanya Ayyar for the appellant.

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T. V. Muthukrishna Ayyar and A. Swaminatha Ayyar for the respondent.

The Court delivered the following JUDGMENTS :—

ABDUR RAHIM, J.—The defendants in the suit have appealed from a decree of the Subordinate Judge of Kumbakōnam by which he directed specific performance of an agreement (Exhibit A) executed by the first defendant on 21st October 1914 in favour of the plaintiff. The first point taken is that the transaction in question was an agreement to grant a lease and as it was not registered it could not be specifically enforced. The second and alternative objection to the decree is that, supposing it to be an agreement to execute a mortgage as found by the Subordinate Judge, even then all that the plaintiff will be entitled to would be damages and not a decree for specific performance.

As regards the first question, we have been referred to a number of decisions some of which seem to be inconsistent with the others, but it is not necessary to discuss them in any detail. In none of these cases, the question arose with reference to the application of the Registration Act. In most of them the nature of the transaction had to be considered in connexion with the provisions of Stamp Act or the Limitation Act. That a transaction may combine the features partly of a lease and partly of a mortgage, does not admit of any dispute. That seems to be the nature of what is known as the *Zuri Peshgi* lease in Northern India or a *kanom* in Malabar [*vide Bengal Indigo Company v. Raghobur Das*(1), *Nellaya Variyath Silapani v. Vadakipat Manakel Ashtamurti Nambudri*(2), and *Gopalan Nair v. Kunhan Menon*(3)]. The Stamp Act contemplates and provides (a) for an instrument comprising or relating to several distinct matters (section 5) and (b) for an instrument so framed as to come within two or more of the descriptions of transactions on which duty is payable under the Act. We are not concerned in this case with an instrument of the first class. The question is whether Exhibit A is an agreement for the execution of an instrument which would fall within the definition both of a mortgage and a lease, or only of one of such transactions. Supposing it is the former, if the question were as to the duty payable, the Stamp

Act provides a simple answer. But the matter involves obvious difficulties when the question arises as to the application of the Limitation Act or the Registration Act to such transactions. For then we have to find out the exact nature of the transaction taken as a whole before it can be ascertained which particular article of the Limitation Act is applicable or whether the document is compulsorily registrable or not. The solution in my opinion has to be sought in what was the intention of the parties, whether the transaction was intended to be a lease or a mortgage. This is the principle to be deduced from the rulings. In *Nellaya Variyath Silapani v. Vadakipat Manakel Ashtamurti Nambudri*(1), a Full Bench of five Judges of this Court laid down that the question whether a *kanom* was to be regarded as a lease or a mortgage depended upon the object for which the tenure was created. There the question arose with reference to limitation. The learned Judges observed,

“In some cases it (that is, the *kanom*) may be a mere lease, a sum being advanced as security for the rent or for proper cultivation, to be repaid on the expiry of the term. In other cases, and most frequently, it is created as a lease by way of mortgage to secure a loan advanced to the *jenmi* (proprietor) The Limitation Act has no provision specially applicable to tenures of a mixed character For the purposes of limitation when, as is alleged in the case before us, it is intended as a mortgage, we must apply to it the law of limitation applicable to mortgages.”

In *Tukaram v. Ramchand*(2), which was a Full Bench decision of the Bombay High Court, the question was raised with reference to a claim for redemption and the principle applied was what was intended by the parties to the transaction. That intention has to be gathered mainly from the internal evidence furnished by the document itself with such light as may be derived from the surrounding circumstances in which the transaction had its birth. The essential test to be applied to such cases is whether by the transaction in question the debt was secured or satisfied; if the former, it would be a mortgage, otherwise a lease. This seems to be the *ratio decidendi* of another Full Bench ruling of this Court in *Reference under Stamp Act*(3). Mr. A. Krishnaswami Ayyar, the learned vakil

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(1) (1897) I.L.R., 24 Calc., 272 at page 279 (P.C.).
(2) (1880) I.L.R., 3 Mad., 382 (F.B.). (3) (1907) I.L.R., 30 Mad., 300.

(1) (1880) I.L.R., 3 Mad., 382 (F.B.).
(2) (1902) I.L.R., 26 Bom., 252 (F.B.). (3) (1884) I.L.R., 7 Mad., 203 (F.B.).

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for the appellants, relied upon a recent ruling of a Division Bench in *Kammara Peda Subbayya v. Kararha Chennappa*(1). In that case the learned Judges accepted the principle laid down by the Full Bench in *Reference under Stamp Act*(2), and whether their interpretation of the particular documents which they had to consider was correct or not, that is not a matter with which we are concerned.

The document in question in the present suit provides that the first defendant is to execute in favour of the plaintiff a swamibhogam for twenty years from 1st May 1915 on receiving from him Rs. 5,000, that the entire amount including the interest thereon shall be realized by enjoyment of the swamibhogam, and that the plaintiff should pay the first defendant 100 kalams of paddy, Rs. 300 in cash and 300 bundles of straw every year and at the expiry of twenty years deliver the land to the first defendant. The document also stipulates that if there be a delay in payment, a sum of Rs. 750 is to be added to the amount payable and that the plaintiff is to supply labour of fifty workmen every year. It concludes with a provision that if the Rs. 5,000 be paid at the end of eight years, the plaintiff must receive it and give up possession of the properties and the deed will be cancelled. It was not suggested by any one at the bar that in this case there were two distinct matters, a lease and a mortgage embodied in one document. The transaction is either a lease or a mortgage and for purposes of the Registration Act must be treated as one document. In my opinion, the intention of the parties was to secure a debt and not to satisfy it, within the meaning of *Reference under Stamp Act*(2). No doubt there is a stipulation for the payment of a fixed quantity of paddy and money to the first defendant, but even here the word "rent" is not used. There is also provision for the supply of labour which is an unusual term in a mortgage. But the rest of the provisions clearly show that the parties contemplated a security. The benefit to be derived by the plaintiff is in so many words said to be by way of interest, and the last clause of the document provides that the first defendant may redeem the property by the payment of the amount borrowed at the end of eight years. It has been argued that the transaction does not fall within the

(1) (1915) 28 M.L.J., 303.

(2) (1884) I.L.R., 7 Mad., 203 (F.B.).

definition of a usufructuary mortgage as given in section 58 of the Transfer of Property Act, but the Act clearly contemplates mortgages other than those defined in the Act. I hold, therefore, that Exhibit A is an agreement to grant a mortgage and as such does not require registration.

Then, was the lower Court right in decreeing specific performance of this agreement, or is the proper remedy of the plaintiff by way of damages? It is settled law that the Court will not specifically enforce an agreement to lend or to borrow money whether on security or not [see *Rogers v. Challis*(1)]; *Sichel v. Mosenthal*(2) and *Larios v. Bonany Y. Gurety*(3). But specific performance was ordered in *Ashton v. Corrigan*(4) and in *Hermann v. Hodges*(5), where the money had actually been advanced and all that remained to be done was the execution of the mortgage agreed upon. In *Ashton v. Corrigan*(4), Sir JOHN WICKENS, V.C., said,

"I doubt whether a contract to execute a mortgage, which the mortgagee may enforce by a sale the day after its execution, is one which the Court will specifically perform; and I know of no reported case in which such relief has been given where the right to it has been contested. However, on the authority of the cases cited from *Selton on Decrees*, I will make the decree."

In *Hermann v. Hodges*(5), where the defendant did not oppose the decree, Lord SELBORNE, L.C., said that he had no doubt of the propriety of making the decree asked for, unless the defendant was prepared to pay off the advance at once. Both were cases in which, so far as one can gather, the entire amount had been advanced. That is also how the scope of the rulings is stated in Fry's Specific Performance (5th Edition), section 54, page 24, and Halsbury's Laws of England, Volume 27, section 125, page 73, and Volume 21, section 135, page 75. The question then is whether specific performance can be decreed where only a part of the advance has been made. In the last reference it is stated in the footnote that in an Irish case, *Hunter v. Langford*(6) specific performance was ordered of an agreement to grant a mortgage for an amount of £30,000 of which £1,000 was already advanced. But this report has not

(1) (1859) 27 Beav., 175.

(3) (1878) L.R., 5 P.C., 346.

(5) (1878) L.R., 16 Eq., 18.

(2) (1862) 30 Beav., 371.

(4) (1871) L.R., 12 Eq., 76.

(6) (1828) 2 Mol., 272.

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been available to me. In *Bass v. Clivley*(1) where the plaintiff had agreed to advance £3,000 and actually advanced £600 in part, the defendant apparently submitted to a decree for specific performance according to the terms of the contract. It cannot be said that the question, whether a contract to lend money on security can be specifically enforced if only part of the amount to be lent had been advanced, was considered and decided by the Master of the Rolls.

On the other hand, there is the decision of the Court of Appeal of England(2) and the House of Lords in *South African Territories v. Wallington*(3) where the defendant had applied for and paid 10 per cent deposit on some debentures, it was held that the company was not entitled to a decree directing the defendant to pay the rest of the instalments according to agreement. In the Court of Appeal, Lord Justice CHITTY observed :

" It is clear that no specific performance of a contract to lend and borrow money can be granted at the suit either of the proposed lender or the proposed borrower. It is immaterial whether the loan is to be on security or without security, or whether the loan is to be for a fixed period ; and it can make no difference whether the loan is to be made in one sum or by instalments."

This view of the law was confirmed by the House of Lords. No doubt the decree passed by WRIGHT, J., which was in question in the appeal was rather peculiar. It did not in so many words grant specific performance, but gave a decree for the entire amount unpaid, and one of the arguments advanced in support of the decree was that the contract was for purchase of debentures on certain terms. But Sir ROBERT REID, afterwards Lord LOREBUEN, also argued, that if the respondent had paid all the instalments and the debentures had been withheld, the respondent would be entitled to specific performance and the remedy must be mutual. The learned Lords, however, did not think that specific performance could be extended to a case like the one before them where only part of the advance had been made. The principle of the decision of the House of Lords in *South African Territories v. Wallington*(3), and the other English cases, has been followed in this Court in *Rajagopala*

(1) (1829) 48 E.R., 33.

(2) (1897) I.Q.B., 692.

(3) (1898) A.C., 309.

Aiyar v. Sheik Davood Rowther(1) to which I was a party, and in *Sheikh Galim v. Sadarjan Bibi*(2). In all those cases, however, the suit was by the borrower. The general rule of English Law, which in these cases is followed in India, is not that the Courts will compel performance of contracts according to their tenor ; on the other hand, the proper remedy according to English Common Law for the breach of a contract is compensation by way of damages for the loss arising from the breach. The Courts of Equity however assumed jurisdiction to compel the defaulting party to carry out the contract in its terms, in a class of cases where damages would not be an adequate remedy. Hence one of the conditions for the exercise of this equitable jurisdiction has always been that the common law remedy should be inadequate. Section 21 of the Indian Specific Relief Act therefore says that a contract for the non-performance of which compensation in money is an adequate relief, cannot be specifically enforced. An ordinary contract to lend or borrow money, whether on security or otherwise, comes within this category. But supposing money has already been advanced and the borrower refuses to execute a mortgage according to the agreement, the lender would apparently be prejudiced if the loan were to remain without security, and it is difficult to see what difference it would make in this respect whether the entire loan had been advanced or only a portion, if in the latter case the lender has been ready and willing to advance the remaining sum according to the agreement. On the other hand, if the loan was liable to be repaid at once and the borrower is willing to pay it off, there would be no object in decreeing specific performance in such a case. Hence it was that Lord SELBOURNE in *Hermann v. Hodges*(3) said that he would not decree specific performance of an agreement to borrow on a mortgage if the defendant was prepared to pay off the advance at once. If the loan was not repayable for a certain period that would only affect the amount of damages and the method of calculation. The Courts of Equity seem to be reluctant to force upon a man the position of a debtor if he is in a position to pay off the loan, though no doubt he will be made to compensate the other party

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(1) (1918) 34 M.L.J., 342.

(2) (1916) I.L.R., 43 Cal., 59.

(3) (1878) L.R., 16 Eq., 18.

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for breach of the agreement. This seems to me to be the result of the authorities. Where, however, the borrower is not prepared to pay off the loan, to refuse specific performance in such a case of the agreement to execute a mortgage would be, as I have said, denying justice. In Halsbury's Laws of England, Volume 21, page 75, it is stated, "In equity a mortgage is created by a contract to execute, when required, a legal mortgage, or by a contract that certain property shall stand as security for a certain sum. The agreement may be enforced according to its terms, even though the legal mortgage when executed will confer on the mortgagee an immediate power of sale." This is supported by a number of decisions of the English Courts. The case, however, is to be distinguished where no money has actually been advanced, for there would be no question there of an equitable mortgage. In India, except in the Presidency Town, equitable mortgages are hardly recognized and it was argued by Mr. A. Krishnaswami Ayyar that if we accepted the proposition laid down by the House of Lords in *South African Territories v. Wallington*(1) in cases where the suit is by the borrower, the doctrine of mutuality required that the rule should be equally followed where the suit is by the lender. The two cases do not stand on the same footing. In the last case, the lender would have altered his position and his money may be lost if specific performance were not decreed, while in the other case the only question would be one of damages. Besides, if the doctrine of mutuality were strictly applied to these cases, there could be no specific performance even when the entire amount had been advanced, but none of the learned Lords in their judgments in the above-mentioned case suggested any doubt as to the decisions in *Hermann v. Hodges*(2) and *Ashton v. Corrigan*(3) which were cited at the bar, and the text writers mention these cases with apparent approval.

The plaintiff has already paid about Rs. 4,250 to the first defendant out of the Rs. 5,000 which he agreed to advance, and Mr. A. Krishnaswami Ayyar has offered on behalf of the first defendant to pay up the amount though his client was not

(1) (1898) A.C., 309.

(2) (1873) L.R., 16 Eq., 18.

(3) (1871) L.R., 13 Eq., 76.

willing or prepared to do so in the Court of First Instance. On payment by the first defendant of this amount with profit thereon according to the terms of Exhibit A to be ascertained by the lower Court within four months after the re-opening of the said Court, the decree for specific performance will be set aside, and the lower Court will be directed to ascertain the damages sustained by the plaintiff by reason of the breach of the contract and pass a decree accordingly. The plaintiff must either produce an acquittance in respect of the amount payable under the promissory note in favour of Krishna Mudaliar within the period specified above or execute a bond of indemnity in favour of the first defendant. Failing either, the amount payable under the above-mentioned promissory note will be deducted from the amount payable to the plaintiff. In default of such payment, the decree of the Subordinate Judge will be confirmed and the appeal dismissed. The appellants must pay the costs of the respondent up till now in this Court and the lower Court. Future costs, if any, will be disposed of by the Subordinate Judge.

SESHAGIRI AYYAR, J.—I have come to the same conclusion.

On the 21st of October 1914 the first defendant entered into an agreement with the plaintiff to execute a deed of swamibhogam of the properties in suit. Rupees 250 was paid on that day and the balance of Rs. 4,750 was agreed to be paid on the execution of the document which was to be on the 15th of April 1915. Subsequent to the agreement, at the request of the defendant, plaintiff agreed to pay a sum of Rs. 2,000 due from the defendant to one Krishna Mudali. He also paid Rs. 655 on the 29th January 1915 and a sum of Rs. 515-9-0 on the 3rd April 1915 directly to the defendant. The plaintiff's case is that, notwithstanding the receipt of these monies, the defendant refused to execute the swamibhogam deed, and that therefore he should be compelled to execute the document. The first defendant denied the payments above referred to and contended that the document on which the claim for specific performance was based was not receivable in evidence as it was not registered. The Subordinate Judge in a careful judgment found all the points in favour of the plaintiff, and passed a decree directing the execution of the deed on payment of Rs. 759-15-8. The first defendant has appealed.

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Before dealing with the main contentions in the case, I shall dispose of the minor points argued by Mr. Balasubrahmanya Ayyar. It was suggested that the two sums of Rs. 515-9-0 and Rs. 655 were not independent payments, but were paid as rent due to the defendant in respect of the previous occupation of the properties by the plaintiff. In the day book of the plaintiff (Exhibits J₁ and J₂), these two payments are entered as advances to the defendant. There is no reason to doubt the accuracy or genuineness of these two documents. There is reliable evidence that the defendant was in need of money at this time and that he received the monies not as being entitled to them as landlord, but only as borrower. I see no reason to differ from the Subordinate Judge in his appreciation of the evidence on these points.

As regards the sum of Rs. 2,000, the Subordinate Judge has dealt with it at some length in paragraph 9 of his judgment. Shortly put, the position of affairs was this. The defendant was indebted to Krishna Mudali in a sum of Rs. 2,000. Plaintiff was asked to discharge that debt. Two months after the date of the agreement in question, the plaintiff executed a promissory note for that amount to Krishna Mudali. Krishna Mudali thereupon endorsed payment on the original promissory note given by the defendant to him. It is thus clear that Krishna Mudali absolved defendant from liability and looked to plaintiff for payment. When the parties fell out, the first defendant who is a relation of Krishna Mudali induced another relation of his, the second defendant, to execute a fresh promissory note to Krishna Mudali ignoring the endorsement upon the note which he executed and also the promissory note executed by the plaintiff. It is said that a suit has been brought by Krishna Mudali for the sum due. I feel no hesitation in agreeing with the Subordinate Judge that Krishna Mudali and the first and second defendants have colluded together and are acting in concert to make the Court believe that the liability of the first defendant to Krishna Mudali has not yet been discharged. I accept the conclusion of the Subordinate Judge that the sum of Rs. 2,000 must be deemed to be a payment by the plaintiff to the defendant. The defendant notwithstanding these payments has not delivered possession of the properties to the plaintiff. The Subordinate Judge was therefore right in calculating interest on

the payments and in holding that the plaintiff had paid on the date of the suit a sum of over Rs. 4,000 to the first defendant.

One other small matter may be disposed of before proceeding further. In the agreement there is a stipulation that if the defendant did not execute the document in time, the plaintiff would be entitled to add a sum of Rs. 750 to the Rs. 4,750 remaining due and to get a document executed as if he had paid Rs. 5,500. This is purely a penal provision and I do not think that Courts will be justified in directing specific performance of an agreement with these penal terms. The Courts have a discretion to vary the terms of a contract and to delete so much of it as in their opinion is not equitable.

Now I proceed to consider the main questions argued by Mr. Krishnaswami Ayyar for the appellants. The first contention was that the document in question is an agreement to lease and as it is not registered it should not have been received in evidence in support of a claim for specific performance. It is settled law [See *Narayanan Chetty v. Muthiah Servai*(1)] that, a document requiring registration cannot be the basis of a suit for specific performance. The question is whether Exhibit A is an agreement to lease or an agreement to mortgage. If it is the latter, it does not require registration. If it is the former, it must be registered. An intermediate position is that the document may be construed as a combination of an agreement to lease and also to mortgage. In that case, the further question would be whether it should be registered.

On the construction of the document, various authorities were quoted by the learned vakil. Before dealing with them, I shall examine the provisions of the document. It says that (a) the defendant has agreed to give the plaintiff in swami-bhogam the nanja and punja properties for twenty years from the 1st May 1915; (b) the consideration is stated to be Rs. 5,000 of which Rs. 250 was acknowledged to have been received on the date of the agreement; (c) the balance of Rs. 4,750 was agreed to be paid within the 15th April 1915 when the deed itself was to be executed by the defendant; (d) the said Rs. 5,000 and the interest thereon were to be realized by the enjoyment of the properties for twenty years. There are provisions for payment of

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(1) (1912) I.L.R., 35 Mad., 63.

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kist which I need not refer to now; (e) the plaintiff agreed to pay the defendant 100 kalams of samba paddy, Rs. 300 in cash, 300 bundles of straw and also to procure 50 labourers for each year; (f) it is stipulated that the land should be delivered back after a period of twenty years; (g) there is a penal provision for adding Rs. 750 more in case the defendant did not execute the deed on the 15th of April 1915; and lastly (h) the document provides for enjoyment of the properties for eight years certain, and for redemption by the defendant, notwithstanding the fixed period of 20 years, at any time after the eighth year on payment of the Rs. 5,000. In my opinion the document is a usufructuary mortgage, and falls strictly within the definition of the terms contained in section 58, clause (d) of the Transfer of Property Act. Mr. Krishnaswami Ayyar contended that the provision for the delivery of paddy, money and straw to the defendant took the document out of the category of usufructuary mortgages. I am inclined to think that the clause "partly in lieu of interest and partly in payment of mortgage money" in section 58 (d) does not prevent the payment of a portion of the usufruct to the mortgagor. In my experience of the Southern Presidency, it is almost an ordinary term of a usufructuary mortgage to provide for the payment either of a consolidated sum or of an annual sum to the mortgagor; and I am not satisfied that such a provision is obnoxious to section 58, clause (d) of the Transfer of Property Act. The clue to the interpretation of the definition may be gathered from sections 76 and 77 of the Transfer of Property Act. Clause (g) of section 76 provides for the mortgagee keeping clear and accurate accounts of all sums received and spent by him and also directs the mortgagee to give the mortgagor true copies of such accounts and of the vouchers by which they are supported; clause (h) provides for the surplus of the usufruct being paid to the mortgagor under certain circumstances. Section 77 provides that nothing in clauses b, d, g and h [(b) being a provision for the collection of rents and profits and (d) being a provision for repairs] applies to cases where there is a contract between the mortgagor and the mortgagee that the receipts from the mortgaged property shall be taken in lieu of interest on the principal money or in lieu of such interest and defined portions of the principal as may be agreed upon. As I understand this section, it means that ordinarily having

regard to the fact that the relationship is that of debtor and creditor, it is the duty of the mortgagee to keep proper accounts. But this duty may be dispensed with where there is a contract between the parties that the usufruct, whatever it may amount to, shall be applied in a definite way towards the liquidation of the debt or of the interest on the debt. In other words, section 77 contemplates a contract between the mortgagor and the mortgagee that the income of the property shall be appropriated in a particular manner. I fail to see why a contract that a definite portion of the income shall be paid annually to the mortgagor should not find a place in a deed of mortgage or in an agreement to give such a deed. Therefore, without reference to the authorities, I am of opinion that the document in question is an agreement to give a usufructuary mortgage. No doubt the terms of section 105 of the Transfer of Property Act are to a large extent complied with by this agreement. The Rs. 5,000 may be regarded as premium, and the annual payment may be regarded as rent. The insertion of a clause as to enjoyment during a specified period is also within that section; but in a lease *simpliciter*, there will be no provision for interest upon the amount; and there will not be a provision for redemption as in the present document. I am therefore unable to hold that this is an agreement to lease.

There is no doubt a possibility of construing it as a combination of an agreement to mortgage and to lease. The elements which make up a mortgage are to be found in the provision relating to principal and interest and to the redemption of the property after a fixed period. It is also clear that the property is regarded as security for the monies to be advanced. The supplementary provision regarding the annual payment is in the nature of a lease. Therefore there is great force in the contention of the learned vakil that the document in question partakes of the character of a lease and of a mortgage. Even in that view, as I shall show presently, the document would not require registration; but my inclination is to regard the document as an agreement to execute purely usufructuary mortgage.

Now I shall deal with the cases quoted at the bar. The citations from Dr. Ghose's Book on Mortgage, Vol. I, pages 95 and 96, only point to the difficulties attendant upon the construction

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of such documents. The learned author, after referring to the conflict of judicial opinion, inclines in favour of holding similar documents to be agreements to mortgage and not to give a lease. With one observation of his, I am in entire agreement, namely, that the construction must be based upon the intention of the parties and not upon an academical discussion regarding the inapt words used in the instrument. In *Reference under Stamp Act*(1) the question for consideration before the Full Bench was as to the stamp to be affixed on the document. There were three instruments before them, but we are concerned only with the third of them. The learned Chief Justice, who delivered the judgment of the Court, says that

"although the parties may have understood and described the transaction as a mortgage, it was in fact a sale for a term or a lease for nine years with a reserved rent of Rs. 35, in consideration of Rs. 899-12-0, the amount of the debt and interest."

It is not shown that there was any provision for redemption in that case. This opinion of the Chief Justice may, no doubt, be taken as suggesting that although interest may be payable upon the advance, the document may still be regarded as a lease. I do not think that this case covers the present. In *Kammara Peda Subbayya v. Kararha Chennappa*(2) the question related to limitation. There the document was completed. It was not an agreement that the learned Judges had to consider. Exhibit B which is given in full in the judgment contains no stipulation for redemption as in the present case. Therefore that is not an authority which is conclusive on the point. On the other hand, the cases quoted by Mr. Muthukrishna Aiyar on behalf of the respondent show that documents like the present one should be construed as mortgages. *Mashook Ameen Suzzada v. Marem Reddy*(3) is a case in point; in *Reference under Stamp Act*(4), four Judges of this Court held that a provision for enjoyment of the property for a particular period coupled with a loan rendered the document a usufructuary mortgage. No doubt the opinion was given with reference to the amount of stamp duty payable. It is also true that there was no provision for the payment of rent as such. I do not

(1) (1884) I.L.R., 7 Mad., 203 (F.B.). (2) (1915) 28 M.L.J., 303.
(3) (1875) 8 M.H.O.R., 31, (4) (1898) I.L.R., 21 Mad., 358 (F.B.).

think that in the present case it can be said that there is a provision for payment of rent as such. Reference may also be made to *Mahamad v. Bagas*(1). I do not propose to consider the other cases quoted before us, as in my opinion the document in suit is strictly within the definition of the term *usufructuary mortgage*; and the provision for redemption would be inconsistent with the parties having intended to treat it as an agreement to lease.

The intermediate view which I referred to, namely, of regarding the document as a combination of mortgage and lease, derives its support from the decision of the Judicial Committee in *Bengal Indigo Company v. Raghobur Das*(2). The other decisions *Reference under Section 46, Stamp Act*(3), *Nellaya Variath Silapani v. Vadakipat Manakel Ashtamurti Nambudri*(4), *Perlathail Subbu Rau v. Mankude Narayana*(5), and *Gopalan Nair v. Kunhan Menon*(6), also regard documents more or less of a similar character as not wholly within the category of usufructuary mortgages. Granting that the document in question is not an agreement to mortgage, I am unable to agree with the contention that it should be registered under the Registration Act. Under section 17 of the Registration Act, written instruments referred to in clause (1), sub-clauses (a), (b) and (c) which would include sales, gifts and mortgages, should be registered, if the value exceeds Rs. 100. Sub-clause (5) of clause 2 in terms excludes from this liability documents which, by themselves, do not create, declare, assign, etc., rights in immovable property. That clause makes it clear that an agreement to sell or to mortgage need not be registered, because clause (2) begins by saying that "nothing in clause (b) and (c) of sub-section (1) applies to the following instruments." It is noticeable that sub-clause (d) of clause (1) is not referred to in clause (2). Clause (1) (d) says that "leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent should be registered." As I said before, an agreement to give a lease is not among the exempted

(1) (1908) I.L.R., 32 Bom., 569. (2) (1897) I.L.R., 24 Cal., 272 (P.C.).
(3) (1882) I.L.R., 8 Cal., 254 (F.B.). (4) (1880) I.L.R., 3 Mad., 382 (F.B.).
(5) (1882) I.L.R., 4 Mad., 113. (6) (1907) I.L.R., 30 Mad., 300.

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documents in the second clause. Further, the definition of the term *lease* in section 2 includes an agreement to lease as well; whereas, under the definition of the terms "mortgage" or "sale" as contained in the Transfer of Property Act, an agreement to mortgage or an agreement to sell would not be included. It is rather an anomalous position that an agreement to lease should be compulsorily registrable, whereas an agreement to give a mortgage or to sell should be exempted from such a provision. However the legislature has chosen to impose such a liability upon agreements to lease alone, and we are bound to give effect to that intention. At the same time, it is clear that unless a document comes strictly within the four corners of the expression "lease" we would not be justified in holding that the document should be registered.

The learned vakil for the respondent drew our attention to some decisions which have held that provisions relating to registration should be very strictly construed. *Amjed Ali v. Ala Buksh*(1) and *Jiwan Ali Beg v. Basa Mal*(2) have laid down this principle. I am in entire agreement with these decisions. In my opinion, any provision which has the effect of preventing parties from adducing in evidence a specified document for want of a technicality should be very strictly construed, and therefore unless a document is a lease pure and simple, I see no reason for applying section 17, clause (1)(d) of the Registration Act to such instruments. If the term regarding the lease is only incidental to the main provisions of the document, I am prepared to hold that such a document need not be registered. I am also impressed by the argument for the respondent that, at best, the document in question is an agreement to execute an anomalous mortgage as was held in *Raman Nair v. Vasudevan Namboodripad*(3) and in *Kaderkutti v. Imbichi*(4). If it is a document of that description, my view is that it does not require to be registered, because it would come under clauses (1)(b) and (c) and clause 2 (5) of section 17 of the Registration Act. In this view, it is unnecessary to consider the further point argued by Mr. Krishnaswami Ayyar that if there was a combination

(1) (1868) 9 W.R., 537.

(3) (1904) I.L.R., 27 Mad., 26

(2) (1887) I.L.R., 9 All., 108 (F.B.).

(4) (1914) M.W.N., 618.

of a mortgage and lease, the unregistered document cannot be looked at even for the purpose of enforcing the term relating to the mortgage.

The next important point is whether even if it is an agreement to give a usufructuary mortgage, a suit for specific performance is competent. The learned vakil for the appellants, with his usual ability, contended that, if the amount agreed upon was not fully paid, by asking for specific performance, the plaintiff would be compelling the defendant to accept the loan with reference to the balance remaining unpaid. In *South African Territories v. Wallington*(1) it is definitely laid down that a contract to lend cannot be specifically enforced, affirming the decision of the Court of Appeal in 1897, 1 Q.B., 692. That principle has been followed in this country in *Sheikh Ghalim v. Sadarjan Bibi*(2). *Ramakrishna v. Narayana*(3) also belongs to the same class. Mr. Krishnaswami Ayyar contended that an agreement to borrow stands on the same footing as an agreement to lend. It is not necessary for me to disagree with that contention although I am not prepared to hold that the principle of mutuality as laid down in *Flight v. Bolland*(4) is of universal application. Without quoting many cases, I may refer to *James Jones and Sons, Limited v. Tankerville (Earl)*(5) where the principle of mutuality has been departed from to some extent. The decision in *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*(6) does not say that such a principle is of universal application. If in this suit, the only prayer was that the defendant should be compelled to accept the balance of the loan, I would have agreed that the suit should be dismissed. The principle of the English decisions followed in this country is that no person should compel another to accept a loan as he could very well advance it to another, and it would be unjust to compel the would-be borrower to accept it as he could in open market procure the loan easily. But in the present case, the object of the suit is not to compel the defendant to accept the loan. The aim is to obtain the security for the money already advanced and that

(1) (1898) A.C., 809.

(3) (1916) I.L.R., 39 Mad., 80.

(5) (1909) 2 Ch., 440.

(2) (1916) I.L.R., 43 Cal., 59.

(4) (1828) 4 Russ., 298.

(6) (1912) I.L.R., 39 Cal., 232.

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security having been promised by the document the defendant is bound to fulfil it. There is a decision of the Allahabad High Court in *Mayaram, etc. v. Prag Dat, etc.*(1), in which MAHMOOD, J., expresses a doubt whether, even when the whole of the money agreed upon has been paid, the plaintiff will be entitled to sue for specific performance. The learned Judge is apparently of opinion that money compensation would meet the ends of justice in such cases. I am afraid that the learned Judge has not adverted to the fact that the securing of a security by a lender is far more important to him than the obtaining of a decree for money against the borrower. This view of MAHMOOD, J., is opposed to two decisions of very eminent Judges in England in *Ashton v. Corrigan*(2) and *Hermann v. Hodges*(3). In 21 Halsbury 75 the law is thus summarised: "In equity, a mortgage is created by a contract to execute, when required, a legal mortgage, or by a contract that certain property shall stand as security for a certain sum." In *Fry on Specific Performance*, the same principle is enunciated. In section 54 the law is thus stated: "The Court will specifically enforce a contract to execute a mortgage, and that even with an immediate power of sale where the money has been actually advanced either before or at the time of the contract." I fail to see why these principles should not be followed in this country. Therefore I am of opinion that the suit as brought was rightly instituted.

As regards the proper remedy to be given, there is room for considerable divergence of opinion. The Subordinate Judge has decreed specific performance of the entire contract on payment of the balance due. It was argued by Mr. Krishnaswami Ayyar that this provision in the decree indirectly compels the defendant to accept the balance of the loan. Speaking for myself, I do not think that this objection is well founded. What the House of Lords has laid down in the case already referred to is that a party plaintiff is not entitled to claim specific performance of a contract to lend or to borrow. If he comes into Court with such a specific prayer and if there is nothing more in the plaint, the suit will be rightly dismissed. But where the prayer is strictly within the rights of the plaintiff, it is competent to the Court

(1) (1888) I.L.R., 5 All., 44.

(2) (1871) L.R., 13 Eq., 76.

(3) (1873) L.R., 16 Eq., 18.

to annex conditions to the decree calculated to render justice between the parties. The domain of the rights of the parties is then passed and that of the function of the Court comes into play. The Court in the plenary powers it possesses of exercising discretion or of imposing suitable conditions in the interests of justice, being seized of the subject-matter of the suit, can proceed to annex or disannex conditions *suo motu*, in order that complete justice may be rendered. I do not think that the principle that there cannot be a suit for specific performance either to borrow or to lend has any application to the exercise of the Court's powers as above indicated. In my opinion, therefore, the view taken by the Subordinate Judge that specific performance should be decreed on payment of the balance was well within his jurisdiction. There is authority for enforcing the contract in its entirety even though the full amount has not been paid. Mr. Muthukrishna Ayyar quoted *Bass v. Olivley*(1) wherein Sir JOHN LEACH, the Master of the Rolls, decreed specific performance of a contract to mortgage even though the full amount had not been paid. This case is no doubt open to the construction put upon it by Mr. Krishnaswami Ayyar that the decree was by consent. But if the decree could not be passed, the Master of the Rolls would not have acted on the consent; therefore the procedure adopted must be taken to have been legal. I fail to see why Courts should not do what the parties can agree to and impose a condition for the payment of the balance before specific performance is decreed. There is also a citation in 21 Halsbury at p. 75 under note (b) of an Irish case of *Hunter v. Langford*(2) in which specific performance was ordered of an agreement to grant a mortgage for a loan of £30,000, of which £1,000 alone had been already advanced. In my opinion, therefore, the decree of the Subordinate Judge is not wrong.

My learned brother thinks that this is a case in which our discretion should be exercised by decreeing damages, rather than by decreeing specific performance. I agree with the order proposed by my learned brother as to costs, damages and indemnity.

K.R.

(1) (1829) 48 E.L., 33.

(2) (1828) 2 Mol., 272.

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APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1918.
July 17.

KUTTICHAMI MOOTHAN AND THREE OTHERS
(ACCUSED), PETITIONERS,

v.

RAMA PATTAR (COMPLAINANT), RESPONDENT.*

Indian Penal Code (Act XLV of 1860), sec. 295—"Defile," meaning of—Moothans, presence of, inside a temple, whether defilement.

The presence of Moothans, a sub-caste of Sudras, whose status is equal to, if not higher than, that of Nairs, in such portions of a Hindu temple as are open to non-Brahmans is not a "defilement" within section 295, Indian Penal Code.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of P. MACQUEEN, the Sub divisional Magistrate of Palghat Division, in Criminal Appeal No. 113 of 1917, preferred against the conviction and sentence of S. KUPPA RAO, the Second Class Magistrate of Alatoor, in Calendar Case No. 203 of 1917.

The accused who belonged to Moothan caste and who bathed in a tank inside a Hindu temple near Palghat were charged and convicted of having thereby defiled the temple under section 295, Indian Penal Code. The prosecution alleged that it was the custom for Brahmans, Ambalavasis and Nairs to enter such portion of the temple and that Moothans never used to do so. The accused stated that they were in the habit of using the tank and other portions of the temple near the tank. The conviction was confirmed on appeal. Thereupon the accused preferred this revision petition.

K. P. Lakshmana Rao for S. Doraiswami Ayyar for petitioners.

K. P. Kesava Menon for respondent.

E. R. Osborne, Public Prosecutor, for the Crown.

The Court made the following ORDER.

SADASIVA AYYAR, J.—The accused belong to the "Moothan" caste which is one of the divisions of the Sudra caste. There is

* Criminal Revision Case No. 56 of 1918 (Criminal Revision Petition No. 43 of 1918).

nothing to show that their caste status is less high than that of Nairs and, on the other hand, while most Nairs are content to call themselves Sudras, Moothans have been trying to claim the status of Vaisyas as following the profession of trade, their women are called Chettichiyars and some of them have adopted the Vaisya surname "Gupta."

The prosecution theory that while a Nair's entry into the Nalamabalam of the temple does not pollute the temple or the idols in it, the entry of a Moothan does so is *prima facie* improbable and I may say it almost amounts to an absurdity.

This contention that the particular custom in this temple is to make such entry an act of pollution is sought to be proved by evidence of Brahman and Nair witnesses who give no reason for their extraordinary opinion, which is clearly of very little worth.

I would set aside the conviction and sentences and order the fines to be refunded.

NAPIER, J.—I agree. I accept the contention that the word 'defile' cannot be confined to the idea of 'making dirty' but must also be extended to ceremonial pollution, but it is certainly necessary to prove pollution. The caste of the accused is not one of the polluting castes—*vide* Malabar Gazetteer, page 117. Neither is the act alleged, one confined by right to Brahmans as was the case in *In re Sivakoti Swami*(1), where a goldsmith touched the idol. It is simply presence in that part of a temple which is open to non-Brahmans, but is alleged not to be open to the caste of the accused. In my opinion this is not "defiling" within the meaning of section 295 of the Indian Penal Code.

N.B.

(1) 1 Weir., 253.

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APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1918.
July, 18.

THE SESSIONS JUDGE OF COIMBATORE, PETITIONER
(REFERRING OFFICER),

v.

MURAPPA GOUNDAN (ACCUSED).*

Criminal Procedure Code (Act V of 1898), sec. 436—Indian Penal Code (Act XLV of 1860), sections 323, 354, 376, 511—Subordinate Magistrate taking cognizance on police charge-sheet—No mention of offence under sections 376, 511, Indian Penal Code—Prosecution not pressing for committal before Magistrate—Order by District Magistrate directing committal—Validity of order—Reference by Sessions Judge—Quashing of commitment by High Court—Jurisdiction of District Magistrate.

Where a Subordinate Magistrate took cognizance of a case on a police charge-sheet charging the accused with offences of assault and hurt under sections 354 and 323, Indian Penal Code, but no charge was made therein of the offence of attempt to rape, under sections 376 and 511, Indian Penal Code, and the prosecution did not press for the framing by the Magistrate of a charge in respect of that offence, but the District Magistrate purporting to act under section 436, Criminal Procedure Code, directed the Subordinate Magistrate to commit the accused to the Sessions for an offence under sections 376 and 511, Indian Penal Code, and the accused was so committed:

Held (on a reference by the Sessions Judge), that the proceedings of the Subordinate Magistrate did not amount to an order of discharge on the major offence and the District Magistrate had no jurisdiction to pass an order under section 436 of the Criminal Procedure Code directing the Subordinate Magistrate to commit the accused to the Sessions for the offence under sections 376 and 511, Indian Penal Code. Commitment quashed and the Subordinate Magistrate directed to proceed with the trial of the minor offences. *Krishna Reddi v. Subbamma* (1901) I.L.R., 24 Mad., 136 (F.B.), distinguished.

CRIMINAL MISCELLANEOUS PETITION to the High Court by D. G. WALLER, the Sessions Judge of Coimbatore, in his letter D. No. 3230, dated 3rd April 1918, to quash the commitment in Sessions Case No. 21 of 1918 on the file of the Sessions Court of Coimbatore (P.R. No. 2 of 1918 on the file of the Court of the Sub-Magistrate of Mēttupālaiyam).

The material facts are set out in the Sessions Judge's Reference which was as follows:—

"I have the honour to submit to the High Court under section 215, Criminal Procedure Code, the records in Sessions Case No. 21 of

1918 on the file of this Court, with a recommendation that the commitment be quashed. The material facts are briefly these:—

2. A complaint of attempted rape was made by the husband of the complainant to the monegar of his village. It was reported to the police, who made an investigation and charge-sheeted the accused under sections 354 and 323, Indian Penal Code. The Sub-Magistrate of Mēttupālaiyam recorded the prosecution evidence and proceeded, without any objection on the part of the police or of complainant's counsel, to frame charges against the accused under these sections. Two days later, complainant moved the District Magistrate under section 435, Criminal Procedure Code, to revise the Sub-Magistrate's 'order' and to direct the commitment of accused for an offence under sections 376 and 511, Indian Penal Code. The District Magistrate, after hearing both parties, directed the Magistrate to commit accused on a charge framed under sections 376 and 511, Indian Penal Code, holding that the Magistrate's order 'was equivalent to the discharge of the accused so far as the offence of an attempt at rape' was concerned. The Magistrate accordingly committed accused to this Court as directed.

3. The District Magistrate relied on the ruling in *Krishna Reddi v. Subbamma*(1). Counsel for accused contends that this ruling is not applicable to the facts of the present case. As I understand the decision, I think that he is right. In this case, the police charge-sheeted accused under sections 354 and 323, Indian Penal Code, and there was no application by complainant or any one else for a charge of attempted rape. In that case, on the other hand, there was an application by the prosecution for a charge under section 477, Indian Penal Code, which the Magistrate formally refused and his refusal was held to be tantamount to an order of discharge.

4. In this case no order has, it seems to me, been passed that the District Magistrate was empowered to revise. Complainant should have applied to the Sub-Magistrate under section 347, Criminal Procedure Code, to commit the case as one of attempted rape and on his refusing to do so, there would have been a proper basis for an application to the District Magistrate in revision. It cannot, I submit, be asserted in this case, as it could in *Krishna Reddi v. Subbamma*(1) that the Sub-Magistrate had 'adjudicated upon the question whether there was any evidence against the accused in respect of the major offence.' For the latter had not been charge-sheeted for the major offence and no one had asked that he should be charged with it.

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* Criminal Miscellaneous Petition No. 141 of 1918.

(1) (1901) I.L.R., 24 Mad., 136 (F.B.).

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5. I recommend, therefore, that the commitment be quashed both on the law and on the facts. The accused was charge-sheeted for offences which the Sub-Magistrate could try and no one suggested before him that he should convert the charge into one of a major offence exclusively triable by a Court of Session. There can consequently be no question of a discharge under section 209(1), Criminal Procedure Code, within the meaning of the decision relied on by the District Magistrate."

The Public Prosecutor (E. R. Osborne) on behalf of the Crown.

The Hon. Mr. T. Richmond for the accused.

The Court passed the following ORDER:—

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—The decision in *Krishna Reddi v. Subbamma*(1) goes only to this extent that where the prosecution had pressed for the framing of a charge of a higher offence triable by the Sessions Court, even if the Subordinate Magistrate had originally taken cognizance only of a charge relating to a lesser offence, the refusal of the Magistrate to frame the charge for the higher offence might be treated as an order of discharge in respect of that offence and that section 436 of the Criminal Procedure Code would, in those circumstances, give the District Magistrate jurisdiction to direct the Subordinate Magistrate to commit the accused to the Sessions on the graver charge.

In the present case, the offence of attempt at rape was not mentioned in the police charge-sheet on which the Subordinate Magistrate took cognizance of the case and the prosecution did not press for the framing by that Magistrate of a charge against the accused in respect of that offence.

The Sessions Judge was, therefore, justified in holding that the decision in *Krishna Reddi v. Subbamma*(1) could not be extended so as to cover this case and we accordingly accept the Reference. Quashing the commitment, we direct the Subordinate Magistrate of Mēttupālaiyam to proceed with the trial of the charges for the minor offences framed by him against the accused.

K.R.

(1) (1901) I.L.R., 24 Mad., 136 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

MACHI RAJU VENKATARATNAM (THIRD DEFENDANT),
APPELLANT,

v.

SRI RAJA VADREVVU RANGANAYAKAMMA ZAMINDARINI
GARU AND TWO OTHERS (PLAINTIFF AND FIRST AND SECOND
DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XXI, rules 58 to 63—Order refusing in effect to investigate claim whether an order "against" claimant within O. XXI, r. 63, Civil Procedure Code and art. 11 of Limitation Act (IX of 1908).

Held by the FULL BENCH (1) that an order refusing to investigate a claim to attached property, on the ground that there was delay in filing it, is an order passed "against" the claimant within Order XXI, rule 63, Civil Procedure Code, and article 11 of the Limitation Act (IX of 1908) and (2) that an order on a claim petition merely stating that, as it was filed late, it will be notified to the bidders is in effect an order rejecting the claim to which the provisions of Order XXI, rule 63, will apply.

Narasimha Chetty v. Vijapala Nainar (1915) 2 L.W., 206 and *Ponnusami Pillai v. Samu Ammal* (1916) 31 M.L.J., 247, followed.

Thithikutti Umma v. Thalathodi Chekkamutti, Second Appeal No. 1986 of 1916, overruled.

SECOND APPEAL against the decree of J. C. FERNANDEZ, the District Judge of Gōdāvari, in Appeal No. 32 of 1916, preferred against the decree of T. VARADARAJULU, the Temporary Subordinate Judge of Rajahmundry, in Original Suit No. 23 of 1914.

The facts are given in the first paragraph of the Order of Reference of NAPIER, J., and the first paragraph of the Order of Reference of SADASIVA AYYAR, J. The third defendant, against whom and other defendants a decree was passed in favour of the plaintiff by both the lower Courts, preferred this second appeal.

This Second Appeal coming on for hearing, in the first instance, before SADASIVA AYYAR and NAPIER, JJ., the following

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March
12 and 13
and July 15,
16 and 23.

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ORDERS OF REFERENCE TO THE FULL BENCH were made by NAPIER, J.—One of the points taken in this appeal was whether the suit is barred by limitation by reason of the provisions of Order XXI, rules 58 to 63, and article 11 of the Limitation Act. The claim was put in before the District Munsif under rule 58 and the District Munsif dealt with it as appears in Exhibit V. He first passed an order as follows:—

“As this petition was filed late, this claim is ordered to be notified to the intending bidders.”

A fresh petition was put in before him and he passed another order as follows:—

“The allegations of the Zamindarini will be notified to the bidders with the remark that the Zamindarini did not take steps for her claim being enquired into during the last ten months.”

On the face of it, this order appears to me to be one passed under the proviso to rule 58 of Order XXI—“Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.” It is argued before us that even if it is a case covered by the proviso, still rule 63 applies and that rule together with the operation of article 11 of the Limitation Act bars any suit on the same subject matter after one year from the date of the order. The question as to the construction of rule 63 had been before this Court and it was decided in *Narasimha Chetty v. Vijiapala Nainar*(1) that

“Order XXI, rule 63 of the new Code, is much wider in its scope than the corresponding section 283 of the Code of 1882 and unlike the latter section covers cases in which there has been no investigation.”

This case was followed by a Bench of this Court in *Ponnusami Pillai v. Samu Ammal*(2). There the order was passed by the District Munsif in the following terms:—“Application comes late and is rejected.” It was held by the Bench that

“the language of article 11 in the new Act is more comprehensive than that of the previous Act and has been construed in this Court as covering orders after full investigation as well as orders passed on default”

and with that view, the learned Judges in this case were in entire agreement. The matter again came before another Bench of this Court in *Thithikutti Umma v. Thalathodi Chekkamutti*(3)

(1) (1915) 2 L.W., 206.

(2) (1916) 31 M.L.J., 247.

(3) Second Appeal No. 1986 of 1916.

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a case to which my learned brother was a party. In that case an objection had been filed and the order passed by the Munsif was as follows:—“The petitioner’s objection will be noted in the proclamation.” The learned Judges say

“Here there was nothing except an order passed, so far as we can see, after no investigation in any ordinary sense of the term, since it is not shown that anything was considered which could justify a decision as to the validity of the claim, and eventually no decision regarding it was reached. In fact the case resembles *Babu Jodonath v. Radhamonee*(1) and agreeing with the judgment in that case, we set aside the lower Appellate Court’s decision.”

These decisions are in my opinion irreconcilable and I think that it is necessary to refer the matter to a Full Bench for decision as the question is not one of procedure only. The result of holding that article 11 applies is to reduce the period of limitation from twelve years to one year without any decision of a Court on the merits and without allowing the claimant or objector to prove his right. It appears that the history of this provision is as follows:—In the Code of 1859, there was a provision for a refusal to investigate in certain circumstances and there are decisions of the High Court of Calcutta on the language of the Code of 1859, namely, *Babu Jodonath v. Radhamonee*(1), *Roghoonath Doss Mohapattur v. Bydonath Doss Maharatha*(2), *Jugobundhoo Bose v. Sachya Bibee*(3) to the effect that a refusal to investigate was not an order which gave rise to the shortened period of limitation mentioned in the section of the Code. This view receives some support from the language of the Privy Council in a case reported in *Sah Mukkun Lall Panday v. Sah Koondun Lall*(4).

Then coming to the Code of 1877, we have sections 278 to 283. All these sections with the exception of section 283 are practically in the same words, as in the present Code, but the language of section 283 is

“that the party against whom an order under sections 280, 281, or 282 is passed, may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive”.

(1) (1867) 7 W.R., 256.
(3) (1871) 16 W.R., 22.

(2) (1870) 14 W.R., 364.
(4) (1875) L.R., 2 I.A., 210 at p. 218.

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It was held by this Court in *Sarala Subba Rau v. Kamsala Timmayya*(1) that where a Court had, under the proviso to section 278, not made an investigation, it was clear on the face of it that section 283 did not apply because section 278 was not one of those sections mentioned in section 283. That is clear, but it is important to bear in mind that this omission is intentional, the object being to preserve the law as it existed under the Act of 1859, the principle being that in a case where there has been a refusal to investigate (the Court having full discretion whether to investigate or not), it would not be proper to attribute to such an order a degree of finality as would justify the legislature in depriving a party of the longer period of limitation given to him in the Code and limit it to the one year provided for by article 11. That seems to have been the policy of both the Codes.

We now come to the present Code and it is of course to be noted as has been pointed out in the cases that the words 'in sections 280, 281 and 282' have disappeared. They must disappear because the scheme of the Code is different in that these sections reappear in the form of rules in Order XXI, and it is certainly open to argument that the reason for the omission of the definite rule or order was not for the purpose of extending the operation of rule 63, but because of the altered scheme of the Code. Bearing in mind the reason why the order under section 278 was not incorporated in section 283, it is a little difficult to see why the Code of 1908 should introduce a provision of this very drastic nature which had not been in the Codes of 1859 and 1882. Of course, if the language is such that it leads to no other interpretation, then that meaning must be ascribed to the words. Reliance is placed on the general nature of the language in rule 63

"where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

Certainly, the language is more comprehensive. First of all, we get the general words "where a claim or an objection is preferred" which were not in section 283 and then we get the

(1) (1908) I.L.R., 31 Mad., 5.

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simple use of the words "the party against whom the order is made". Now it is of some importance to look at the later words of the section because if a party is to institute a suit to establish the right which he claims within a year and in default of that, the order is conclusive, one would expect that the order referred to would be one which definitely disposes of the claim or the petition. But it is clear that the order which is passed under section 278 is a simple refusal of the Court to take any proceedings which are provided for under those clauses, for it neither accepts nor rejects nor does it decide anything. The clauses are headed "Investigation of claims and objections" and the proviso in rule 58 is one under which a Court has an option, whether to take the matter on its file or not. On principle, it would seem that where a Court has refused to take the procedure laid down by the section and which it has an option to refuse, an order which is passed refusing to entertain the petition or claim and investigate it, is not one which can be said to be *conclusive with regard to the right to the property in dispute*.

Suppose an order framed as follows: "I refrain from expressing any opinion on the claim and decline to investigate it as the claim is made at the last moment before sale. What will be sold is the right, title and interest of the debtor whatever that is; petition for investigation is dismissed." Could it be said that such an order is an order "against a party on a claim preferred" within the meaning of article 11 or an order "against a party" within the meaning of rule 63? It seems to me that the proper interpretation of rule 63 is that it only applies to investigations and not to refusals and that being so, it would be an unnecessary extension to give article 11 any wider scope. In this view and on conflict of the authorities, I think it is advisable to refer to the Full Bench the following questions:—

- (1) *Where a Court purports to make an order under the proviso to rule 58, Order XXI, that is to say, an order refusing to investigate, does such an order come within the mischief of Order XXI, rule 63, and article 11 of the Limitation Act?*
- (2) *Is Exhibit V an order covered by article 11 of the Limitation Act?*

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SADASIVA AYYAR, J.—I agree that the question mentioned in the judgment just now pronounced by my learned brother should be referred to a Full Bench. There was a claim petition filed by the present plaintiff when the plaint properties were attached in execution of a decree passed against the present second defendant in favour of the present first defendant. That petition, so far as it relates to the plaint lands, alleged that the judgment-debtor, the present second defendant, had no saleable interest whatever in the land and that it was the petitioner's private land which had been granted on service tenure to the second defendant's father. She (the petitioner) prayed for the release of the property from attachment. That claim petition was E.A. No. 3307 of 1910 and was filed on the 23rd December 1910. The property had been proclaimed for sale and so the Munsif seems to have at once passed an order that as the petition was filed late it should be notified to the intending bidders. The sale seems to have been afterwards adjourned from time to time and the sale itself seems to have finally taken place only in January 1912. Meanwhile, the claimant, the present plaintiff, put in a fresh petition (evidently as supplementary to the claim petition 3307 of 1910) requesting the Court to make an enquiry into the claim petition in respect of the alleged non-saleability of the plaint land. Then the District Munsif holding his first order of December 1910 as not a final order passed a final order on the 16th October 1911 on that same claim petition 3307 of 1910 as follows:—"The allegations of the Zamindarini (that is petitioner) will be notified to the bidders with the remark that the Zamindarini did not take steps for her claim being enquired into during the last ten months." Neither in his first incomplete order nor in his final order did he use the word "rejected" or "dismissed" as regards the disposal of the petition. Now the question is whether the failure of the petitioner to file a suit within one year of October 1911 under Order XXI, rule 63, to establish the right which she claims to the property in dispute precludes her by the bar of limitation from establishing the same right in this suit filed in January 1913. Under section 247 of the Civil Procedure Code of 1859, it was enacted "no such investigation" (that is, into claim or objection) "shall be made if it appear that the making of the claim or objection was designedly or unnecessarily

delayed, with a view to obstruct the ends of justice. The order *disallowing the investigation* shall not be subject to appeal, and the claimant shall be left to prosecute his claim by a regular suit." In the previous section 246, investigation was directed as a general rule on claim petitions and the last sentence of that section is "The order which may be passed by the Court under this section shall not be subject to appeal, but the party *against whom the order may be given* shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order." Thus a clear distinction was made between an order passed after investigation (*in favour of one party and against another party*) and an order passed *disallowing investigation*. [I shall not use the expression "without investigation," because that phrase may include cases where the Court was ready and prepared to investigate but through the default of the petitioner to pay batta or to put in appearance or to adduce evidence, the claim petition was decided against him. Even in cases of dismissal for default, *Kallu Mal v. Brown*(1), and *Sarala Subba Rau v. Kamsala Timmayya*(2), held that the plaintiff was not precluded under the old Code by the limitation bar of one year.] Then the Code of 1877 by the proviso to section 278 gave the Court the same power to *decline investigation* when it considered the claim unnecessarily delayed and then under sections 280, 281 and 282, provided for orders being passed on investigation, that is in cases in which it did not refuse to embark on investigation under the powers given to it by the proviso to section 278. Then section 283 enacted that "the party against whom an order under sections 280, 281 or 282" (that is, *where it has not refused to investigate*) "is passed, may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive." Article 11 of the Limitation Act provides one year's limitation for the suit. The present Code of 1908 under Order XXI, rule 63, omits references to rules 60, 61 and 62 of Order XXI which correspond to old sections 280 to 282 and uses the expression "the party against whom an order is made" (on the claim preferred). The question is whether where a Court has refused investigation under the proviso to rule 58, it can be said that an order

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(1) (1880) I.L.R., 8 All., 504. (2) (1908) I.L.R., 31 Mad., 5.

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has been made against that party on the claim petition preferred by him. I think no order has been made on the claim preferred under those circumstances, but only an order refusing to make any order on that claim petition either for or against the petitioner. In *Subba Aiyar v. Subba Aiyar*(1), decided by my learned brother and myself, we thought it unnecessary to consider whether the provisions of the new Civil Procedure Code and the new Limitation Act were intended to, and could, take away the right of suit under the general law which the plaintiff had till 31st December 1908 where the Court refused to investigate the claim petition which he had preferred on an attachment. In *Narasimha Chetty v. Vijiapala Nainar*(2), the order which was held to have become conclusive after one year was as follows:—"The claim is based on a sale-deed dated a fortnight before the attachment. I find that the claim has been unnecessarily delayed and dismiss it without investigation. Order XXI, rule 58 (1) proviso." In *Ponnusami Pillai v. Samu Ammal*(3), the order was "Application comes late and is rejected." The learned Judges SESHAGIRI AYYAR and BAKEWELL, J.J., refused to accept Mr. Devadoss's contention that as there was no investigation, the one year rule did not apply. The learned Judges remarked that "the contention came too late in the day" and they quoted *Narasimha Chetty v. Vijiapala Nainar*(1), and *Subba Aiyar v. Subba Aiyar*(1), in support. But as I have said already, *Subba Aiyar v. Subba Aiyar*(1) did not decide the question as it was considered unnecessary to decide it for the purpose of that case. In *Thithikutti Umma v. Thaluthodi Chekkamutti*(4) the order on the claim petition was that the claim would be referred to in the sale proclamation. The claim was neither rejected nor dismissed expressly in that case. OLDFIELD, J., and myself held that there was no order passed against the claimant under those circumstances as "no decision regarding the claim was reached". I think the presence or absence of the words "rejected or dismissed" is immaterial provided that it is clear that what the Court substantially intended to do was to refuse to investigate the claim under the powers given to it by the proviso to rule 58, Order XXI. I am inclined to hold that in this case there was no order on

(1) (1915) 31 I.C., 250.

(3) (1916) 31 M.L.J., 247.

(2) (1916) 2 L.W., 206.

(4) Second Appeal No. 1086 of 1916.

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the claim against the claimant but only an order refusing to pass any order on his petition either for or against the claimant and that therefore Order XXI, rule 63, does not apply to such an order. But seeing that the decisions in *Narasimha Chetty v. Vijiapala Nainar*(1) and *Ponnusami Pillai v. Samu Ammal*(2) seem to be against that view and that there are numerous decisions of the Calcutta High Court all of which (if I may be permitted to say with respect) cannot be reconciled with one another, I think that the question whether the order Exhibit V in this case was an order passed on his claim petition against the plaintiff so as to preclude him from bringing a suit after one year to establish the rights which he sought to have investigated by the Court in the claim petition should be considered by a Full Bench and I agree to the reference proposed by my learned brother. I do not think that the mention in the order of direction to the ministerial department of the Court to proclaim the fact of the making of the claim to intending bidders is relevant in the consideration of this question.

ON THIS REFERENCE

P. Narayanamurti for the appellant.—Both the questions must be answered in the affirmative. Exhibit V is an order as contemplated by Order XXI, rule 58, Civil Procedure Code. There was an investigation in the case. The proviso to Order XXI, rule 58, Civil Procedure Code, does not apply as there was no delay in filing the claim; it was filed early enough, but there was a long delay of 10 months in re-filing the petition. The claim petition was actually dismissed by the order in question. Supposing there was no investigation, but a rejection under the proviso, still Order XXI, rule 63, Civil Procedure Code, will apply to such an order. See the difference in wording between the section 283, Civil Procedure Code of 1882, and Order XXI, rule 63, Civil Procedure Code (V of 1908) and see *Narasimha Chetty v. Vijiapala Nainar*(1), *Ponnusami Pillai v. Samu Ammal*(2), *Nogendra Lal Chowdhury v. Fani Bhuran Das*(3) and *Jugal Kishore Marwari v. Bejoy Krishna Mukherjee*(4). Article 11 of the present Limitation Act is wider than the article 11 of the previous Limitation Act.

(1) (1915) 2 L.W., 206.

(3) (1918) 44 I.C., 265 at p. 266.

(2) (1916) 31 M.L.J., 247.

(4) (1912) 16 C.W.N., 882.

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A. Krishnaswami Ayyar for the first respondent.—Both questions must be answered in the negative. The order is one refusing investigation. Such an order is not “an order passed against a person.” The decisions under the old Code bear out this view. In such cases the Court does not exercise its jurisdiction or entertain the claim petition. Refusal to investigate is not negating the right or rejecting the claim so as to compel the claimant to file a suit. There is no order for or against the claimant. In such cases he may have to file a suit. Order XXI, rule 63, says that the order shall be conclusive. An order refusing to investigate cannot be called a conclusive order. The form of the suit that has to be brought under Order XXI, rule 63, also shows that there must be an order negating a proprietary right. There is none such here. The wording of article 11 of the present Limitation Act was referred to. Order XXI, rule 58, says that the Court shall proceed to investigate. Hence there must be an investigation. The proviso to Order XXI, rule 58, means that the Court may in some cases not be willing to investigate. There is really “no order” referred to in the proviso. Order XXI, rules 60, 61 and 62, Civil Procedure Code, refers to “orders”. The order now passed is not one to the effect that the property is liable to be attached irrespective of the claim. The mention of Order XXI, rule 58, is only to include cases of default in prosecution of claim petitions as to which there was a difference of opinion under the Civil Procedure Code of 1882. The meaning of the words “order against” is given in *Venkapa v. Chenbasapa*(1).

K. C. Gopaladesikan followed and referred to *Syed Mahomed Afzul v. Kanhya Lal*(2). Dismissal for default is not an order on investigation: *Sarala Subba Rau v. Kamsala Timmayya*(3), *Kunj Behari Lal v. Kandh Prashad Narain Singh*(4), *Alwar Iyengar v. Zelleveger*(5) and *Sarat Chandra Bisu v. Tarini Prasad Pal Chowdhry*(6). Though the extent of the enquiry need not be scanned, there must be some enquiry: *Sardhari Lal v. Ambika Pershad*(7), *Jugal Kishore Marwari v. Bejoy Krishna Mukherjee*(8), *Gokul v. Mohri Bibi*(9).

- (1) (1880) I.L.R., 4 Bom., 21 at p. 23. (2) (1865) 2 W.R., 263.
(3) (1908) I.L.R., 31 Mad., 5. (4) (1907) 6 C.L.J., 362.
(5) (1899) 8 M.L.J., 175 at p. 177. (6) (1907) 1 L.R., 34 Cal., 491.
(7) (1888) I.L.R., 15 Calc., 521 (P.C.). (8) (1912) 16 C.W.N., 882.
(9) (1918) 16 All. L.J., 256.

P. Narayanamurti in reply.—Article 11 of the Limitation Act does not contain the words “decided against”. Compare the wording of article 15 of the Limitation Act of 1871.

The Court delivered the following OPINIONS :—

WALLIS, C.J.—The general policy of these provisions of the Code, as explained by the Judicial Committee in *Sardhari Lal v. Ambika Pershad*(1) is to secure the speedy settlement of questions of title raised at execution sales. Section 283 of the Codes of 1877 and 1882 only gave a right of suit to the party against whom an order had been passed under sections 280, 281 or 282, and did not provide for the case where the Court under section 278 refused to investigate the claim on the ground that it had been designedly or unnecessarily delayed. In such cases, section 283 failed to provide for the speedy settlement of the questions of title raised by the claim. The legislature would appear to have intended to supply this omission when in rule 63 of Order XXI of the present Code it conferred the right of suit in general terms “where a claim or an objection is preferred” upon “the party against whom an order is made,” instead of limiting it, as in section 283, to cases in which an order had been passed under rules 60, 61 and 62 (sections 280, 281 and 282 of the old Code). Where a claim or objection is preferred under rule 58 (formerly section 278), and the Court rejects it under the proviso to that rule on the ground that it was designedly or unnecessarily delayed, the unsuccessful claimant or objector in my opinion clearly comes within the words “the party against whom the order is made”. Rule 63 does not speak of any party but of the party against whom an order has been made, and assumes that, where a claim or objection is preferred under rule 58 (section 278), there must always be a party against whom an order is made within the meaning of the rule. I cannot agree with the suggestion in *NAPIER, J.’s Order of Reference* that the change in the language of rule 63 was due merely to the altered scheme of the Code. If no change had been intended, rules 60, 61 and 62 would simply have been substituted in rule 63 for sections 280, 281 and 282 in the corresponding section 283 of the former Code. We are bound, I think, to

(1) (1888) I.L.R., 15 Calc., 521 at p. 525 (P.O.).

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give effect to the clear intention of the legislature to widen the scope of the rule in accordance with the general policy of this legislation as explained by the highest tribunal. A claimant, who comes forward too late in the day to entitle him to have his claim investigated having regard to the proviso in rule 58, none the less raises a question of title with regard to the attached property; and there is nothing unfair in depriving him owing to his laches of the chance of getting a provisional decision in his favour on his claim petition and requiring him to proceed to assert his title by suit within the shorter period of limitation prescribed when questions of title are raised with regard to attached property. I accordingly agree with *Narasimha Chetty v. Vijapala Nainar*(1) and *Ponnusami Pillai v. Samu Ammal*(2). As regards *Thithikutti Umma v. Thalathodi Chekkamutti*(3), the attention of the Court was not called in that case to the alteration in the language of rule 63 on which my opinion is based. Our answer to the first question is that the case comes within the terms of Order XXI, rule 63. As regards the second question, assuming SADASIVA AYYAR, J., appears to hold in his Order of Reference, that the Zamindarini's claim in E.A. No. 3307 of 1910 was not finally rejected by the order passed on it on 23rd December 1910, we think that the subsequent order Exhibit V was an order made against the Zamindarini within the meaning of rule 63, and was consequently an order covered by article 11 (1) of the Limitation Act of 1908. Though the order only was that the allegations of the Zamindarini would be notified to bidders, we think it amounted, and was understood to amount, to a rejection of the claim on the ground that it was filed too late.

OLDFIELD, J. OLDFIELD, J.—I agree.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I entirely agree. The language of Order XXI, rule 63, leaves little room for doubt that all orders which negative the right set up by the claimant or the decree-holder are within the rule. *Prima facie* the decree-holder attaches the property as that of the judgment-debtor. The law compels him to give certain information to the Court before the proceedings in attachment are taken. When this requirement is satisfied unless a third party intervenes the sale would be effected

as if the property belonged to the judgment-debtor. When a claim is preferred, the usual prayer is that the attachment should be raised as the property does not belong to the judgment-debtor but belongs to the claimant. On the presentation of such a petition, if the order is not that the property be released from attachment, it must be taken to be an order against the claimant. The practice of notifying claims to intending bidders is not warranted by anything contained in the Code of Civil Procedure. It often leads to the depreciation in value of the property to be sold and is not calculated to advance the right of the claimant in any way. Consequently, it seems to me that the procedure adopted by some of the Subordinate Courts of notifying objection by claimants at the time of the sale without expressing any decision upon those objections, should be discouraged. Although the practice is not a salutary one, I fail to see how this procedure can be construed as not having the force of giving a decision against the claimant. His right to raise the attachment must be deemed to have been negatived when the property was ordered to be sold without releasing it from attachment. Therefore, in my opinion, an order on a claim petition which expresses no final judgment upon the right put forward but simply directs the sale after notifying the claim, is an order against the claimant and he is bound to institute a suit under article 11 of the Limitation Act. The history of the legislation has been reviewed in the judgment of the learned CHIEF JUSTICE and I do not propose to deal with that question. I agree to the answers proposed.

N.R.

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(1) (1915) 2 L.W., 206.

(2) (1916) 31 M.L.J., 247.

(3) Second Appeal No. 1986 of 1916.

PRIVY COUNCIL.*

1918.
May 10 and
July 11.

VEERABASAVARAJU PANTULU (PLAINTIFF),

v.

BALASURYA PRASADA RAO PANTULU (DEFENDANT).

[On appeal from the High Court of Judicature
at Madras.]

Hindu Law—Adoption—Assent of nearest sapindas not sought—Consent of remote sapindas whether sufficient—Knowledge that sapinda will refuse, whether a good ground for not asking for his consent.

In the Dravida country an adoption by a Hindu widow having no authority from her deceased husband to adopt, made with the consent of remote sapindas but without asking for the consent of the nearest sapindas is invalid.

It is immaterial that the widow knew that the nearest sapindas if asked for their consent would have refused it.

Collector of Madura v. Mootoo Ramalinga Sathupathy (1868) 12 M.I.A., 397, (400, 440, 411); *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (1876) I.L.R., 1 Mad., 174 (190); s.c., L.R., 4 I.A., 1 (13, 14) and *Raghunada Deo v. Brozo Kishore Patta Deo*, (1876) I.L.R., 1 Mad., 69; s.c., L.R., 3 I.A., 154, discussed and followed.

Quære, whether the widow of a co-parcener, who died in or before 1853, could adopt a son in 1896 after the joint family property had vested in the widow of his brother's son?

APPEAL No. 119 of 1916 from a judgment and decree (17th April 1914) of the High Court at Madras, which affirmed a judgment and decree (1st May 1911) of the Court of the District Judge of Ganjām.

The main question for determination on this appeal was whether the adoption of the first appellant Veera Basavaraju Pantulu, by Narasayamma, a Hindu widow, as the son of her deceased husband Pedda Sanyasiraju was a valid adoption. The fact of the adoption is not now in dispute.

The parties to the litigation were Hindus governed by the Mitakshara Law. One Perayya Lingam was the father of Sanyasiraju and Basavaraju; they lived as members of a joint Hindu family. Sanyasiraju died in 1840 leaving Narasayamma, his widow, and Perayya Lingam died in 1846 leaving his son

* Present:—Lord SUMNER, Lord PHILLIMORE, Sir JOHN EDGE and Mr. AMEEB A.L.J.

Basavaraju who died in 1878, leaving a son Venkata Viswanadha Rao who became the last male owner of the joint family property; he died in 1880, and his widow Mahalakshamma took her life estate in accordance with Hindu Law. She died in December 1908. Thereupon Veera Basavaraju Pantulu on the one side, and Balasurya Prasada Rao and Lakshmi Prasada Rao on the other side, became the rival claimants to the estate, each side claiming to represent the reversionary inheritance on the death of Mahalakshamma. (See pedigree at page 1005). The revenue authorities upheld the claim of the last-named claimants in September 1909. Veera Basavaraju's claim as reversioner was based on the allegation that he is adopted son of Sanyasiraju, the paternal uncle of the last male owner, having been adopted by Sanyasiraju's widow Narasayamma in February 1896. The case of the other claimants is that they, as grandsons of the grand-uncle of the last male owner, were the nearest reversioners, the adoption of Veera Basavaraju being, they contended, invalid.

The first appellant (plaintiff) instituted the present suit on 22nd December 1909 against Balasurya Prasada Rao and Lakshmi Prasada Rao. In his plaint he set up his adoption in 1896 by Narasayamma with the consent of the sapindas of her deceased husband, and as the next reversioner of Viswanadha Rao, the last male owner, he claimed all the properties in dispute. Before the suit was heard he set up an alleged authority to adopt given by her husband to Narasayamma, his adoptive mother.

The defendants (respondents) pleaded (*inter alia*) that Narasayamma's husband Sanyasiraju, his father Perayya Lingam and his younger brother Basavaraju formed a joint Hindu family subject to the Mitakshara Law; and after Sanyasiraju's death his interest in the joint family properties passed eventually to Basavaraju by survivorship; that all the properties in suit were joint family properties vested at the time of the alleged adoption in the widow of the last male owner, and consequently Narasayamma was not legally entitled to make any adoption. They also denied the alleged consents of the sapindas, and contended that in any case the consents obtained were not in law sufficient to make the adoption valid.

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The sapindas of Sanyasiraju, Narasayamma's husband, whose consent was desirable, in the order of their nearest in relationship, were as follows :—

Class (1) consisted of the paternal uncle's son (the father of the respondents, a person of the same name as Narasayamma's husband) and the respondents themselves. These formed a joint family and the consent of the father only was necessary. He died before the present dispute arose.

Class (2) contained three persons, Veeresa Lingam, Mallayya and China Brahmayingam who were great-great-grandsons of the paternal great-grandfather.

Class (3) consisted of three persons named Ayyapparaju, Mallikarjunudu and Narayanamurti. They were the great-great-grandsons of the paternal great-grandfather.

Class (4) consisted of only one person named Borrayya Bhushana Rao who was the paternal great-great-grandfather's great-great-grandson.

Class (5) consisted of two persons named Veera Venkata Konayya and Veerabhadra Prasada Rao who were the great-great-grandsons of the great-great-grandfather.

The plaintiff claimed to have obtained the consent of seven of the sapindas, namely, three in the second class, three in the third and one in the fourth. The defendant contended that he only obtained three consents.

On the points material to this appeal the District Judge, Mr. (now Mr. Justice) Sadasiva Ayyar, found as follows:—(1) Sanyasiraju did not give authority to his wife to make any adoption: (2) Defendants' father was not applied to and did not consent in 1882 as sapinda, to Narasayamma's making an adoption; but he might have consented to give the first defendant in adoption to her in 1882: (3) He was never applied to after 1882 to give any consent to any adoption especially to the adoption of the first plaintiff or any boy other than first defendant, and so there could be no refusal on his part of any such application: (4) Narasayamma obtained the consent of only three remote reversioners and not of seven persons, those three being in the third class, two of them (first plaintiff's father and uncle) being brothers: and (5) The consents of these three remote reversioners (first plaintiff's father and uncle and

Ayyapparaju) were given independently of Narasayamma's representation that she had her husband's consent because they expressly say so in the registered consent deeds A and A-1.

The District Judge also held, relying on *Adivi Suryaprakasa Rao v. Nidamarty Gangaraju* (1), that Narasayamma had no power to make any adoption after the death of the last male member in her husband's family, viz., Viswanadha Rao, and the estate had vested in his widow Mahalakshamma, and that the adoption she had made was invalid as having been made without the consent of Mahalakshamma.

As to the consent of sapindas to an adoption he referred to the principles discussed in the *Rammad case* (*Collector of Madura v. Moottoo Ramalinga Sathupathy*) (2) by the Judicial Committee, and in *Jonalagabba Venkamma v. Subramanian* (3), and cited a number of cases decided on the subject by the High Court and remarked on them as follows in his judgment:—

"In the light of the legal principles laid down in the above cases, I must hold that Narasayamma having failed to apply for the consent of the defendants' father (defendants' father's presumed consent in 1882 to give first defendant in adoption having been given fourteen years before first plaintiff's adoption and before first defendant's elder brother died is of no use) and she having failed also to apply for the consent of the reversioners of the next degree, the consent of the remoter reversioners was quite insufficient to validate first plaintiff's adoption. Though the reversioners need not assemble at a formal meeting, I cannot hold that in this case there was any family council (in any sense) at which the majority of reversioners in the degree of their importance gave their consent to the adoption as beneficial to the family after considering all the circumstances and after all the nearer reversioners were consulted. As to the precise ratio of the weight to be given to the opinion of the nearer reversioner as compared with the opinion of a remoter reversioner, no definite rule has been or could be laid down. The defendants' father's warning to Narasayamma not to adopt (Exhibit D-2) was a proper warning based upon his *bona fide* view of the law that she (a maintenance widow who had even promised to Mahalakshamma not to make an adoption) had no legal right to make an adoption after all the male members of her husband's undivided family had died. As to the *bona fides* of the consents of the three sets of reversioners,

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(1) (1910) I.L.R., 33 Mad., 228.

(2) (1868) 12 M.I.A., 397.

(3) (1907) I.L.R., 30 Mad., 50; s.c., L.R., 34 I.A., 22.

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if I am permitted to discard all legal presumptions, I should say that the first plaintiff's father and his brother and Ayyapparaju merely pretended to have acted solely for the spiritual benefit of Narasayamma's husband in giving their consents and that their real object was to injure defendants' father and defendants and to benefit the son of one of the three consenting reversioners (who was the brother of another). Narasayamma left her husband without such spiritual benefit for fifty-six years before the adoption and even the adoption was not of much immediate spiritual use as first plaintiff could not perform any *sraddha* till he got his *Linga Dharana* which took place only after Narasayamma's death long after the adoption."

The District Judge consequently made a decree dismissing the suit. On appeal the High Court (Sir C. ARNOLD WHITE, C.J., and OLDFIELD, J.) in their judgment said:—

"The effect of the adoption, if it is valid, will be to make the first plaintiff a nearer reversioner, as son of his adoptive father, Pedda Sanyasiraju, Viswanadha Rao's paternal uncle. The learned District Judge has held it invalid on the ground that it was not made either with the authority of Pedda Sanyasiraju or with a legally sufficient consent by sapindas."

"We are prepared to accept these findings and we, therefore, need not deal with his remaining ground of decision, that in any case no adoption made by the widow of Pedda Sanyasiraju, after the last male member of the family of Viswanadha Rao had died and the estate had vested in his widow, could justify the plaintiff's claim. The learned District Judge has dealt at length with the facts, and it is clear that (1) Narasayamma, his widow, took no steps to adopt for at least thirty years from the later date, alleged for the death of Pedda Sanyasi by the plaintiff; (2) she then, very possibly owing to dissatisfaction with her position on the succession of Mahalakshamma, widow of the last male holder of the estate, merely sent Exhibit S to the Collector; (3) she formally abandoned her intention to adopt in 1890 by Exhibit Va in consideration of the continuance of her very substantial allowance; (4) she revived that intention in 1895 only after Mahalakshamma had taken steps towards an adoption, apparently because there was no indication that any member of her own and the first plaintiff's branch of the family would be chosen and her opportunities for deriving advantage from the estate might be diminished; (5) she then adopted the first plaintiff, though he would not be capable of performing her husband's ceremonies for over twelve years. The learned District Judge was

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apparently deterred by the first part of the *dictum* of the Privy Council in the penultimate paragraph of *Vallanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(1) from holding that the foundation of the widow's motives in no legitimate desire for her husband's spiritual benefit or the perpetuation of his family, but in caprice and personal advantage, was not decisive. We need not consider whether the conclusion of that *dictum* did not authorize him to do so, nor need we go through the cases to which he has referred. For, though the circumstances enumerated imposed a special obligation on Narasayamma to place her conduct beyond suspicion, it is plain that, having failed to consult the first defendant's father, the nearest reversioner, and to obtain the consent of any but three comparatively remote sapindas, of whom two were interested directly in approving her project, she made no such *bona fide* effort to take the opinion of the sapindas or a majority of them, as the law requires. We accordingly agree with the learned District Judge that the adoption was made without the necessary authority and was therefore invalid."

The High Court accordingly dismissed the appeal.

ON THIS APPEAL—

De Gruyther, K.C. and *J. M. Parikh* for the appellants contended that the Courts below had wrongly held that the consents of the sapindas in the second class were not proved; and that those in the third class proved by Exhibits A and A-1 were insufficient to enable Narasayamma to make a valid adoption. As to the consent of the defendants' father probably after asking him in 1882, she was deterred from asking him again in 1894 because she knew he would refuse. In any case the evidence on the record proved the consent of seven sapindas, and was sufficient, it was submitted, to support the adoption. Reference was made to the *Collector of Madura v. Mootoo Ramalinga Sethupathy*(2), *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(1), *Venkatakrishnamma v. Annapurnama*(3) and *Parasara Bhattar v. Rangaraja Bhattar*(4). The question was one of mixed law and fact, and concurring findings were, therefore, not conclusive

A. M. Dunne, K.C. and *B. Dube* were not called upon.

(1) (1876) I.L.R., 1 Mad., 174 (190); s.c. L.R. 4 I.A. 1 (13).

(2) (1868) 12 M.I.A., 397 (400).

(3) (1899) I.L.R., 23 Mad., 486.

(4) (1880) I.L.R., 2 Mad., 202.

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The JUDGMENT of their Lordships was delivered by Mr. AMEER ALI.—This appeal arises out of a suit brought by the plaintiff, Basavaraju, on the 22nd December 1909, in the Court of the District Judge of Ganjam, in the Madras Presidency, for possession of considerable landed property by virtue of his right as the nearest reversioner by adoption to one Viswanadha Rao, the last male owner. And the question for determination by this Board is whether the adoption under which he claims title is valid under the Hindu Law. Viswanadha died in 1880, and since his death the properties were held by his widow, Mahalakshamma, for a Hindu widow's estate until her decease in 1908, when the defendants, who are admittedly the grandsons of Viswanadha's paternal grand-uncle and who, on failure of the adoption alleged by the plaintiff, would be entitled as the nearest reversioners, took possession of the same, and their possession was confirmed by the revenue authorities, before whom the question now in dispute was first litigated.

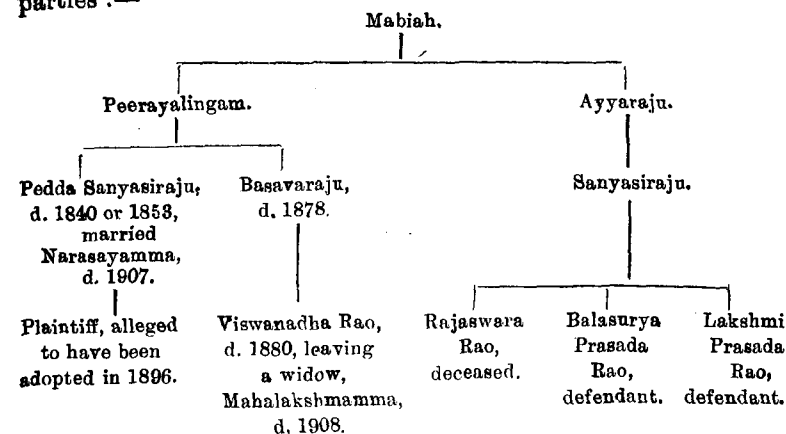
The plaintiffs' claim is based on the allegation that Basavaraju, the father of Viswanadha, and one Pedda Sanyasiraju were two brothers, and that Pedda predeceased Basavaraju, leaving a widow named Narasayamma, who in 1896 adopted him as a son to her husband. He is, thus, he asserts, nearer in degree as the paternal uncle's son to Viswanadha and has, therefore, a title superior to that of the defendants to the succession to his estate.

The *Ramnad Case* [Collector of Madura v. Moottoo Ramalinga Sathupathy(1)] established the proposition that, under the Dravidian branch of the Mitakshara Law, in the absence of authority from her deceased husband a widow may adopt a son with the assent of his male agnates in the Dravida country, where such law is in force. The plaintiff, accordingly, placed his adoption on two grounds—first, that Narasayamma had direct authority from her husband to adopt a son to him; and secondly, that his own adoption was made with the authority of the husband's kindred.

After the institution of the suit, other parties, who had acquired interest in the properties in dispute from the plaintiff or

(1) (1868) 12 M.I.A., 397.

from his guardian, were joined as co-plaintiffs; it is, however, unnecessary to refer to them in this judgment. The following pedigree will explain the exact relationship of the contesting parties :—



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The defendants challenged both the power of the widow to make any adoption and the validity of the assent or authority with which it was alleged to have been made. They contended that under the circumstances, which will be detailed later, Narasayamma had no power to make an adoption to her deceased husband, and that in any event the assent of the sapindas, on which its validity was conditioned, was not legally sufficient. The District Judge, before whom the case came for trial in the first instance, in an able judgment in which he examined the facts as well as the law applicable to those facts with considerable care, came to a conclusion wholly adverse to the plaintiff. He held in substance that the plaintiff had failed to establish the alleged authority from the husband to the adopting widow, and that the consent of the sapindas on which the claim was rested was not sufficient. The learned Judge further held that Peeraya and his two sons Pedda and Basavaraju formed a joint undivided Hindu family; that Pedda died in the lifetime of his father somewhere before 1842; that on his death his interest in the joint family property vested by right of survivorship in Peeraya and Basavaraju; and that he left no separate property to which his widow could succeed and hold separately. He held that, in this condition of the joint family, the power and capacity of his widow to make any adoption to him came to an end when the joint family property vested in Viswanadha's widow. He

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accordingly dismissed the plaintiffs' suit. The High Court of Madras on the plaintiffs' appeal did not consider it necessary to enter upon a consideration of this latter branch of the learned Judge's decision relating to Narasayamma's power to make the adoption. They, however, concurred with the First Court in its other findings, and in agreement with the Trial Judge, held that the sapindas' assent was not sufficient in law to validate the adoption in question, and dismissed the appeal.

The plaintiffs have now appealed to His Majesty in Council, and it has been strenuously urged on his behalf that the lower Courts have wrongly applied the law to the present case. As the Trial Judge has in his judgment fully set out the facts, their Lordships are relieved of the necessity of stating them in any detail. They propose, therefore, to refer only to some salient points in the history of this family. It appears that Peerayalingam, the grandfather of Viswanadha, died in 1846, leaving him surviving his widow Veyamma, who was the owner in her own right of the greater part of the property which forms the subject-matter of this litigation. The plaintiffs allege that Pedda died in 1853, whilst the defendants place his death so far back as 1840. As already stated, the Trial Judge has found on the evidence that the latter date represents approximately the real date of his death. The finding is that he died some years before his father's death in 1846. Veyamma died in 1855, when the entire family estate vested in Basavaraju, the surviving son of Peeraya. He died in 1878, leaving a son Viswanadha, who survived him only two years. On his death his widow succeeded to the estate, and held it as a Hindu widow until 1908. Narasayamma, the widow of the predeceased co-parcener, had become, on the death of her husband, entitled to maintenance, which she received from the estate until her death in 1907. Peerayalingam, the grandfather of Viswanadha, had a brother named Ayyaraju; his son was also called Sanyasiraju and the present defendants are the sons of Sanyasi. At the time of the alleged adoption, this Sanyasi, who might be conveniently called Sanyasi II, was alive. Upon this state of facts, the two questions of law which the High Court had to determine were exactly the two which the District Judge has discussed and decided. First (and this went to the very root of the plaintiffs' title), whether Narasayamma had,

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under the circumstances of Peerayalingam's family, any power in 1896 surviving in her to make the adoption; secondly, if she had, whether the assent that is put forward is sufficient. As already observed, the High Court have abstained from expressing an opinion on the first point.

Assuming that Narasayamma had, when she purported to adopt the plaintiff Basavaraju, the power to make the adoption, the question arises whether that power was validly exercised. In the absence of authority from the husband, the valid exercise of the power by a Hindu widow in the Dravida country is conditioned on the assent of her husband's sapindas. In the present case the claim is rested on the assent of seven kinsmen. The District Judge has, for convenience of reference and examination, divided the agnatic relations of Viswanadha living at the time of the alleged adoption into five groups in the order of propinquity. In the first group are included Sanyasiraju (the defendants' father) and the defendants. Sanyasiraju died in 1899; it has been found that his assent was not asked for nor given. In the second group are included three persons whose consent is said to be contained in a paper Exhibit B. Both Courts have held their signatures to be forgeries. To group 3 belong plaintiff Basavaraju's father, his paternal uncle, and a witness of the name of Ayyappa Raju. These three have certainly given their assent to the adoption.

To group 4 belonged a man named Borayya Bhusana, since deceased, who is alleged to have conveyed his assent in a letter addressed to the widow. This letter contains a general approval of her intention to make an adoption, but does not evince a consent to any specific adoption. There are several men in the remotest group who do not seem to have been approached and do not enter into the consideration of the case. The question then is whether, in the absence of authority from the husband and of the consent of the nearest sapinda, the assent of remote sapindas is sufficient to validate the exercise of the widow's power. None of the decided cases deal with the concrete question under consideration. The decision in the *Rāmnād Case* [*Collector of Madura v. Moottoo Ramalinga Sathupathy*(1)], which forms the principal authority on the validity of an adoption with the

(1) (1868) 12 M.I.A. 397.

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consent or authority of the husband's sapindas, declares in general terms the class of kinsmen among whom the consent should be sought; and the generality of the expressions has in some instances given rise to doubts. But a close examination of the judgment shows clearly to their Lordships' mind what the Board intended to indicate. Dealing first with the case of a joint and undivided family, joint in food, worship and estate, the Board observed as follows:—

"The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband is the first to suggest itself. Where the husband's family is in the normal condition of a Hindu family—i.e., undivided—that question is of comparatively easy solution. In such a case the widow, under the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no father, the consent of all the brothers who, in default of adoption, would take the husband's share would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener against their will."

There the widow had acquired some property which was held by her husband separately from the other members of the family, which is not the case in the present instance, as Pedda left no separate property. Dealing with the case of a widow so situated, Sir JAMES COLVILLE went on to say:—

"Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt, when not actually given by the husband, can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindus. Their Lordships do not think there is any ground for saying that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think that the consent of the father-in-law, to whom the law points as the natural guardian and 'venerable protector' of the widow, would be

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sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."

The decision in the *Ramnad case* [*Collector of Madura v. Moottoo Ramalinga Sathupathy*(1)] was followed and explained in *Vallanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(2), which established the following propositions: That the requisite authority in the case of an undivided family is to be sought by the widow within that family; that it is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her; and that she cannot at her will travel out of that undivided family and obtain the authorization required from separated and remote kinsmen of her husband. This being the position of a widow in an undivided family, what are the conditions imposed on her if her husband happens to die in a state of separation from his kindred? Division does not affect her personal dependence or give her an independent status to alter by her own authority the succession to the estate which she takes as the widow of her husband. She is still dependent for counsel and protection upon the nearest sapindas of her husband, who are the most closely united to him by ties of blood, or, to use the language of Hindu lawyers, by "community of corporal particles." The father of the deceased, if still alive, continues to be her "natural guardian and venerable protector." He has furthermore a direct interest in the protection of the estate, for in case of her death without leaving her surviving a daughter or the mother of her deceased husband, he has a right to the reversion. His authorization is, therefore, essentially requisite to the validity of an adoption by her to her husband. If there is no father the divided brothers take his place by virtue of the tie of blood as her husband's nearest sapindas; they become her natural guardians and the protectors of her interests. They also have an interest in the protection of the inheritance. In the absence, then, of the father the assent

(1) (1868) 12 M.I.A., 397.

(2) (1876) I.L.R., 1 Mad., 174: s.c., L.R., 4 I.A., 1.

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of the divided brothers is equally requisite for the validity of the widow's adoption. If a majority assent and one refuses, his objection may be discounted. But the absence of their consent, or in case there is only one, of his consent, cannot be made good by the authorization of distant relatives remotely connected whose interest in the well-being of the widow or the spiritual welfare of the deceased, or in the protection of the estate, is of minute character, and whose assent is more likely to be influenced by improper motives. In this connexion it seems desirable to bear in mind the following observations of the Board in *Raghunada Deo v. Brozo Kishore Patta Deo*(1):—

"But it is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the courts to keep the power strictly within the limits which the law has assigned to it."

It is true that in the judgment of this Board in the *Ramnada Case* [*Collector of Madura v. Mootoo Ramalinga Sathupathy*(2)] some expressions are used which might imply that the question of reversionary interest forms only a secondary consideration in determining what sapindas' assent is primarily requisite, but the remarks that follow as to the right of co-parceners in an undivided family to consider the expediency of introducing a new co-parcener, coupled with the observations of the Board in the subsequent case *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(3) show clearly that rights to property cannot be left out of consideration in the determination of the question.

In the latter case *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(3) the Board observe as follows:—

"There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives, in order to defeat the interest of this or that sapinda, but

(1) (1876) I.L.R., 1 Mad., 69: s.c., L.R., 3 I.A., 154.

(2) (1868) 12 M.I.A., 397.

(3) (1876) I.L.R., 1 Mad., 174 (190): s.c., L.R., 4 I.A. (14).

upon a fair consideration of what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband."

And an eminent Hindu lawyer, dealing with the question whose consent is requisite to the validation of an adoption when the husband is separate, remarks that an adoption is more a temporal than a spiritual institution, there being no spiritual reason for adoption if the deceased left a fraternal nephew; and that the requisites of a valid adoption are all temporal; therefore, the spiritual consideration should not be allowed to influence the judgment regarding the secular essential. And he then goes on to add—

"Some light is thrown on the point by the decisions relating to alienations by widows with the assent of the next heir."—Golap Chandra Shastri, on the Hindu Law of Adoption.

The reasons which make the assent of divided brothers a requisite condition apply *mutatis mutandis* to the case of the nearest sapindas other than brothers. In the present case, Sanyasiraju II was unquestionably the nearest sapinda to Pedda at the time of Narasayamma's adoption. He was also unquestionably nearest to Viswanadha. The case for the plaintiff is that in 1882 he had given his consent to Narasayamma making an adoption, which was repeated in 1894. The Trial Judge who heard the evidence found as a fact that both allegations were false; and the High Court agree in that view. The concurrent finding of the two Courts on this point is not open to question on this appeal. Their Lordships consider, even if it were open to discussion, the reasons given by the District Judge for disbelieving the story to be conclusive.

It was argued at the bar that no application was made for the assent of Sanyasiraju II, because it was known that he would refuse. This, in their Lordships' opinion, is a futile reason for not applying for his assent.

In their Lordships' opinion this suit must fail on the second ground on which the Trial Judge decided the case, viz., that Narasayamma did not obtain the requisite assent necessary for the valid exercise of that power. Their Lordships express no disapproval of the decision of the District Judge on the first point, but, like the High Court, do not find it necessary to decide it.

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Their Lordships will accordingly humbly advise His Majesty that the decree of the High Court dismissing the suit should be affirmed and the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant.—*Edward Dalgado.*

Solicitor for the respondent.—*Douglas Grant.*

J.V.W.

PRIVY COUNCIL.*

1918,
May 30, 31,
June 3, 4,
July 1.

SURYANARAYANA AND OTHERS (PLAINTIFFS),

v.

PATANNA AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature
at Madras.]

Estates Land Act (Madras Act I of 1908) s. 3 (2) (d)—Grant in inam of an Agraharam by an ancient King—Presumption as to rights conveyed—Agraharam granted, whether an "estate"—Right of Agraharamdar to sue in ejectment in Civil Court.

There is no presumption in law that the grant of an inam by a Native Ruler prior to British rule conveyed only the *Melvaram* (revenue due to the State).

Held accordingly that a grant of an Agraharam in inam made by a Reddi King of Nellore more than 400 years ago and validated under section 15 of Madras Regulation XXXI of 1802 conveyed both the *Melvaram* and *Kudivaram* rights.

Held further that the Agraharam was not an "estate" within section 3 (2) (d) of the Madras Estates Land Act and the Agraharamdar was entitled to sue the tenants in ejectment in a Civil Court.

CONSOLIDATED APPEAL No. 55 of 1916 from a judgment and three decrees (9th October 1913) of the High Court at Madras, which affirmed the judgment and decrees (4th March 1912) of the District Judge of Kistna, which reversed the judgment and decrees (18th April 1911) of the Additional District Munsif of Masulipatam.

The suits in which the above decrees were made, and which gave rise to the present appeals, were suits for ejectment brought

* Present: Lord ATKINSON, Sir JOHN EDGE, and Sir WALTER PHILLIMORE, *Bart.*

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in the Civil Court by the appellants (plaintiffs) against the respondents (defendants). They related to the inam village of Korragunta, of about two-thirds of which the plaintiffs were owners including certain lands referred to as minor inams. The defendants were their lessees, but their leases had expired. The plaintiffs' case was that the lands in suit were their Sarva Agraharam Inam lands in which they possessed absolute rights of ownership, under their grant, made by one of the Reddi Kings in 1373 to their predecessors in title. The terms of the grant could not be proved; but it was confirmed by an absolute deed of gift in 1752, and so recognized by the British Government.

The main defence raised in the suits was to the effect that the lands in dispute formed an "estate," or part of an estate under the Madras Estates Land Act (Madras Act I of 1908), and consequently the jurisdiction of the Civil Court was excluded by the Act, and that the defendants were entitled to retain possession of the lands notwithstanding that their leases had expired.

The Munsif held that this defence was not established and made a decree in favour of the plaintiffs in each suit.

The District Judge reversed those decrees and dismissed the suits.

On appeal by the plaintiff the High Court (SADASIVA AYYAR and SPENCER, JJ.) dismissed the appeals, and made decrees directing that the plaints be returned to the plaintiffs for presentation to the Revenue Court.

The question whether the lands in suit or any of them formed part of an "estate" within the meaning of the Madras Estates Land Act, 1908, depended on the construction of section 3, sub-section (2), clause (d) which defines "estate" as meaning,

"Any village of which the land revenue alone has been granted in inam to a person not owning the "kudivaram" thereof provided that the grant has been confirmed, or recognized by the British Government, or any separated part of such village."

With that should be read the last paragraph of section 8,

"Notwithstanding anything contained in this section, where, before or after the commencement of this Act, the 'kudivaram' interest in any land comprised in an estate falling within clause (d) of sub-section (2) of section 3, has been or is acquired by the inamdar, such land shall cease to be part of the estate."

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"Kudivaram" is a Tamil word which has no equivalent in Telugu, the language of the country where the parties to the present suits live, and is not defined in the Act. It means, literally, the cultivator's share in the produce of land as distinguished from "melvaram," the share which the landlord receives as rent. The judgments of the High Court appealed from will be found in the report of the case in *Suryanarayana v. Patanna*(1).

ON THIS APPEAL,

De Gruyther, K.C. and *Kenworthy Brown* for the appellants contended that the respondents claim to possess rights of permanent occupancy—whether by virtue of custom or otherwise had not been established—and they had no rights in the lands in suit apart from the leases in which their tenancies originated, which leases had expired; nor has any fact been proved which excludes the jurisdiction of the Civil Court to try these suits. Neither the village in suit, nor the appellants' part thereof, was an estate within the definition contained in section 3, sub-section (2), clause (d) of the Madras Estates Land Act (I of 1908). The onus was on the respondents, and there was no evidence that at the time of the grant the land was occupied by tenants or cultivated. In such circumstances, it could not therefore be presumed that the grant was only of the revenue. No such general presumption was laid down in *Ravji Narayan Mandlik v. Dadaji Bapuji Desai*(2). The view of the High Court is not supported by the authorities relied on. Reference was made to *Rajaya v. Balkrishna Gangadhar*(3); *Vaman Janardan Joshi v. Collector of Thana*(4); *Bhadrayya v. Bapayya*(5); *Cheekati Zamindar v. Ranasooru Dhora*(6); and *Narasimhulu v. Narasimhulu*(7). Cases in which the grant was for services are distinguishable. The fact that the village was recorded as a "sarva agraaharam" strongly supports the appellants' case. There is no authority for the proposition that the ancient Hindu rulers did not own the soil: that proposition is inconsistent with the terms of Madras Regulation XXXI of 1802; see also the Fifth Report of the Parliamentary Committee on India, Vol. II, pages

(1) (1915) I.L.R., 38 Mad., 608.

(3) (1905) I.L.R., 29 Bom., 415.

(5) (1911) 21 Mad. L.J., 803.

(2) (1875) I.L.R., 1 Bom., 523.

(4) (1869) 6 Bom. H.C., 191.

(6) (1900) I.L.R., 23 Mad., 313.

(7) (1906) 16 Mad. L.J., 333.

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84, 156, 167, 168. The lands were vacant prior to the grant of the leases to the respondents and the kudivaram was not granted to them, and was not acquired by the appellants. The exception in section 8 of the Act therefore applied. The cases of *Kadumbi Jaganatha v. Pidikiti Kutumbarayudu*(1) and *Ponnusamy Padayachi v. Karuppadayan*(2) are in the appellants' favour, and, it is submitted, were rightly decided. Reference was also made to *Virabhadrayya v. Sonti Ventanna*(3).

B. Dubé for the respondents contended that the land in suit was an "estate" within the meaning of section 3, sub-section 2 of the Madras Estates Land Act, 1908. The High Court, it was submitted, was right as to the presumption which arose. The ancient Hindu rulers were not owners of the soil, but had only a right to the royal share of the produce. Reference was made to *Mitra's "Land Law of Bengal,"* Tagore Lectures, 1895, pages 4, 6, 7, 22, 24; *Baden Powell's "The Village Community in British India,"* chap. V, sections 2, 3; and the Fifth Report of the Parliamentary Committee on India, Vol. II, pages 2, 3, 6, 8, 11, 12, 14 (as to the Northern Circars). The word "land" as used in Madras Regulation XXXI of 1802, in the Report of the Inam Commission, and in the title-deed issued by it, means either the "said land" itself, or the land revenue, according to the circumstances; see Madras Act IV of 1862. The presumption that a grant to an inamdar was of the land revenue only is well established by decisions in India. Reference was made to *Krishnarav Ganesh v. Rangrai*(4); *Vaman Janardan Joshi v. Collector of Thana*(5); *Ravji Narayan Mandlik v. Dadaji Bapuji Desai*(6); *Ramchandra Mantri v. Venkairav*(7); *Rajaya v. Balkrishna Gangadhar*(8); *Narasimhulu v. Narasimhulu*(9); *Lakshmi Narasimha Rao v. Setaramaswami*(10); *Venkata Narasimha Rao v. Subba Reddi*(11), and *Upadrasta Venkata Sastrulu v. Divi Sitaramudu*(12). The evidence showed that the land had always been under ryots; it cannot therefore be

(1) (1914) I.L.R., 39 Mad., 21 (23).

(3) (1913) 24 Mad. L.J., 659.

(5) (1869) 6 Bom. H.C., 191.

(7) (1882) I.L.R., 6 Bom., 593 (608).

(9) (1906) 16 Mad. L.J., 333.

(11) (1913) 24 Mad. L.J., 655.

(2) (1914) I.L.R., 38 Mad., 843.

(4) (1867) 4 Bom. H.C. A.C., 1 (7).

(6) (1875) I.L.R., 1 Bom., 523.

(8) (1905) I.L.R., 29 Bom., 415 (420).

(10) (1913) 24 Mad. L.J., 288.

(12) (1914) I.L.R., 38 Mad., 891.

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inferred that it was uncultivated at the time of the grant; it appears that the Reddi King was a cultivator—Kistna District Manual, pages 9, 10, 342. The grant being to Brahmans, who, however, do not appear to have been resident until 1846, the inference is that the kudivaram was not granted. The decisions under Madras Act VIII of 1865 established that a cultivator, whether or not the previous tenant was his predecessor in title, had a permanent right. The Madras Act I of 1908 was intended to prevent jirayati land from being converted into private land: and under section 135 it is to be presumed that lands are not private lands until they are proved to be so. The appellants did not acquire the kudivaram by reason of the lands being vacant; the exception in section 8 of the Act has therefore no application. Reference was also made to *Venkata Narasimha Naidu v. Dandamudi Kotayya*(1); *Cheskatu Zamindar v. Ranasooru Dhora* (2); and *Chalapathi Zamindar v. Rajalapati Somayya*(3).

De Gruyther, K.C., replied.

The JUDGMENT of their Lordships was delivered by

SIR JOHN
EDGE.

SIR JOHN EDGE.—This is a consolidated appeal from three decrees, dated the 9th October 1913, of the High Court at Madras, which affirmed decrees, dated the 4th March 1912, of the District Judge of Kistna, by which decrees, dated the 18th April 1911, of the Additional District Munsif of Masulipatam were set aside and the plaintiffs' suits were dismissed.

The suits in which these appeals have arisen were brought on the 10th July 1909 in the Court of the District Munsif of Gudivada, and were suits of ejectment from agricultural lands situate within the Agraharam village of Korraguntapalem in the Northern Circars of the Presidency of Madras. The plaintiffs are inamdars of the village, holding under an *inam* grant of 1373 from a Reddi King of the district. The defendants are agricultural tenants who, or whose predecessors in title, at various times within very recent years and before July 1908, were respectively let into possession by the inamdars under agreements for terms, which expired in each case before the suits of ejectment were brought. By these documents of tenancy

(1) (1897) I.L.R., 20 Mad., 299 (300, 301).
(2) (1900) I.L.R., 23 Mad., 318. (3) (1914) I.L.R., 39 Mad., 341.

the defendants or their predecessors in title agreed with the inamdars to quit possession of their holdings on the determination of the term for which the lands were let to them, and without claiming any jirayati right in the lands.

In their written statements the defendants alleged that the Agraharam village is an estate within the meaning of section 3 of Act I of 1908 (the Madras Estates Land Act, 1908), and in the alternative, and if the Agraharam is not an estate within the meaning of the Act, then the defendants alleged in their written statements that they or their predecessors in the holdings had been cultivating the lands long before the formation of the Agraharam, had acquired permanent rights of occupancy in the lands, and had enjoyed the lands with such rights to the present time.

In the written statements it was denied that the defendants held the lands for temporary terms as alleged in the complaints, and it was stated that if it were proved that agreements of tenancy had been executed by which the lands were to be held for terms and were to be quitted on the expiration of the terms it was not admitted that such documents were executed willingly by the defendants or their predecessors or with any knowledge of their provisions. If that statement meant anything, it must have meant that the inamdars had by fraud and the exercise of undue influence procured the execution by the defendants or their predecessors of the agreements of tenancy under which the defendants held the lands occupied by them. It may be mentioned at once that no evidence to suggest that there was any foundation of truth for that statement has been brought to the attention of their Lordships, and it may be dismissed from consideration as unfounded.

If the lands from which the inamdars are seeking to eject the defendants are part of an estate within the meaning of section 3, sub-section (2) (d) of "The Madras Estates Land Act, 1908" (Act I of 1908), as the defendants allege they are, the Civil Court had no jurisdiction to entertain the suits. The Munsif, who tried the suits, found on the evidence that the Agraharam village in question was not an estate within the meaning of the Act, and finding the other issues in favour of the plaintiffs, made a decree of ejectment and for mesne profits in each suit. The District Judge on appeal decided that the

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Agraharam village was an estate within the meaning of section 3, sub-section (2) (d) of the Act, and dismissed the suits. The High Court on appeal directed that the plaint in each case should be returned to the plaintiff in order that it might be presented to the Court of Revenue. It is from these decrees of the High Court that this consolidated appeal has been brought.

As the decision of this appeal mainly depends on the question as to whether the Agraharam village is or is not an estate within the meaning of section 3, sub-section (2) (d) of the Act, it is necessary to see how an estate for the purpose of the Act is thereby defined. Clauses (a), (b), (c), and (e) of section 3, sub-section (2), do not apply in this case, and need not be referred to. Section 3, so far as it is applicable here, is as follows:—

"3. In this Act, unless there is something repugnant in the subject or context:—

* * * * *

(2) 'Estate' means—

* * * * *

(d) Any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been confirmed or recognized by the British Government, or any separated part of such village;

* * * * *

The term 'kudivaram' is not defined in the Act. It is a Tamil word, and literally signifies a cultivator's share in the produce of land held by him as distinguished from the landlord's share in the produce of the land received by him as rent. The landlord's share is sometimes designated "melvaram." The "kudivaram interest," an expression occurring in section 8 of the Act, is apparently understood by the High Court at Madras as meaning a right to occupy land permanently.

The grant of the village by the Reddi King to the predecessor in title of the plaintiffs has not been produced. It would be unreasonable to expect that at this long distance of time it is still in existence. But that grant has been recognized and confirmed by the British Government, and the question is, was it a grant of the revenue only of the village, or was it a grant of the proprietary right in the village, that is, of the soil of the village? If it was a grant merely of the revenue obtainable from the village, the village is an estate within the meaning of

the Act. On the other hand, if the grant included the soil of the village, the village is not an estate within the meaning of the Act, and the decree of the Munsif was right and should not have been set aside.

It has been contended on behalf of the respondents that in the times when the Reddi kings ruled in this district the ownership of the soil of land in India was not in the sovereign or ruler, and that the right of the ruler was confined to a right to receive as revenue a share in the produce of the soil from the cultivator. Upon that assumption it was contended that the inam grant of 1373 could have been only a grant of the king's share in the produce of the soil, that is, that the grant was a grant of land revenue alone and did not include the kudivaram. That is an assumption which no Court is entitled to make, and in support of which there is, so far as their Lordships are aware, no reliable evidence. The fact that rulers in India generally collected their land revenues by taking a share of the produce of the land is not by itself evidence that the soil of lands in India was not owned by them and could not be granted by them; indeed, that fact would support the contrary assumption, that the soil was vested in the Rulers who drew their land revenue from the soil, generally in the shape of a share in the produce of the soil, which was not a fixed and invariable share, but depended on the will of the rulers. The assumption contended for on behalf of the respondents was not recognized in Regulation XXXI of 1802. The opening words of that Regulation are instructive; it is there recited:—

"Whereas the ruling power of the provinces now subject to the Government of Fort St. George has, in conformity to the ancient usages of the country, reserved to itself and has exercised the actual proprietary right of lands of every description; and whereas, consistently with that principle, all alienations of land, except by the consent and authority of the ruling power, are violations of that right; but whereas considerable portions of land have been alienated by the unauthorized encroachments of the present possessors, by the clandestine collusion of local officers, or by other fraudulent means; and whereas the permanent settlement of the land-tax has been made exclusive of alienated lands of every description; it is expedient that rules should be enacted for the better ascertainment of the titles of persons holding, or claiming to hold, lands exempted from the payment of revenue to Government under grants not being badshahie or

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royal, and for fixing an assessment on such lands of that description as may become liable to pay revenue to Government; wherefore the following rules are enacted for that purpose."

By that Regulation all grants for holding lands exempt from the payment of revenue made previously to the 26th February 1768 in the Northern Circars shall be deemed to be valid,

"provided that such lands may not have escheated to the State, or may not have been resumed and assessed for the public revenue since the period of those dates respectively; and provided also that the present incumbents or their ancestors did obtain and hold actual possession of the said lands previously to the dates hereinbefore specified."

The date thereinbefore specified, so far as the Northern Circars were concerned, was the 26th February 1768.

By section 15 of Regulation XXXI of 1802 it was enacted that a register should be kept in each zilla of the lands held exempt from the payment of revenue previously, in the case of the Northern Circars to the 26th February 1768 and that the registers should specify the denomination of each grant or sanad, the names of the original grantors or grantees, and the names of the present possessors, with other particulars. The earliest of such registers from which an extract was put in evidence in these suits was Mr. Oakes' Inam Register. It appears from Mr. Oakes' Inam Register that the whole of the Agraharam village of Korraguntapalem was granted by Sri Madana Vema Reddi to Ivaturi Naganaradhyulu, and had been enjoyed by his successors in title for 429 years. That entry in Mr. Oakes' Inam Register affords, in their Lordships' opinion, conclusive evidence that the grant of the Agraharam village by the Reddi King was a grant not only of the revenue but of the soil of the village, and that conclusion is supported by the dumbalas which have been put in evidence in these suits, and it is also supported by the reliable evidence in these suits showing how the inamdars dealt with the lands of the village. It is not proved, nor is there any evidence to suggest, that at the date of the grant there were any tenants in the village holding lands with any rights of occupancy by custom or otherwise.

By Act VIII of 1865 (Madras) it was enacted that inamdars and other landholders should enter into written agreements with their tenants, the engagements of the land-owners being termed patta and those of the tenants being termed muchilika. The

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CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXVIII, R. 2—*Arrest of defendant before judgment—Deposit of money in Court—Right of the plaintiff to the amount on obtaining decree—Rights of Official Receiver in insolvency and of other attaching creditors of the defendant.* The defendant was arrested before judgment and was ordered to be released from custody on his depositing in Court a sum of money sufficient to meet the plaintiff's claim in the suit, under Order 38, rule 2, of the Civil Procedure Code. There was subsequently an attachment of the money by a decree-holder and an adjudication of the defendant as an insolvent. Held, that the money was paid into Court to the general credit of the action and charged with a lien in favour of the plaintiff on the latter obtaining a decree in his favour; and that the attaching creditor's and the Official Receiver's claims were subject to this lien.

Ramiah Aiyar v. Gopalier ... (1918) I.L.R., 41 Mad., 1063

SECOND SCHEDULE, PARA. 14, CLAUSE

(c)—Award—'Illegal on the face of it', meaning of—*Patent illegality—Remittance to arbitrators for re-consideration, when permissible.* In a suit for

partition and recovery of a share in the family properties, the defendants pleaded *inter alia* that the plaintiff was born blind and was therefore not entitled to any share under Hindu Law. After issues were framed, the whole dispute was, by agreement of the parties, referred to arbitrators who, without deciding the question as to congenital blindness, passed an award to the effect that the plaintiff was entitled to a life-interest in one-fourth share subject to its becoming an absolute interest in case the plaintiff married. *Held*, on objection to the award, that the award was not so patently illegal as to come within the mischief of clause (c) of paragraph 14 of the second schedule of the Civil Procedure Code, and that the award could not be remitted to the arbitrators for re-consideration. English and Indian cases reviewed.

Madepalli Venkataswami v. Madepalli Suranna ... (1918) I.L.R., 41 Mad., 1022

CONTRACT ACT (INDIAN), SEC. 222:—See CONTRACT TO PURCHASE AND SHIP GOODS. 1060

CONTRACT, C.I.F., nature of:—See CONTRACT TO PURCHASE AND SHIP GOODS. 1060

CONTRACT TO PURCHASE AND SHIP GOODS—C.I.F. contracts, nature of—C.I.F. contract with ordinary vendor and with commission agent, difference between—

Outbreak of war, effect of—Liability of vendor and vendee—Special terms as to risk in contract, effect of—Indian Contract Act, sec. 222.] E. & Co., who were commission agents, entered into a contract with the defendants under

which they undertook to purchase and ship certain goods 'on account and risk' of the defendants, and did ship them under a C.I.F. contract on board a German ship. Owing to the outbreak of war during their transit,

the goods did not arrive at their destination until long after due time. On defendants' refusal to accept the goods, they were sold by the plaintiff, the liquidator of E. & Co., who sued the defendants for damages for breach

of contract; the defendants denied the liability. *Held*, that E. & Co. being commission agents of the defendants, were entitled, both under the special

terms of the contract and under the general law of agency embodied in section 222 of the Indian Contract Act, to recover damages for breach of contract. In an ordinary C.I.F. contract between vendors and vendees,

the tender of a bill of lading after the contract of affreightment has been dissolved by the outbreak of war is not such a tender as the vendees are bound to accept and they are not bound to pay for the goods. *Arnhold*

Karberg & Co. v. Blythe Green Jourdain & Co. (1916) 1 K.B., 495, followed. Where, however, goods are purchased from a commission agent, though he

is regarded for some purposes as a principal as any other vendor under a C.I.F. contract, yet the relationship of principal and agent still subsists for all other purposes; the true principle is that the assimilation is only to be

carried so far as is necessary to give necessary efficacy to the transaction. *Ireland v. Livingston* (1871-2) L.R., 5 H.L., 395, *Cassaboglou v. Gibb* (1882) 11 Q.B.D., 797, *Williamson v. Barbour* (1877) 9 Q.B.D., 529, referred to.

Harry Meredith v. V.K. Abdula Sahib ... (1918) I.L.R., 41 Mad., 1060

Co-sharers—Lease by majority of common land—Validity of lease—Lease, whether binding on minority—Suit by minority in ejectment—Remedy, whether limited to partition only—Form of decree.] A majority of co-sharers in samudayam

or common land cannot grant a perpetual lease of the common property.

Where a lease by some of the co-sharers is found to be invalid, the lessee is not entitled to be maintained in his possession, leaving it to those co-sharers objecting to his lease to sue for partition as their only remedy. Where the

lease is by some of the co-sharers to a person who is also a co-sharer, and the suit is by other co-sharers to eject the lessee, the proper decree to be passed is one declaring that the lease is not binding on the plaintiffs and directing

recovery of possession by the latter on their own behalf and that of the other co-sharers. *Palanisappa Chetty v. Sreemath Devasikamony Pandara Sannadhi* (1917) I.L.R., 40 Mad., 709 (P.C.), applied. *Watson and Company v. Ramchund Dutt* (1891) I.L.R., 18 Cal., 10 (P.C.), explained.

Raghavacharyulu v. Govindasari ... (1918) I.L.R., 41 Mad., 1068

HINDU LAW—Conversion of a Hindu widow to Muhammadan and marriage with a Muhammadan—Section 2 of Hindu Widows' Re-marriage Act (XV of 1856)—

Forfeiture of Hindu husband's estate.] *Held*, by the Full Bench (SESHAGIRI AYYAR, J., dissenting) that a Hindu widow, who becomes a Muhammadan, forfeits under the Hindu Law, by her re-marriage, her interest in her Hindu

husband's estate. *Murugai v. Viramakali* (1877) I.L.R., 1 Mad., 226, followed. *Moniram Kolita v. Keri Kolitani* (1880) I.L.R., 5 Cal., 776 (P.C.), distinguished; *Choolappa v. Narasamma* (1917) 23 M.L.T., 81, overruled. *Held*,

further, by WALLIS, C.J. (OLDFIELD, J., and SESHAGIRI AYYAR, J., contra)—She forfeits also under section 2 of Act XV of 1856, which only embodied the existing law on the subject. *Per* SESHAGIRI AYYAR, J.—Neither by Hindu

Law nor by section 2 of Act XV of 1856, which is only an enabling Act, does she forfeit her interest.

Vitta Tayaramma v. Chatakundu Sivayya ... (1918) I.L.R., 41 Mad. (F.B.), 1079

— — — Surety—Son's liability—Kinds of sureties—Surety for appearance, assurance and payment, meaning of—Texts of Yajnavalkya, construction of—Debt contracted prior to surety-bond—Effect on son's liability.] Where a Hindu

executed a surety-bond stating that he would make the debtor pay within two months the amount due on a promissory note already executed by the latter and that, in default of payment by the debtor, he would pay. *Held*,

that the surety was one for payment; that the sons of the surety were liable under Hindu law for the payment and that it made no difference that the money had already been lent to the creditor before the surety-bond was

executed. Suretyship, according to the texts of Yajnavalkya, is of three kinds, viz., for appearance, for assurance and for payment: in the last case the surety's sons are also liable to pay his surety-debts. According to the

Mitakshara commentary, the suretyship by way of assurance consists of a general warranty of credit, but a surety for payment is one who says, "If he does not pay, then I myself will pay". *Tukaram Bhat v. Gangaram* (1899)

I.L.R., 23 Bom., 454; *Rasik Lal Mandal v. Singheswar Rai* (1912) I.L.R., 39 Cal., 813, referred to.

Thangathammal v. Arunachalam Chettiar ... (1918) I.L.R., 41 Mad., 1071

HINDU WIDOWS' RE-MARRIAGE ACT, sec. 2:—See: HINDU LAW, CONVERSION OF A

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INDIAN MAJORITY ACT (IX OF 1875), sec. 2:—See: MUHAMMADAN LAW—DOWER.

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MALABAR LAW — <i>Right of a member of a tarwad to separate maintenance.—Female member marrying under Malabar Marriage Act (IV of 1896).—Act whether bar to her claim for maintenance from tarwad.</i>] The right of every member of a Malabar tarwad to be maintained out of the tarwad property is based on his or her right as a co-proprietor in the same and a female member of the tarwad is not deprived of such right by reason of her marriage under the provisions of the Malabar Marriage Act (IV of 1896). <i>Ammani Amma v. Padmanabha Menon</i> ... (1918) I.L.R., 41 Mad., 1075	1075
MALABAR MARRIAGE ACT :— <i>See MALABAR LAW</i> ... 1075	1075
MORTGAGE BY CONDITIONAL SALE — <i>Mortgagor in possession as tenant of mortgagee.—Rent in arrear.—Suit for rent.—Decree for rent barred by limitation.—Suit for redemption.—Mortgages, whether entitled to claim arrears of rent and interest decreed as part of price of redemption.—Abandonment of charge.—Election of remedies.</i>] In a suit for redemption, the mortgagee is not entitled to claim any arrears of rent with interest thereon in respect of the mortgaged lands which were left in the possession of the mortgagor as tenant of the mortgagee under the terms of the mortgage-deed, when the mortgagee has already sued and obtained a decree for such rent with interest and has allowed the decree to become barred by limitation, even though the arrear of rent is a charge under the deed. English and Indian cases reviewed. <i>Hewanchal Singh v. Jawahir Singh</i> (1889) I.L.R., 16 Calc., 307 (P.C.), distinguished; <i>Imdad Hasan Khan v. Bachu Prasad</i> (1898) I.L.R., 20 All., 401, referred to. <i>Naraina Rao v. Shivu Rao</i> ... (1918) I.L.R., 41 Mad., 1048	1048
MUHAMMADAN LAW — <i>Astana—Mujavar—Religious office—Competency of women to hold or succeed to such office.—Right to perform fatiha.—Rule of Muhammadan Law.</i>] A religious office can be held by a woman under the Muhammadan Law unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy and the burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion. Though there is no general rule of Muhammadan Law prohibiting a woman from holding a religious office, prohibition may arise by local usage or custom. <i>Imam Bee v. Molla Khasim Sahib</i> (1916) 5 L.W., 228, followed. <i>Shahoo Banoo v. Aga Mahomed Jaffer Bindanssem</i> (1907) 34 Calc., 118 (P.C.), referred to. Held (on the facts of the case), that a woman was competent to succeed to the office of Head Mujavar of the suit Astana. <i>Munnawaru Begam Sahibu v. Mir Mahapalli Sahib.</i> (1918) I.L.R., 41 Mad., 1083	1083
— <i>Dower, relinquishment of, by a Muhammadan woman of the age of 15, whether valid.—Indian Majority Act (IX of 1875), sec. 2.—‘act in the matter of dower’, meaning of.—Indian Contract Act, sec. 11.</i>] A relinquishment of her right to dower by a Muhammadan woman, who is a minor under the Indian Majority Act, is invalid under the Indian Contract Act (IX of 1872). To relinquish dower is not ‘to act in the matter of dower’ within section 2 of the Indian Majority Act. <i>Abi Dhunimsa Bibi v. Muhammad Fathi Uddin</i> ... (1918) I.L.R., 41 Mad., 1026	1026
RELIGIOUS OFFICE, competency of woman to hold :— <i>See MUHAMMADAN LAW</i> ... 1083	1083

patta should contain, amongst other things, “all other special terms by which it is intended the parties shall be bound”. The muchilika should, at the option of the landholders, be a counter-part of the patta, or a simple engagement to hold according to the terms of the patta. By the muchilikas which were executed by the defendants respectively or their predecessors in title the term for which the lands were let to them was specified; it was admitted that they held no jirayati rights, and they agreed to quit the lands at the end of their term. All these muchilikas were made before the coming into force of Act I of 1908, and it has not been proved that, when these tenancy agreements were entered into and the defendants or their predecessors in title were let into possession under them, any of the lands were, or had been, held by a ryot with a permanent right of occupancy.

The District Judge, in setting aside the decrees of the Munsif and dismissing the suits, and the learned Judges of the High Court in the decrees which they made, acted upon what they conceived to be a presumption of law, deduced by them from some decisions of the High Court at Madras and of the High Court at Bombay, to the effect that in the case of an inamdar it should be presumed, in the absence of the inam grant under which he held, that the grant was of the royal share of the revenue only, and they cited the decisions upon which they relied as authorities. Some of those decisions to which they referred do not, upon an examination of them, support the opinions of those Judges as to the presumption which they applied in these suits. In their Lordships’ opinion there is no such presumption of law. But a grant of a village by or on behalf of the Crown under the British rule is in law to be presumed to be subject to such rights of occupancy, if any, as the cultivators at the time of the grant may have had.

Their Lordships will humbly advise His Majesty that this consolidated appeal should be allowed with costs; that the decrees of the District Judge and of the High Court should be set aside with costs; and that the decrees of the Munsif should be restored and affirmed.

Appeal allowed.

Solicitor for the appellants : *Douglas Grant.*

Solicitors for the respondents : *Barrow, Rogers and Nevill.*

J.V.W.

SURYA-
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EDGE.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1917, MADEPALLI VENKATASWAMI (FIRST DEFENDANT), APPELLANT,
November
14 and 15.

v.

MADEPALLI SURANNA AND FOUR OTHERS (PLAINTIFF AND
DEFENDANTS 2 TO 5), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), second schedule, paragraph 14, clause (c)—
Award—'Illegal on the face of it,' meaning of—Patent illegality—Remittance to
arbitrators for re-consideration, when permissible.*

In a suit for partition and recovery of a share in the family properties, the defendants pleaded *inter alia* that the plaintiff was born blind and was therefore not entitled to any share under Hindu Law. After issues were framed the whole dispute was by agreement of the parties referred to arbitrators who, without deciding the question as to congenital blindness, passed an award to the effect that the plaintiff was entitled to a life-interest in one-fourth share subject to its becoming an absolute interest in case the plaintiff married.

Held on objection to the award, that the award was not so patently illegal as to come within the mischief of clause (c) of paragraph 14 of the second schedule of the Civil Procedure Code, and that the award could not be remitted to the arbitrators for re-consideration.

English and Indian cases reviewed.

SECOND APPEAL against the decree of P. C. TIRUVENKATA ACHARIYAR, the Additional Temporary Subordinate Judge of Rajahmundry, in Appeal Suit No. 4 of 1916, preferred against the decree of K. NARASIMHAM Garu, the Additional District Munsif of Amalapuram, in Original Suit No. 245 of 1912.

The plaintiff sued for partition and recovery of his one-fourth share in his family properties from the defendants who were the other members of the joint Hindu family. The defendants pleaded that the plaintiff was born blind and was not entitled to any share in the joint family properties under the Hindu Law. The parties agreed to the submission of the whole dispute to the arbitration of certain persons named by them. The submission was in general terms as follows:—"We have selected the undermentioned arbitrators to give an award con-

* Second Appeal No. 1461 of 1916.

sidering the facts of this suit. We have agreed to abide by the judgment to be given by a majority of them." The arbitrators, without deciding the question as to the congenital character of the blindness of the plaintiff, passed an award granting *inter alia* the plaintiff only a life-interest in one-fourth share in the family properties subject to its becoming an absolute interest in case the plaintiff married. The plaintiff objected to the award as illegal on the face of it, and the trial Court (the Court of the District Munsif) upheld the objection and remitted the award to the arbitrators for their re-consideration under paragraph 14 (c) of the second schedule of the Code of Civil Procedure, and on the failure of the arbitrators to pass a revised award as directed, revoked the arbitration, tried the suit and passed a decree in favour of the plaintiff. The first defendant appealed against the decree to the lower Appellate Court, which confirmed the decree of the Original Court and dismissed the appeal. The first defendant preferred this Second Appeal.

B. Narasimha Rao for the appellant.

P. Somasundaram for the respondents.

The JUDGMENT of the Court was delivered by—

SESHAGIRI AYYAR, J.—Plaintiff sues for a share in the family properties. The defence is that he was born blind and that consequently he is not entitled to any share under the Hindu Law. A number of issues were raised including the one on the question whether the plaintiff was congenitally blind. After the settlement of the issues, the parties agreed to refer the dispute to certain arbitrators. The agreement to refer is very general in its terms and apparently all questions of fact and of law were referred to arbitrators. Upon the reference, the arbitrators decided that the plaintiff was entitled to a life-interest in a fourth share in the properties subject to its becoming an absolute interest in case the plaintiff married.

On the submission of this award, objections were taken by the plaintiff on the ground that it was illegal on the face of it and the Court should not accept it. Both the Courts below have upheld this contention and have set aside the award.

In Second Appeal, the learned vakils have argued the case very elaborately; we have come to the conclusion that the Courts below are wrong.

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Paragraph 14 of the second schedule to the Civil Procedure Code sets out the grounds on which an award may be set aside. Clause (a) refers to the arbitrators not deciding what has been referred to them and to deciding matters not within their jurisdiction, clause (b) refers to an indefinite award. Clause (c) refers to an award whose illegality is patent upon the face of it.

In the present case, the complaint is that the award is illegal as it apparently proceeded on the ground that the plaintiff, though not born blind, was not entitled to his full rights in the family. It may be observed in passing that the rights of the plaintiff were not beyond question until the recent decision of the Judicial Committee in *Mussumat Gunjeshwar Kunwar v. Durga Prashad Singh*(1). The arbitrators were of opinion, whether rightly or wrongly, that the plaintiff should not have anything more than a life-interest in the properties. Now the point is whether this conclusion is so patently illegal as to come within the mischief of clause (c) of paragraph 14.

A large number of English decisions were quoted by Mr. Somasundaram for the respondent. They all assume that where an error of law appears on the face of the award the error can be remedied by Courts. The various dicta to be found on this subject all refer to the decision in *Hodgkinson v. Karnie*(2) as enunciating this proposition. On examining that case, we find this statement of the law in the judgment of WILLS, J., one of the ablest common law Judges of his time :

"I am entirely of the same opinion, and I should have been of that opinion if I had come to the conclusion that that very experienced arbitrator, Mr. Richards, had decided this matter as erroneously as, upon reading the affidavits, I am satisfied that he decided rightly. The parties agreed to take his decision upon the question of damages instead of that of the Court and Jury; and if we were now to substitute ours for his, we should be acting contrary to the agreement of the parties, and without jurisdiction. It is quite clear that before the passing of the last Common Law Procedure Act, the Court could not, as a general rule, interfere with the discretion of an arbitrator. An exception had been introduced in the case of a mistake of law apparent on the face of the award. I do not say that my reason assents to that exception. We are bound by

(1) (1917) 22 M.L.T., 403 (P.C.).

(2) (1857) 3 O.B. (N.S.), 189.

the course of decisions. I regret that we are so, however, this case does not come within the exception."

If we may say so with respect, we share the doubt expressed by the learned Judge regarding the 'practicability' and soundness of enforcing the time-honoured principle referred to by him. Moreover, the later decisions to which we shall presently refer and the Civil Procedure Code do not appear to have accepted the proposition that an erroneous view of law appearing on the face of the award vitiates it. In *King and Duveen, In re*(1) CHANNEL, J., said that if on a question of law referred to the decision of an arbitrator he has given an erroneous decision, it should not be questioned by the Court. In *Muhammad Nawaz Khan v. Alam Khan*(2), the Judicial Committee have laid down the same principle. In *Ghulam Khan v. Muhammad Hassan*(3) they say expressly that an arbitrator has jurisdiction to decide both on facts and on law and that the Courts have no right to sit in judgment over his views. In *Adams v. Great North of Scotland Railway Company*(4), the same view was held. See also *Dinabhandu Jana v. Chintamani Jana*(5). As regards the decision in *British Westing House Electric and Manufacturing Company, Limited, v. Underground Electric Railway Company of London, Limited*(6), what was said by Lord HALDANE in the House of Lords was that if the result of an arbitration was induced by a wrong direction as to law given by a Court, the Appellate Court is not powerless and the Court below is not entitled to shelter itself under the award. It is true that the decision of a Division Bench in *Landauer v. Asser*(7) supports the contention of the learned vakil for the respondents. But that case stands by itself, and although there are dicta of a very general character in the English Reports, in no case except in the case in *Landauer v. Asser*(7) was an award set aside on the ground that the arbitrator has given an erroneous decision on law.

Coming to the Civil Procedure Code, we think that clause (c) of paragraph 14 should be confined to cases like those where the

(1) (1918) 2 K.B., 32.

(3) (1902) I.L.R., 29 Cal., 167 (P.C.).

(4) (1891) A.C., 31.

(6) (1912) A.C., 673.

(2) (1891) I.L.R., 18 Cal., 414 (P.C.).

(5) (1914) 19 Cal., W.N., 476.

(7) (1905) 2 K.B., 184.

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arbitrator perversely and manifestly misapplies a rule of succession or applies to the parties a rule by which they are not bound; we are not to be supposed to have exhausted the category of the cases which may come under that clause, but we do think that where the arbitrator has applied his mind honestly and has arrived at a decision to the best of his ability, the fact that a Judge might take a different view is not a ground for holding that the award is illegal on its face. We must reverse the decrees of the Courts below and remand the suit to the Court of First Instance for its being heard on the other objections taken to the award. Costs to abide the result.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

ABI DHUNIMSA BIBI, APPELLANT (PLAINTIFF),

v.

MAHAMMAD FATHI UDDIN AND ANOTHER
(DEFENDANTS), RESPONDENTS.*

Muhammadian Law—Dower, relinquishment of, by a Muhammadan woman of the age of 15, whether valid—Indian Majority Act (IX of 1875), sec. 2—'Act in the matter of dower,' meaning of—Indian Contract Act, sec. 11.

A relinquishment of her right to dower by a Muhammadan woman, who is a minor under the Indian Majority Act, is invalid under the Indian Contract Act (IX of 1872).

To relinquish dower is not 'to act in the matter of dower' within section 2 of the Indian Majority Act.

SECOND APPEAL against the decree of S. G. ROBERTS, District Judge of South Arcot, in Appeal No. 2110 of 1915, preferred against the decree of A. V. RATNAVELU PILLAI, District Munsif of Chidambaram, in Original Suit No. 627 of 1914.

Plaintiff, a Muhammadan woman aged about 20, sued her deceased husband's heirs for recovery of Rs. 725, the dower settled at the time of her marriage. The defendants pleaded

* Second Appeal No. 1277 of 1916.

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inter alia that the plaintiff relinquished her right to dower at the time of her husband's death out of deference to her husband and at his request to her to do so and that the relinquishment was valid in law as it was made when plaintiff had completed her fifteenth year and was therefore a major according to the Muhammadan Law. The District Munsif decreed the suit holding that the relinquishment, though true, was invalid as having been made under pressure and by reason of plaintiff's minority and consequent incapacity to enter into a contract according to the Indian Contract Act. On appeal by the defendants the District Judge dismissed the suit holding that the relinquishment of dower was true and was made by the plaintiff out of her free will and that the same was valid by reason of section 2 of the Indian Majority Act. The plaintiff preferred this Second Appeal.

T. R. Venkatarama Sastri for appellant.

N. Rajagopalachariyar for respondents.

T. R. Venkatarama Sastri—The relinquishment is invalid as the plaintiff was a minor at the time, according to the Indian Majority Act and the Indian Contract Act, though a major according to the Muhammadan Law. A dower according to the Muhammadan Law becomes a debt as soon as it is settled at the time of marriage and section 2 of the Indian Majority Act which preserves to minors like the plaintiff their capacity existing under the Muhammadan Law 'to act in the matter of dower', does not however enable them to enter into any contract by which they can relinquish debts or other benefits arising out of contracts. The validity of a contract of relinquishment of a debt must be tested only by the Contract Act which abrogates all rules of Muhammadan Law, according to which plaintiff could have relinquished the dower. The word 'act' section 2 of the Indian Majority Act is not apt when used in respect of 'dower' alone, but it seems to have been used as a comprehensive verb to denote the steps to be taken in respect of all the four classes of cases mentioned, viz., marriage, dower, divorce or adoption. Probably the words 'act in the matter of dower' in section 2 preserve to persons like the plaintiff their right to settle the amount of dower.

N. Rajagopalachariyar—The relinquishment is valid according to Muhammadan Law; see Koran, Chapter IV, section 4,

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Wilson's Digest of Muhammadan Law, Fourth Edition, pp. 127 and 206, and *Jyani Begam v. Umrav Begam*(1). Section 2 of the Indian Majority Act preserves to persons like the plaintiff their capacity to relinquish, by the words 'act in the matter of dower', which are wide enough to include not only a power of settling the amount of dower but also a power to relinquish the same. On the construction of those words, see *Bai Shirinbai v. Kharshedji*(2). If according to the decision of the Privy Council in *Jumoona Dassya v. Bamasoondari Dassya*(3) a Hindu widow of the age of 16 or 17 can adopt a boy, a power preserved to her by section 2 of the Indian Majority Act, and thus divest herself of all her husband's property, there is nothing inconsistent in construing section 2 as preserving to a person like the plaintiff a power to relinquish a right to dower. If a minor can settle the amount of dower, however small and prejudicial to her it might be, she can equally relinquish the same. The personal law cannot be invoked for one purpose and rejected as to the other. Dower does not cease to be a dower simply because it has also the characteristic of a debt. Reference was made to section 129 of the Transfer of Property Act.

The Court delivered the following JUDGMENT:—

SESHAGIRI
AYYAR J.

SESHAGIRI AYYAR, J.—This is a suit by a Muhammadan lady for dower. The defence is that when her husband was on his death-bed and she was only fifteen years of age, she relinquished her right to the dower. The question for consideration is whether this relinquishment debars the plaintiff from suing to recover it. The District Munsif found that the dower was released but the release was brought about by undue influence and fraud, and that consequently plaintiff was entitled to recover it. The learned District Judge has written an interesting judgment in which, while accepting the conclusion of the District Munsif that there was a release of the dower, he differs from the lower Court on the question of fraud and finds that the release is binding upon the plaintiff.

The question is not covered by any authority and is one of some importance. It has to be decided on first principles. Under the Muhammadan Law a dower, as pointed out by Mr.

(1) (1908) I.L.R., 32 Bom., 612.

(2) (1898) I.L.R., 22 Bom., 430.

(3) (1876) I.L.R., 1 Cal., 289 (P.C.).

Justice ABDUR RAHIM at page 334, in his book on Muhammadan Jurisprudence, is

"a sum of money or other form of property to which the wife becomes entitled by marriage; it is not a consideration proceeding from the husband, for the contract of marriage, but is an obligation imposed by the Law as a mark of respect for the wife."

In Hamilton's Hedaya, Chapter 15, section I, the right to dower is said to have been founded upon the text

"Let him support her according to his ability."

It is pointed out in this treatise

"that when a woman surrenders herself to the custody of her husband, it is incumbent upon the latter thenceforth to provide her with food, clothing and lodging, because such is the precept both in the Koran and in the traditions and also because maintenance is a recompense for the matrimonial restraint."

The author is apparently of opinion that the fixing of dower is a recompense for the surrender. It is stated in Muhammadan Law books that even though no dower may have been fixed on the date of the marriage, the wife is entitled to some dower from the estate of the husband. That is the nature and origin of dower or *Mahar* in Muhammadan Law.

The character of the obligation to pay the dower is as a debt. The moment that dower is settled, it passes from the domain of a moral precept into an enforceable debt. It has been held that the wife has a lien over the property of her husband in her possession for unpaid dower. It has also been held that she would rank *pari passu* with other creditors in the distribution of the estate of her husband: see *Meer Mehar Ally v. Mussamut Amanee*(1) and *Syed Imdad Hossein v. Musamat Hosseinee Buksh*(2). Mr. Tyabji in his Principles of Muhammadan Law discusses the cases and says that the widow's claim for dower due from the estate of her deceased husband ranks equally and rateably with the claims of other creditors.

Having now arrived at a conclusion as regards the nature and character of dower, the next question is whether a minor can give up her rights to it. There cannot be much doubt that, where a Muhammadan female attains an age which according to Muhammadan Law is the age of majority, she can release her rights to dower. In the present case, the plaintiff was a major

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(1) (1869) 11 W.R., 212.

(2) (1869) 2 N.W.P. H.C.R., 327.

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according to Muhammadan Law. But as regards general contractual obligations, the Indian Contract Act has superseded the laws of Hindus and of Muhammadans. If this question is not complicated by the exception contained in the Indian Majority Act to which we shall presently refer, there could be no doubt that the renunciation of the dower by plaintiff would not bind her.

Now the question is whether section 2 of Act IX of 1875 has made any difference in this respect. That section lays down that nothing in the Indian Majority Act shall affect the capacity of any person 'to act in the matter of dower.' It was contended by Mr. Rajagopalachariyar for the respondent that in releasing the right to dower the plaintiff was acting in the matter of the dower. There is some justification for this contention in the language employed by the learned Judges of the Bombay High Court in *Bai Shirinbai v. Kharshedji* (1). That was a case relating to Parsees and the question there was whether a Parsee minor suing to have a marriage declared void was acting in the matter of marriage. The learned Judges seemed inclined to hold that the plaintiff brought herself within the meaning of section 2 of the Indian Majority Act. In our opinion, the construction placed upon the word 'act' seems far-fetched. As Mr. Venkatarama Sastriyar for the appellant contended, the word 'act' has been used as a comprehensive verb to control the steps to be taken in four specified classes of cases—marriage, dower, divorce and adoption. It is not very apt as applied to dower, although it is full of meaning as applied to the other three classes. It must be remembered that the primary object of the Indian Majority Act was to reserve liberty to the Indian subjects of the Sovereign to exercise their rights in matters specially pertaining to religion or religious usages. No attempt was made in the Majority Act to indicate the legal consequences which might flow upon the exercise of these rights. The object was to confer a privilege and not to endanger ordinary civil rights. Civil and contractual obligations might flow upon the exercise of such rights. The ordinary law was intended to take its course in respect of these correlative rights. Therefore, in our opinion, when the legislature permitted a person to act in the matter of

(1) (1898) I.L.R., 22 Bom., 430.

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dower, it only intended to allow that person, who was not otherwise competent under the ordinary law, to act in that matter, to initiate to the religious act or ceremony which under the personal law of the subject he or she was capable of initiating. In our opinion the legal consequences flowing from this primary act was not intended to be controlled by section 2 of the Indian Majority Act.

One other consideration to be borne in mind is this. The Indian Majority Act should not be so construed as to deprive a person of rights which he is otherwise entitled to. What was intended to be a beneficent legislation should not be construed as operating to deprive the ordinary rights of a person. Under the Muhammadan Law, as pointed out by Mr. Justice ABDUR RAHIM in his book at page 241,

"Generally speaking, only such acts and transactions of a minor will be upheld as are of benefit to him, and whatever is injurious to his interest will be disallowed."

He says again at page 242,

"But an infant, with or without permission of his guardian, cannot do any act which is absolutely injurious to his interests, such as divorcing his wife or making gift or waqf of his property or lending his money. Similarly a bequest of an infant is void because it is laid down that it is better for a man that he should leave his heirs rich rather than they should beg of people."

No doubt this prohibition against the act of an infant is removed when he or she attains majority as understood by Muhammadan lawyers. But the question still remains whether when the British Government enacted a uniform rule as to the age of majority, it was intended to deprive minors belonging to the Hindu or Muhammadan communities from enjoying the privileges of that legislation by operation of section 3 of the Indian Majority Act. In our opinion the injunction of Muhammadan Law which prohibits injurious acts being done by a minor to his prejudice must be taken to have been preserved till the age at which he or she attains majority under the ordinary law of the land.

There is one other passage at page 241, in Mr. Justice RAHIM's book which is rather significant. He says—

"An infant even if possessed of understanding is, however, under no obligation with respect to what is regarded in law as a

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benevolent act, having a semblance of penalty; he is also not liable to penalties which are in the nature of private rights like retaliation."

This passage has some bearing upon the finding of the learned District Judge. The act of renunciation by the plaintiff is said to have occurred under the following circumstances:—Her deceased husband was suffering from cholera. He was a pious man and was anxious that he should be relieved of all obligations contracted by him prior to his death as he believed that if he died an undischarged debtor he would not be able to attain salvation. It was apparently to ease the mind of her husband in this behalf, that the plaintiff is said to have cried out that she released her rights of dower. That is undoubtedly a benevolent act intended to secure religious benefit to her husband. In the passage which we have cited from Mr. RAHIM's book such a benevolent renunciation would be regarded as not binding upon a person even though he or she be of good understanding. We are not sure whether the learned author intended to lay down that where the age of majority according to the Muhammadan Law had been attained such a renunciation would still be not binding. But apart from that question, in our opinion, such a purely gratuitous act on the part of the minor should not bind her when she attains the age of majority. As we pointed out at the beginning, the moment that the marriage is contracted, the dower due to her becomes a debt and before a debt can be relinquished the person must be of age according to the law of the land. In our opinion the plaintiff was not acting in the matter of dower when she said that she gave up her rights to it. We are, therefore, of opinion that the decision of the District Judge should be reversed and that of the District Munsif restored with costs in this and the lower Appellate Court.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice
Seshagiri Ayyar.

MUNNAVARU BEGAM SAHIBU (THIRD PLAINTIFF),
APPELLANT,

v.

MIR MAHAPALLI SAHIB AND TWO OTHERS (DEFENDANTS),
RESPONDENTS.*

1918,
March 15,
19 and 20.

Muhammadan Law—Astan—Mujavar—Religious office—Competency of women to hold or succeed to such office—Right to perform fatiha—Rule of Muhammadan Law.

A religious office can be held by a woman under the Muhammadan Law unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy and the burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion.

Though there is no general rule of Muhammadan Law prohibiting a woman from holding a religious office, prohibition may arise by local usage or custom.

Imam Bee v. Molla Khasim Sahib (1916) 5 L.W., 226, followed.

Shahoo Banoo v. Aga Mahomed Jaffer Bindaneem (1907) 34 Cal., 118 (P.C.), referred to.

Held (on the facts of the case), that a woman was competent to succeed to the office of Head Mujavar of the suit Astan.

APPEAL against the decree of K. KRISHNAMA ACHARIYAR, the Temporary Subordinate Judge of Masulipatam, in Original Suit No. 71 of 1908, dated 11th August 1916.

The material facts appear from the judgment of ABDUR RAHIM, J.

T. Ramachandra Rao for the appellant.

P. Nagabhushanam for the first respondent.

The Court delivered the following JUDGMENTS:—

ABDUR RAHIM, J.—The appeal is by the third plaintiff, daughter of the first plaintiff who died since the institution of the suit. The suit was to recover certain lands which are attached to what is described in the plaint as the Astana Bara Imam at Inugudur, a suburb of Masulipatam, from the defendants

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who are in possession. The third plaintiff's case is that she is entitled to the office of Head Mujavar of the Astana in succession to her mother, the first plaintiff. What the nature of the institution is one of the important questions we have to consider in the appeal.

There was a grant made by Nizam-ul-Mulk, Nizam of Hyderabad, in 1725 which is the root of the title of the parties, and one of the questions for consideration is as to the true interpretation of that document. The grant is in Persian, and when properly translated the material portions of it are to this effect.—It purports to confirm previous grants by ancient rulers made by way of Madad-Mash, or (literally translated) subsistence allowance of Mir Ali Akbar and others, sons of Mir Syed Mahomed Madani who are to recite Darood or blessings on the Prophet and Fatiha in the name of the Imams and the Martyrs, the descendants of the prophet. Then it goes on to say, "It is necessary that the said lands should be left in the possession of the aforesaid persons so that they should utilize the incomes thereof towards their maintenance and along with their descendants, literally, children and grand-children (aulad and ahfad), should engage themselves in offering prayers for the perpetuity of the State." If the matter stood merely upon the interpretation of this document, it might be contended that the grant was in absolute terms to the persons mentioned therein, Mir Ali Akbar and others, sons of Mir Syed Mahomed Madani, who were expected to perform certain religious ceremonies. Upon such an interpretation the grant would be of an absolute estate to the persons named in the sanad. But the evidence clearly shows that the parties concerned have put their own interpretation upon the document and the practice and usage has been in accordance with that interpretation. That is to say, they have treated the grant as creating a public religious trust for the performance of Fatiha and certain other ceremonies during the Muharram, and though it might be possible to hold that the grant was of an absolute estate to Mir Ali Akbar and others, sons of Mir Syed Mahomed Madani, I am not prepared to say that the parties' interpretation of the sanad as creating a *Waqf* is unreasonable. In any case, so far as this appeal is concerned, we must proceed upon that interpretation, for, it is upon it that the parties base their claim.

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Both the parties are descendants of Mir Syed Mahomed Madani's sons and they are, according to the interpretation placed by themselves on the grant, entitled to allowances for maintenance provided they keep up and perform the religious duties mentioned in the sanad. There has been previous litigation with respect to the rights of the parties, some time in 1896, when a suit was instituted by the father of defendants Nos. 1 and 2 in the present suit against the first plaintiff and another lady. That suit was compromised and a decree passed in the terms of the *rajinama* marked Exhibit B. By that compromise it was provided that "the second defendant, (that is, the mother of the appellant) should be Head Mujavar henceforward, the plaintiff should give up the remaining lands for which he had brought the suit in excess heretofore and the part produce, etc. . . . business should be carried on from generation to generation (not lineally as wrongly translated in the paper-book) according to the terms of this agreement." There cannot be any doubt that if this *rajinama* is binding on the parties the appellant is entitled to the office of Head Mujavar. This is what has been held by the lower Courts and is undoubtedly in accordance with the correct interpretation of Exhibit B. The lower Court, however, is of opinion that Exhibit B is in violation of, or contrary to, the provisions of the sanad already referred to (Exhibit VI) and cannot bind the parties; and that we have therefore to fall back on the terms of the sanad and in the light of the general Muhammadan Law to ascertain whether the plaintiff or the defendant is entitled to the office of Head Mujavar.

The use of the words *Astana* and *Mujavar* *prima facie* indicates as if there was a shrine or tomb of some holy person which had to be kept up by the endowment. But the evidence shows that these words are used merely to indicate a sort of place in the form of a raised platform where a 'panja' and a 'peer' (staffs which are carried about in a Muharram procession) is planted and where certain ceremonies in connexion with the Muharram are performed. There is no evidence to show that there is any tomb of any well-known Sufi or fakir where any initiation of fakirs takes place as may be the case in some Khankah or Astana. If we look to the pleadings of the parties, there can be no doubt that all the religious ceremonies which are

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performed at the place called Astana Bara Imam are in connexion with Muharram, and the defendants in their written statement never alleged that any Sufi or other doctrines are propagated at this place or any fakirs are initiated into any particular order or brotherhood. It was by the words Astana or Mujavar that the Subordinate Judge who originally tried the case as well as the learned Judge against whose judgment this appeal has been preferred, were misled into thinking that there were some particular religious teachings associated with this so-called Astana. Then unfortunately when the matter came up on a previous occasion before this Court, arguments were addressed on the assumption that there might possibly be certain ceremonies connected with this institution which a woman was not capable of performing. In order to ascertain if this was so, the appeal was remanded to the lower Court for enquiry into this matter. As was to be expected, some of the defendants have now put forward some sort of evidence suggesting that initiation of fakirs actually takes place in this institution in order to make out that the appellant is not fit to be at its head. The evidence, however, is that by 'fakirs' all that is meant is some persons, Hindus or Muhammadans, who are engaged to carry in the procession the 'panja' and the 'peer' during the ten days of the Muharram. That is to say, these so-called fakirs are no more than persons taking part in a Muharram procession. It is not suggested, nor could it well be, that these men have to be initiated into any particular doctrines or they have to perform any ceremonies requiring particular religious status. To describe such a state of things as equivalent to initiation into a religious brotherhood is absolute misuse of words. So is the use of the words Astana and Head Mujavar in this case, for these terms properly used are connected with institution for the up-keep of a shrine of a reputed saint or for the teaching of certain doctrines connected with Sufi-ism. The evidence amply makes out that the parties are absolutely illiterate and know nothing about any religious order or any religious teaching connected with any brotherhood of fakirs properly so called. The duties connected with this Astana are nothing more than the organizing and carrying out of certain processions in which the Hindus according to the evidence participate equally with the Muhammadans of the locality.

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Many authorities have been quoted to us in connexion with the question whether a woman can properly be a Head Mujavar of an Astana or not. None of those cases or authorities call for any serious consideration, having regard to the fact that there is no Astana in the proper sense of the word and the Mujavars' duties are only purely of a secular character so far as the evidence shows. We can take it to be the law as laid down by the Privy Council in the case of *Shahoo. Banoo v. Aga Mahomed Jaffer Bindaneem*(1) that if the religious duties connected with a religious office are such that a woman cannot properly discharge in person or by deputy, then she cannot be appointed to that office. The well-known cases referred to, relate to the office of Sajjadanashins of certain Khankah and also of Mujavar of certain shrines. The word 'Mujavar' literally means a sweeper or the person who cleans the place, but it is conventionally used to denote a person who is looking after a shrine or tomb of a holy person generally called Astana. 'Astana' is a word which is often used to denote a place inspiring respect and reverence. It need not necessarily indicate a tomb or shrine though in popular use it indicates a shrine or tomb of a holy person. The term Sajjadanashin or Gadhnashin is conventionally used to denote the person in charge of a Khankah or an institution where religious enthusiasts and fakirs congregate and where the superior or the head of the institution has certain doctrines of Sufi-ism to teach. But there is absolutely nothing in connexion with Astan Bara Imam which has anything in common either with a Khankah or an Astana properly so-called. That a woman cannot be a Sajjadanashin may, for the present case, be taken to be sound law, if the duties involve the teaching of certain doctrines to fakirs, necessitating her coming into daily contact with them. It is not, however, the fact that a woman cannot be a sufi or that she is not competent to teach the tenets of Sufi-ism. Sufi-ism, as a school of Muhammadan religion, is equally open to men and women. But having regard to the custom and usage of the country by which women observe seclusion, it is not ordinarily to be expected that women could satisfactorily perform the duties connected with the head of an institution

(1) (1907) I.L.R., 34 Cal., 118 (P.C.).

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like Khankah which would bring her into contact with fakirs and other men not being her own close relations. Excepting for this local usage and custom, I am not aware of any general provision of Muhammadan Law against a woman specializing in any form of religious teaching and propagating any doctrines of the Muhammadan religion either of orthodox Muhammadan religion or of Sufi-ism. The rule prohibiting women from being appointed to such offices is not confined to the office of Sajjadanashin but there may be other offices which she may not be able to perform, for instance, that of an Imam, in a mosque where she would have to lead the congregation. At any rate in practice women are not known to have officiated as Imams in mosque any more than Christian women are known to have officiated as priests or clergy in Christian churches.

It is not necessary for us to consider in this case the extent of the application of the rule precluding the appointment of women to an office like that of Sajjadanashin and the limitations of such a rule.* So far as I have been able to trace the history of the question, it had its origin in certain passages in Macnaughten's Principles and Precedents of Muhammadan Law, page 332. It is stated there:

"Females are not competent to assume the office of superior of an endowment; and such an act is at variance with the usages of the country, because it is the duty of the superior to instruct and guide his disciples, to teach his scholars, and to keep their company continually, in private and in public, and this cannot be done with propriety by a woman, whose duty it is to live retired and secluded."

I think that seems to be a perfectly reasonable proposition so long as it is understood that the prohibition or the disability arises from certain local usages and customs and not by any absolute injunction of Muhammadan religion or law. Mr. Ameer Ali, in stating the law on the subject at page 443, IV Edition, Volume 1, of his Muhammadan Law, states it in similar terms. He also bases it on custom and not on any rule of Muhammadan Theology or canonical law which has in fact very little to do with Sufi-ism, Khankah and Asthanas. One of the earliest decisions on the subject is to be found in *Shah Imam Buksh v. Beebee Shahee*(1). There the learned Judge of the Suddar

(1) (1835) VI Sel. Rep., 24.

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Diwany Adawlut rely upon the passage in Macnaughten already recited as authority for the proposition in question. There are also some rulings of the Madras High Court on the point *Hussain Beebee v. Hussain Sherif*(1), *Mujavar Ibrahim Bibi v. Mujavar Hussain Sheriff*(2). In *Mujavar Ibrahim Bibi v. Mujavar Hussain Sheriff*(2), what is laid down is that a woman is not competent to perform the duties of Mujavar of a durga which are not of a secular nature. What the learned Judges say is that it was established by evidence that the office of Mujavar entailed the discharge of duties of a spiritual character, such as reading the Fatiha, offering prayers and incense, etc., which could not conveniently be performed by a woman, and that there was no satisfactory evidence that the office has ever been held by a woman. Apart from what the special evidence in that case was, I do not think the learned Judges meant to lay down a general proposition that any religious office which entails the performance of Fatiha and other prayers or the offering of incense could not be performed by woman, for I do not think they could have meant that Fatiha which consists in reciting certain suras of the Koran could not be said by woman and that a woman could not say prayers according to the Muhammadan religion. Such a proposition would be incorrect, and apart from the special facts of that particular case, I cannot accept the decision as laying down any such general rule of law as contended for. In *Hussain Beebee v. Hussain Sherif*(1), it was held that according to Muhammadan Law a woman may manage the temporal affairs of a mosque, but not the spiritual affairs connected with it, the management of the latter requiring peculiar personal qualifications. There the institution to which the office in dispute related was called Shakh Fareed Shukurgunj Mosque. If it was a mosque in its proper and ordinary sense of the word, that is, a place where prayers are said by Muhammadans, then there are no duties connected with it which a woman could not perform at least through a deputy. But from the evidence in this case and from what we have noticed in other cases, we know that the word 'mosque' or 'Musjid' is applied to all sorts of places, may be a mere tomb or an Imam Bara. The learned Judges in dealing with the law in *Hussain*

(1) (1868) 4 M.H.O.R., 23.

(2) (1830) I.L.B., 3 Mad., 95.

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Beebee v. Hussain Sherif(1), cite cases connected with the office of Guddeenishin. If that was the real nature of the institution as probably it was from the name, it might have been a replica of the tomb or a shrine containing some relics of that well-known saint. In that case it would perhaps properly be called a durga. The report does not give what the actual duties were in connexion with the office then in question, and if the office required any peculiar personal qualifications which might be wanting in a woman, that is to say, duties which could not be performed by her either personally or through a proxy, then undoubtedly the decision was right. The facts do not appear sufficiently fully to enable me to say what the exact scope of that decision is. On the other hand, I entirely agree with a recent decision of this Court in *Imam Bee v. Molla Khasim Sahib*(2), that a religious office can be held by a woman unless there are duties of a religious nature which she cannot perform in person or by deputy and the burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion and in the absence of anything in the rules by the founder, the usage of the institution governs the case. In that case the office was that of a Mujaivar in a mosque. I believe the duties attached to the office were simply those of a Muttavalli though the word used there is Mujaivar. In this Presidency the word 'Mujaivar' is not seldom used in the sense of Muttavalli of an ordinary religious trust.

Here the appellant, as a member of the family of the descendants of Mir Ali Akbar and his brother, is admittedly entitled to certain allowance by way of maintenance, and she does not dispute that the defendants are also entitled to similar allowance. The dispute is solely about the office of Head Mujaivar in virtue of which she claims to be entitled to possession of the property in dispute, that is, the lands of the institution concerned. As Head Mujaivar she would also be entitled to an additional share of the income. The Subordinate Judge, in my opinion, was entirely wrong in holding that the compromise was in violation of the terms of the sanad and therefore could not be given effect to. He had also gone wrong in thinking that the appellant is disqualified to hold the office she claims. The

(1) (1868) 4 M.H.O.R., 23.

(2) (1916) 5 L.W., 226.

evidence clearly shows that this was never the consciousness of the parties, in fact the consciousness of the parties themselves was just the other way. Before the appellant her mother held the office and the written statement never raised any doubt as to the competency of the appellant to hold the office on the ground of sex, if she was not precluded from holding it, as alleged, by the terms of the sanad. I reverse the decree of the Subordinate Judge and there will be a decree in favour of the third plaintiff giving her possession of the property in dispute. The Subordinate Judge will enquire into the mesne profits she is entitled to from the date of suit to the date when she obtains possession under the decree. The respondents will pay the third plaintiff's costs in this and the lower Court and they will also pay the Court fee payable to Government.

SESHAGIRI AYYAR, J.—I entirely agree. In a very recent reference to the Full Bench which I made in conjunction with NAPIER, J., I went fully into the question of the capacity of a Hindu female to succeed to religious offices and to discharge the duties of those offices. I am glad to find that my learned brother's exposition of the Muhammadan Law is in complete accordance with my views with regard to the position of Hindu women. Except in cases of grants given for the express purpose of performing religious duties which are dependent on personal or sex capacity, I fail to see why a female, whether Hindu or Muhammadan, should be disentitled to perform those duties. In the language of the Judicial Committee in *Shahoo Banoo v. Aga Mahomed Jaffer Bindaneem*(1), a woman holding an office of a religious trust which by its nature involves no spiritual duties such as a woman could never properly discharge in person or by deputy, is competent to hold such an office. Or it may be as in the case in *Mohan Lalji v. Madhusudan Lala*(2) that the peculiar doctrines of a sect may preclude women married into a different sect from performing the duties of the temple or religious institution, belonging to the former sect. Except in these two classes of cases, in my opinion, there is no warrant for holding that women are incompetent to inherit a religious office connected with a religious institution. It has always been held that, in the case of secular duties pertaining to a

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(1) (1907) I.L.R., 34 Cal., 118 (P.O.). (2) (1910) I.L.R., 32 All., 461.

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religious trust, women are competent to perform them. For example, as my learned brother has pointed out, the Muttawalli-ship in a Muhammadan mosque can be held by women. So also it has been held in the *Dhuncooverboi v. Advocate General*(1) that a Mohuntship can be held by a female. Wherever there are profits which are payable to an heir in the discharge of duties appertaining to a religious office, it must be taken as a general rule, subject to some exceptions, that women are competent to inherit those offices and to perform the duties pertaining to them.

In the present case, the course of devolution and the way in which the parties have been enjoying show that women have been held competent to discharge the duties pertaining to this particular Astana. As my learned brother has pointed out, the original grant confers an absolute right in the property. I am inclined to think that its dedication as a *wagf* must have been by the successors of the original grantee. Any way there can be no doubt that the duties connected with the Astana were mostly secular. As has just been pointed out, the way in which Hindus and Muhammadans have been initiated into Fakirship during the Muharram shows that there are really no religious duties to be performed by the Head Mujavar. And further in my opinion the parties are bound by the compromise as the matter had been litigated in a competent Court and the parties agreed that the first plaintiff and her descendants are entitled from generation to generation to the Head Mujavarship. The Subordinate Judge seems to think that this compromise is not consistent with the original sanad. I fail to see how there is any inconsistency between the sanad and the compromise. Even if there were any inconsistencies, I am not prepared to say that the compromise is not binding upon the parties and upon those who claim under the parties to the compromise.

And lastly, I would say that the fact that in the written statement no objection is taken to the third plaintiff succeeding to the Head Mujavarship on the ground of her being a female is clear evidence that in the opinion of the litigants and of their co-religionists women are not incompetent to perform the duties of Head Mujavarship. For these reasons, I entirely agree with the conclusion arrived at by my learned brother.

K.B.

(1) (1899) 1 Bom. L.R., 743.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Krishnan.

MANJESHWAR NARAINA RAO (DEFENDANT), APPELLANT,

v.

S. SHIVU RAO AND TWO OTHERS (PLAINTIFFS NOS. 2 TO 4),
RESPONDENTS.*

1918,
March 20
and April 8.

Mortgage by conditional sale—Mortgagor in possession as tenant of mortgagee—Rent in arrear—Suit for rent—Decree for rent barred by limitation—Suit for redemption—Mortgagee, whether entitled to claim arrears of rent and interest decreed as part of price of redemption—Abandonment of charge—Election of remedies.

In a suit for redemption, the mortgagee is not entitled to claim any arrear of rent with interest thereon in respect of the mortgaged lands which were left in the possession of the mortgagor as tenant of the mortgagee under the terms of the mortgage-deed, when the mortgagee has already sued and obtained a decree for such rent with interest and has allowed the decree to become barred by limitation, even though the arrear of rent is a charge under the deed.

English and Indian cases reviewed.

Hewanah Singh v. Jawahir Singh (1889) I.L.R., 16 Calc., 307 (P.C.), distinguished; *Imdad Hasan Khan v. Bachu Prasad* (1898) I.L.R., 20 All., 401, referred to.

SECOND APPEAL against the decree of C. KRISHNASWAMI RAO, the District Judge of South Kanara, in Appeal Suit No. 301 of 1916 preferred against the decree of JAGANNATHA RAO TAGAT, the District Munsif of Mangalore, in Original Suit No. 132 of 1915.

The plaintiff sued to redeem a mortgage, dated 16th May 1868, executed by him and another in favour of a member of the family of the defendant to whom the suit property was allotted in a family partition. The mortgage was one by conditional sale for the principal amount of Rs. 1,650. The mortgage-deed provided *inter alia*, that the mortgagor should enjoy the property on chalgani until the year Bahudhanya (1878-79) on condition of paying a certain rent by March of every year. The material portion of the document, which was described as yedrumudi (conditional) sale-deed, was as follows:—

"We have hereby sold to you this day for Rs. 1,650 (one thousand six hundred and fifty rupees) and delivered to your possession the land, bagayat buildings, tank, well and land, field, water,

* Second Appeal No. 912 of 1917.

NARAINA RAO etc., everything attached to it. We have obtained the said land, bagayat, etc., on chalgeni under you from this day till the year Bahudhanya. And the rent settled for this Vibhava year is Rs. 119 (one hundred and nineteen rupees) and from the year Sukla the rent settled is at the rate of Rs. 69-8-0 (sixty-nine rupees and eight annas) per year. We shall pay the said rent before the end of March every year to you through Court and shall obtain your receipt. If we fail to do this, you may immediately take possession of the property from us and enjoy the same yourself or through tenants. And till you take possession of the said property from us, we shall pay to you so much rent as would fetch interest on the said one thousand six hundred and fifty rupees at the rate of 12 per cent per annum from this day and the arrears of rent together with interest thereon at 12 per cent per annum from the due date till payment on the liability of the said property. If we pay through Court in one lump sum the said principal amount of Rs. 1,650 (one thousand six hundred and fifty rupees) and arrears of rent if any due by us, together with interest thereon, and any amount due by us to you in respect of any other dealings, before the Vishu Shankramana of any one year after the year Dhata and before the 30th Phalguna Bahula of Bahudhanya year, you should deliver back to us the said property together with the original documents which you may get from your younger brother Ramappayya and also this sale-deed. When we mean to sell this land absolutely, we shall give it to you. If within the said *vaide* we fail to pay to you through Court in one lump sum the said amount and also any other amount due to you in respect of other dealings, this land and everything appertaining thereto shall perpetually belong to you for the said amount. You shall from that day enjoy the said property from generation to generation effecting improvements therein. We and our descendants shall have no right or interest in the same. To this effect is the yedrumudi (conditional) sale-deed executed out of our free will. The description of the boundaries, etc., of the said property is as given herebelow."

The mortgagor having defaulted in paying rent, the mortgagee sued in O.S. No. 199 of 1872 on the file of Buntwal Munsif's Court for recovery of possession of the lands and for rent and obtained a decree for possession and for rent with interest thereon; the mortgagee obtained possession in execution of the decree, but no execution was taken out in respect of the amount of Rs. 200 and odd decreed in that suit. In 1915, the mortgagor brought the present suit for redemption, having

tendered the principal amount of Rs. 1,650 prior to suit. The NARAINA RAO mortgagee claimed that the decree amount of Rs. 200 and odd SHIVU RAO, together with interest thereon up to the date of the present suit was still due to him and that it should be paid along with the mortgage amount as the price of redemption, and that the amount, so calculated, came to about Rs. 2,474 and odd in addition to the principal amount of Rs. 1,650. The mortgagee relied also on the clause in the mortgage-deed for repayment at the time of redemption of not only the principal amount but also arrears of rent, if any, that might remain unpaid, together with interest thereon at a rate given in the deed. The District Munsif allowed the mortgagee's claim. On appeal to the lower Appellate Court, the District Judge disallowed the claim. The defendant (mortgagee) preferred this Second Appeal.

B. Sitarama Rao for the appellant.

K. Yegnanarayana Adiga for the respondent.

The Court delivered the following JUDGMENTS:—

PHILLIPS, J.—Plaintiffs sue to redeem a usufructuary PHILLIPS J. mortgage of 1868 for Rs. 1,650. In the mortgage deed there is a provision that the mortgagor is to take back possession and pay a stipulated rent. In default of payment of this rent, the mortgagee was to recover possession and the mortgagor was to pay a sum equivalent to 12 per cent on Rs. 1,650 as rent from the date of the mortgage deed until the mortgagee got back possession. The mortgagor failed to pay rent as stipulated and the mortgagee obtained a decree in 1873 for possession and for Rs. 200 and odd claimed as rent and for future rent. It does not appear that this decree was ever satisfied and the mortgagee now claims to add the decree amount and subsequent interest to his mortgage money. Under the mortgage deed the payment to be made by the mortgagor was made a charge on the property and there was an undertaking to pay it back together with the mortgage amount. The question for consideration is whether the mortgagee is entitled to demand the decree amount of 1873 together with subsequent interest before redemption. It is contended for respondent that the amount due became merged in the decree and that, as the decree has now become barred, the amount cannot now be claimed. It would appear that under American Law the respondent's contention is correct (*vide Jones*

NARAYNA RAO on Mortgages, S. 936), but the position is not so clear either in English or Indian Law, for it would appear from a passage in 21 Halsbury 325 that the original charge would still remain unless the decree became satisfied and it is questionable whether a decree that has become barred by limitation is on the same footing as a decree that has been satisfied. It cannot be disputed that a mortgagee is entitled, when accounts are settled at the time of redemption, to put forward claims for the recovery of which a suit would be barred, and it is unnecessary to cite authority for this proposition, but whether an amount for which the mortgagee has obtained a decree, the execution of which is barred by limitation, can be treated on the same footing as a barred debt is questionable. In *Hewanchal Singh v. Jawahir Singh*(1), it was held that when a decree had been obtained for interest due on a mortgage the tender of the principal amount alone would not be a proper tender of principal and interest but the question of whether the mortgagee could demand the decree amount again was not specifically decided, and in that case the decree was still alive. The judgment of the Judicial Committee is very brief and gives no reasons for the decision. In the present case we have not to consider whether the decree amount and subsequent interest can be claimed, for it is not claimed on the ground that the amount was decreed but on the ground that the whole amount can be claimed under the mortgage deed. On looking into the deed, it appears that the penalty that could be claimed by the mortgagee on default in payment of rent by the mortgagor was a sum equivalent to 12 per cent interest per annum on the principal amount, and although it is called rent it is really interest on the mortgage money, and out of the total decree amount Rs. 198 is really one year's interest on the mortgage money. To allow a claim for this amount with subsequent interest from 1873 to date of redemption would be to allow compound interest for which no provision is made in the mortgage deed. No doubt the deed provides for interest on arrears of rent, but the decree does not really provide for arrears of rent, and although it does not enforce the stipulation that interest shall be payable from the date of the deed, but only from date of default it is impossible

(1) (1889) I.L.R., 16 Cal., 307 (P.C.).

to go into that question now, and we can only assume that only one year's interest was due at date of decree. This amount, without subsequent interest, can alone be claimed. The balance of Rs. 5-6-0 due under the decree is for road cess, but if the Rs. 198 awarded is treated as interest, the mortgagor was under no obligation to pay road cess which is only payable upon rent. In this view the appellant mortgagee is only entitled to claim Rs. 198, the amount due to him at date of the decree.

Treating this Rs. 198 as interest upon the principal which is made a charge upon the property, can it be said that the charge upon the property has become merged in the decree? It is contended for appellant that Order XXXIV, rule 14, of the Code of Civil Procedure supports the view that the claim can be enforced apart from the decree, but that rule only provides that a decree for money in satisfaction of a claim under a mortgage is no bar to a subsequent suit for sale in enforcement of the mortgage, but it is no authority for saying that the decree amount can also be claimed in the subsequent suit. It is urged then on the other side that to allow the decree amount to be claimed again would be contrary to the principle of Order II, rule 2, for by bringing a suit for money the claim to make it a charge upon the property must be deemed to be abandoned; but, in order that this argument should succeed, it is necessary to show that a suit against the property could have been brought when the claim was made for money alone. In this case it certainly could not have been and consequently the mortgagee's claim is not contrary to the principle of Order II, rule 2. It may, however, be contended that by obtaining a decree for money which could be enforced at once the mortgagee abandoned the charge which he would only enforce later, and there is considerable force in this contention. It is the view taken in *Imdad Hasan Khan v. Badri Prasad*(1) in which case *Hewanchal Singh v. Jawahir Singh*(2) was considered, and I think it is in this case the correct view for having elected to enforce one remedy and having obtained that relief the mortgagee cannot now be allowed to abandon the relief first chosen and fall back upon the other when his right to enforce the first has been allowed to be barred by limitation. It is possible that the

(1) (1898) I.L.R., 20 All., 401. (2) (1889) I.L.R., 16 Cal., 307 (P.C.).

NARAINA RAO v. SHIVU RAO.
PHILLIPS, J. Allahabad view that even while the decree is alive the other remedy cannot be enforced goes too far, but it is unnecessary to consider that now.

This appeal accordingly fails and is dismissed with costs. In view of the above finding, the memorandum of objections relating to mesne profits from date of tender of the mortgage money must be allowed with costs. The amount which has now been found to be correct was tendered through Court, and under section 84, Transfer of Property Act, interest ceased from that date. Time for redemption extended to four months from this date. Mesne profits to be determined before final decree.

KRISHNAN, J. KRISHNAN, J.—The suit from which the second appeal arises was one for the redemption of a mortgage by conditional sale of 1868. The plaintiff mortgagor sought to redeem on payment of the mortgage money alone, viz., Rs. 1,650. The mortgagee claimed that he should be paid in addition a sum of Rs. 2,474-12-0 which was stated to be the amount of rent and interest on it due to him under the decree in O.S. No. 199 of 1872. The way in which this decree came to be passed is as follows:—Though the mortgage was one with possession, it was arranged in the mortgage deed itself that the mortgagor should himself continue in possession as the mortgagee's tenant paying a stipulated rent, every year before the end of March. There was a condition added that if the mortgagor failed to pay the rent on the due date in any year the mortgagee was to have the right to take possession at once, and to charge rent at an amount equal to 12 per cent interest on the mortgage money which works out at Rs. 198 a year; this amount was much higher than the rent originally fixed. It was also arranged that 12 per cent interest should be paid on the arrears of rent and that the mortgaged property should be liable for the total amount. There was a further clause that on redemption the mortgagor should pay the mortgage money together with any arrears of rent and interest due. In 1871 default was made in payment of the rent due and the mortgagee brought O.S. No. 199 of 1872 against the mortgagor and obtained a decree for possession and for arrears of rent and interest at 12 per cent and for some road cess, in all for a little over Rs. 200, with future rent and interest at the same rate. In execution of this decree possession was taken by the mortgagee, but it does not appear that he has been paid the rent

decreed. It is that rent with interest added to it for the last 40 years and more that he now claims to be paid before redemption. It is not denied that his decree was long ago barred by limitation. NARAINA RAO v. SHIVU RAO.
KRISHNAN, J.

The first Court allowed his claim, but the Appellate Court disallowed it and he has appealed to us to claim it. It was conceded on his behalf that his claim was not sustainable so far as it was based on the covenant in the mortgage-deed to pay the arrears of rent with the mortgage money, in view of the ruling in *Ramakrishna Kukkilaya v. Nekker Kuppanna*(1), but it was argued that as in the present case there was a charge on the property for the rent due he could rely upon it and claim to be paid the amount of it before redemption in spite of his having obtained a decree for it and in spite of that decree having become barred by limitation. That there is a charge created by the language of the document must be admitted; and in this particular there is a difference between the present case and *Ramakrishna Kukkilaya v. Nekker Kuppanna*(1). But I do not think that makes any real difference in the result. I am inclined to agree with appellant's argument that the obtaining of a personal decree does not *per se* put an end to the charge on the property. That that is the English rule, is clear from the statement of the law in Halsbury's Laws of England, Vol. 21, section 579, and from the cases cited there in support of it, *Lloyd v. Masen*(2) and *O'Brien v. Lewis*(3). There is no reason why the same rule should not be applied in India. In fact Order XXXIV, rule 14, of the Code of Civil Procedure recognizes the principle and gives the right to bring a second suit to enforce the security. It seems to me also that their Lordships of the Privy Council adopted this rule in the case in *Hewanchal Singh v. Jawahir Singh*(4) though the matter is not free from doubt as their judgment is very brief. It may however be remarked that they make no difference between interest for the first year, for which a decree had been obtained even before payment into Court, and that for the second year. It is no doubt possible to take their ruling to refer to interest for the second year as has been done by the Allahabad High Court in *Imdad Hasan Khan*

(1) (1917) 33 M.L.J., 581.

(2) (1845) 4 Bore, 132.

(3) (1863) De G. J. & S., 606.

(4) (1869) I.L.R., 16 Calc., 307 (P.O.).

NARAINA RAO v. *Badri Prasad*(1). But I think, having reference to the facts of the case as appear from the report and the argument before the Privy Council, the learned Judges of the Allahabad High Court have taken too narrow a view of the effect of that decision.

On the authority of the same Allahabad case, the respondent has contended that the obtaining a decree by itself put an end to the mortgagee's right to rely upon the charge. It is not clear from the report whether the decree which the mortgagee had obtained there for Government revenue paid by him, was a subsisting one at the date of the suit for redemption or not, and also whether it had not been assigned away. If it was subsisting and unassigned, I am, with all respect to the learned Judges, inclined to think that their ruling on the point has gone too far. They treat the case as one of election of remedies and held that having elected to sue on the personal covenant the mortgagee could not rely on his right under section 72 of the Transfer of Property Act. I do not think the principle of election was properly applied as in the second suit the mortgagee was only a defendant and was not seeking any remedy himself but was only setting up a condition for granting to the mortgagor the right of redemption sought to be enforced by him. To apply the principle of election in such a case seems to me to be in effect equivalent to extending the scope of Order II, rule 2, of the Code of Civil Procedure or of section 43 of the old Code which was then in force, to defences; which is unwarranted. The argument that, if the mortgagee is allowed to rely on his security for amounts for which he has obtained decrees, the mortgagor may be compelled to pay the same amount twice over in cases where these decrees are assigned to third parties, does not seem to me of any force as the security is attached to the decree and, on assignment of the decree, can no longer be availed of by the mortgagee. In fact it is exactly like the transfer of any other part of a mortgagee's claim to third parties. As I have already pointed out, it is doubtful whether too narrow a view has not been taken of the effect of the Privy Council decision by the learned Judges. Furthermore, the English rule on the point was not brought to their notice. For all these reasons, I think the ruling in that case on

(1) (1898) I.L.R., 20 All., 401, p. 407.

the point in question cannot be followed if the decree there was a subsisting one and was not assigned away. But, even assuming that a mortgagee does not lose his charge by obtaining a personal decree but can plead it and claim to be paid the amount of it in a redemption suit, the appellant must still fail as I think that can be done only so long as the claim under the decree is not barred by limitation.

When the appellant obtained his decree for rent, his rights with regard to it were regulated thereafter entirely by the terms of that decree; the claim to it was taken out of the operation of the contract between the parties and passed into the domain of judgment. It was not open afterwards to either party to ignore the decree and fall back on their antecedent rights and obligations. In short the claim for arrears of rent became merged in the decree and though the charge did not become extinguished it became thereafter attached to the decree amount so far as it represented the original rent. If the decree was satisfied or assigned away by the mortgagee, he could no longer enforce any charge. I think on the same principle if the decree ceased to be enforceable by limitation the charge also failed. By the obtaining of the decree the claim for rent, even though it was originally a part of the mortgage transaction, was dissociated from the mortgage and became an independent claim on the property; and therefore the principle recognized in the cases in *Athan Kutti v. Subhadra Anterjanam*(1), *Kesar Kunwar v. Kashi Ram*(2) and *Ramakrishna Kukkilaya v. Nekker Kuppanna*(3) that a mortgagee cannot be allowed to take advantage of a redemption suit to enforce his stale and time-barred claims unconnected with the mortgage under redemption applied to it. The cases in *Parasurama Pattar v. Venkatachalam Pattar*(4) and *Nathamuni Pillai v. Vengammal*(5) cited by the appellant referred to claims arising under one and the same mortgage transaction. In neither of them had any decree been obtained for a part of the mortgage claim as in the present case and therefore the question arising here was not considered. The principle stated in the last case following the English cases of *Edmunds v. Waugh*(6) and *In re Marshfield. Marshfield v.*

(1) (1916) 5 L.W., 461.
(3) (1917) 23 M.L.J., 581.
(5) (1916) 5 L.W., 593.

(2) (1915) I.L.R., 37 All., 634.
(4) (1913) 25 M.L.J., 561.
(6) (1866) L.R. 1 Eq., 418.

NARAINA RAO *Hutchings*(1) that the limitation of a mortgagee's right to
SHIVU RAO. recover must not be read as a good plea to be urged by a
KRISHNAN, J. mortgagor endeavouring to redeem applies only to claims arising
under the particular mortgage under redemption and not to
those outside it. In the Privy Council case in *Hewanchal Singh*
v. Jawahir Singh(2) and in the two English cases of *Lloyd v.*
Masen(3) and *O'Brien v. Lewis*(4) above cited the decrees were
alive. In fact, in O'Brien's case, Lord Justice KNIGHT BRUCE
adds a direction

"for allowing against the judgment what has been, or shall be
obtained by means of the lien"
showing that the enforcement of the lien was for the purpose of
paying the decree debt. No case has been cited by the appellant
against the view I am taking. On the other hand, Jones in his
Treatise on Mortgages, section 936, states the American rule
clearly thus:

"The merger of the note in a judgment does not extinguish the
debt and the mortgage continues a lien till it is satisfied or the
judgment is barred by the statute of limitation,"
and cites numerous American authorities in support of it.
Though this is the American Law, it seems to me it enunciates a
principle which we may well accept. It follows then that, assum-
ing the appellant could have asked at the time of redemption to
be paid the amount of his decree in O.S. No. 199 of 1872 so far
as it represented the rent due to him, if his decree had been
kept alive, his right to do so ceased on that decree becoming
barred by limitation.

The second appeal therefore fails and I agree with my
learned brother that it must be dismissed with costs. As a
result, I also agree that the memorandum of objections should be
allowed with costs and to the other portions of his order.

K.B.

(1) (1887) 34 Ch. D., 721.

(3) (1845) 4 Hare, 132.

(2) (1889) I.L.R., 16 Calc., 307 (P.C.).

(4) (1863) 3 De G. J. & S., 806.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Coutts Trotter.

BAMIAH AIYAR AND ANOTHER (DEFENDANTS NOS. 4 AND 5),
APPELLANTS,

1918,
March 28
and
April 16.

v.

GOPALIER AND FIVE OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1,
2, 3 AND 6), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 2—Arrest of defendant
before judgment—Deposit of money in Court—Right of the plaintiff to the
amount on obtaining decree—Rights of Official Receiver in insolvency and
of other attaching creditors of the defendant.*

The defendant was arrested before judgment and was ordered to be released
from custody on depositing in Court a sum of money sufficient to meet the
plaintiff's claim in the suit, under Order XXXVIII, rule 2 of the Civil Procedure
Code. There was subsequently an attachment of the money by a decree-holder
and an adjudication of the defendant as an insolvent.

Held, that the money was paid into Court to the general credit of the action
and charged with a lien in favour of the plaintiff on the latter obtaining
a decree in his favour; and that the attaching creditor's and the Official
Receiver's claims were subject to this lien.

SECOND APPEAL against the decree of A. EDGINGTON, the District
Judge of Tinnevely, in Appeal Suit No. 418 of 1916, preferred
against the decree of R. NARASIMHA AYYANGAR, the District
Munsif of Tinnevely, in Original Suit No. 384 of 1914.

The fourth and fifth defendants in the present suit (Original
Suit No. 384 of 1914) on the file of the District Munsif's
Court of Tinnevely brought a suit against the second defendant
and her son for a sum of Rs. 1,053 in Original Suit No. 305 of
1913 on the file of the District Munsif's Court of Ambāsamudram.
During the pendency of the latter suit, the said defendants
Nos. 4 and 5 who were plaintiffs therein, made an appli-
cation for arrest of the second defendant before judgment and
the latter was arrested on 15th July 1913 and kept in custody
and on the 21st July 1913, the second defendant deposited into
Court a sum of Rs. 1,200, an amount sufficient to meet the
plaintiff's claim, and was released from custody. The suit was

* Second Appeal No. 866 of 1917.

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subsequently transferred to the file of the Sub-Court of Tinnevely and a decree was passed on the 18th August 1914 in favour of the plaintiffs (the present fourth and fifth defendants) for the amount claimed in the plaint. Subsequently certain decree-holders of the second defendant attached the amount deposited in the Ambāsamudram Munsif's Court as money due to the second defendant, their judgment-debtor. The plaintiffs in Original Suit No. 305 of 1913 (the present fourth and fifth defendants) put in a claim petition in the Sub-Court of Tinnevely; the petition was allowed in their favour and the attachment of the decree-holders was raised. The latter brought the present suit (Original Suit No. 384 of 1914) on the file of the District Munsif's Court of Tinnevely to set aside the order passed on the claim petition. Meanwhile on the 29th June 1914 the second defendant herein had filed his petition in insolvency and was adjudicated on that petition on the 17th February 1915. The plaintiffs impleaded in the present suit the Official Receiver in insolvency of Tinnevely as one of the defendants along with their judgment-debtor and the claimants. The District Munsif passed a decree in favour of the plaintiffs, holding that the amount deposited continued to be the property of the second defendant and became vested in the Official Receiver in insolvency. The Subordinate Judge, on appeal, upheld the decision of the District Munsif and dismissed the appeal of the fourth and fifth defendants. The latter preferred this Second Appeal.

K. R. Guruswami Ayyar and *A. Subbarama Ayyar* for the appellants.

S. Viswanatha Ayyar for sixth respondent.

K. S. Ramabhadra Ayyar for first and second respondents.

The Court delivered the following JUDGMENT:—

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COTTES TROTTER, J.—The fourth and the fifth defendants in this case who are the appellants, brought a suit, Original Suit No. 305 of 1913 in the District Munsif's Court of Ambāsamudram, against the second defendant. The second defendant was brought under the machinery of Order XXXVIII of the Code of Civil Procedure, because an application was taken against him for his arrest before judgment on the ground that he was absconding from the local limits of the Court, and thereupon, in accordance with the procedure set out in Order XXXVIII, rules 1 and 2,

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he was brought up before the Court to show cause why he should not furnish security for his appearance; and he proceeded under rule 2 to deposit a sum of money and, in this case, Rs. 1,200 which was adjudged sufficient to meet the plaintiff's claim, that is to say, the claim of the defendants Nos. 4 and 5 in this suit. The dates are important. The arrest was on the 15th July 1913 and the payment into the Court was on the 21st of July following. The fourth and the fifth defendants obtained a decree for the full amount claimed on the 18th August 1914; and meanwhile, on the 29th June 1914, the second defendant had filed his petition in insolvency. He was not adjudicated on that petition until the 17th of February 1915. But by relation back his insolvency will date from the petition on which he was adjudicated and accordingly the insolvency will date back to June 1914.

The question in this case is whether the money paid into Court in accordance with the provisions of Order XXXVIII, rule 2, belongs to the fourth and fifth defendants as the successful plaintiffs in the suit. If it does not belong to them, rival claims may arise as between the Official Assignee, as Receiver of the estate of the second defendant and the plaintiffs in this suit who are prior decree-holders. But, if the true position be that the money in Court belongs to the fourth and the fifth defendants, the question of priority as between other parties to the suit will not arise. There is a good deal of authority on this question, though not any direct decision, as to whether this precise section is to be interpreted as giving a lien to the plaintiff in a suit in the circumstances of money being deposited to secure the defendant from arrest; there are decisions of this and other High Courts in regard to the corresponding sections of the Indian Code and also decisions of the English Courts relating to kindred situations. It is clear that attachment before judgment of property under Order XXXVIII, rule 5, does not pass any title to the person at whose instance it is attached but merely its effect is to prevent alienation on the part of the person whose property is attached. It restricts the hands of the owner of the property, but does not make him cease to be the owner nor does it confer any specific lien on the person who seeks the attachment. This was laid down in numerous cases both in England and in this country,

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and Lord HOBHOUSE observed in *Motilal v. Karrabuddin*(1), that even attachment in furtherance of execution gives no title. This has been re-affirmed by this Court on a specific reference to Order XXXVIII, rule 5, which relates to attachment of property before judgment in order to prevent the disposal of the property by the defendant in *Erikulappa Chetty v. The Official Assignee, Madras*(2), a decision of WALLIS, C.J., and SESHAGIRI AYYAR, J. The learned judges point out that what one may call a condition of the application on which the money was secured to safeguard the plaintiff's interest is the abstaining of the defendant from making away with his property and so long as the property is not taken out of the jurisdiction of the Court or alienated and the defendant is ready to produce his property to the Court, then the condition is not broken, and as soon as ever the property was produced to the Court by the defendant on decree being obtained by the plaintiff, the object for which the money was deposited was gone and it could only be claimed by the person who deposited it. That is tantamount to saying that in contemplation of law it has been his property the whole time, only subject to certain control and retention by the Court. Similar principles have been applied to money deposited into Court under a Garnishee order in *Jitmand v. Ramohan*(3). That is one class of case; but you get a totally different class of case where money is not deposited in Court in order to secure something being done by the person who deposited it, such as abstaining from going away or removing his property from the jurisdiction of the Court but where money is paid to the credit of the suit or ear-marked for the suit, the Courts have always held that, when that is done, the money belongs to the plaintiff in the event of his success and that it cannot pass to the general creditors of the person who pays it in or to any person who claims under him. That distinction has been very clearly laid down by the English Courts in the case of *In Re Pollard*(4). In that case some money in a bank belonging to an alleged defaulting executor and trustee were sequestered by letters of sequestration taken out in the Chancery Division which for ordinary practical purposes may be described as

proceeding in the nature of attachment. The defaulting trustee was adjudicated a bankrupt and it was held that the sequestered fund in the hands of the bank did not pass to the plaintiffs in an action by the *cestius que trustent* who, it was said, had been defrauded, but passed to the Official Receiver as part of the estate of the bankrupt. And ROMER, L.J., in his judgment at page 48 explains why it was so and points out very clearly the distinction between the two classes of cases. He says—

“He (i.e., the plaintiff) might have obtained a special charge by obtaining some special order having that effect. I think, therefore, that the only question is whether the payment of the money into Court, under the circumstances of the present case, did give the appellants, who are no doubt in the position of creditors of the bankrupt, a special right to or charge upon the money so paid in. In my opinion, for the reasons which I will shortly state, the order for payment into Court did not convert the money into the property of the creditors or give them any special charge upon it. The order was to pay the money, not to the general credit of the action, but to the special account of the sequestrators. That left the money as part of the debtor's property received by the sequestrators as sequestrators. Had the order gone on to say that after payment of the costs of the sequestrators, the balance should be paid over to the general credit of the action, the result would have been different; but that was not done”.

Similarly in *Bird v. Barstow*(1), a woman got leave to defend an action under Order XIV (Summary judgment) on terms that she brought into Court £500. She paid the £500 and she lost the case. Then she tried to raise a point that she being a married woman, an inquiry would have to be held to see whether it was money belonging to her separate estate which in the ordinary course of events would be the only fund against which the execution could proceed. The court of appeal consisting of Lord ESHER, M.R., FRY, L.J., and LOKES, L.J., refused to go into that enquiry on the short ground put by Lord ESHER that

“the meaning of such an order, in my opinion, is to give security to the plaintiff that, if he succeeds in the action, he shall obtain the fruits of success.”

And in other cases too it has uniformly been held in England that where, as a condition of granting leave to defend

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(1) (1898) I.L.R., 25 Cal., 179. (P.C.). (2) (1916) I.L.R., 39 Mad., 903.
(3) (1905) I.L.R., 29 Bom., 405. (4) (1903) 2 K.B., 41.

(1) (1892) 1 Q.B.D., 94.

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the suit, money is paid into Court, that money is the property, subject to his proving his claim, of the plaintiff and that it cannot be attached by the creditors or assignee in bankruptcy of the person who paid it in. And that has been followed in this country in the Madras courts in two different sets of cases. In one case it has been decided that if money has been deposited under order XLI, rule 5, as a condition of leave to appeal, it is ear-marked to the appeal. In *Subramania Chettiyar v. Rajarajeswara Sethupathi*(1) immovable property, not money, had been given as security by the judgment-debtor as a condition of his appeal and it was held that the successful decree-holder could realize the decree without bringing a separate suit for the purpose of realizing the security; and of course the necessary implication is that the property was ear-marked to the successful litigant and could be taken possession of by him without further proceedings of any kind. The learned Judges say at page 874—

“The effect of immovable property being given as security is something more than attachment because it makes the property applicable solely in discharge of the judgment-debt and not liable to rateable distribution among other judgment-creditors.”

Similarly a Bench of this Court in *Gopalaiyar v. Thiruvengadam Pillai*(2) held, following the English cases, that where money was brought into Court by the defendant as a condition of being allowed to defend under Order XXXVII of the Civil Procedure Code (Summary Proceeding in this country on negotiable instruments) the amount paid into Court must be regarded as ear-marked to the action of the plaintiff and in the event of success, the judgment amount must be regarded as being charged upon it.

These are principles which seem to us to be clear and the question is which side of the line it is that cases coming under Order XXXVIII, rule 2, fall. Order XXXVIII, rule 1, no doubt, says that a defendant when arrested on a warrant is to be brought before the Court to show cause why he should not furnish security for his appearance; and the argument, as we understand it, is that, that being the nature of the enquiry, the section which tells us what the Court can do must have regard

(1) (1917) M.W.N., 872.

(2) (1917) 32 M.L.J., 503.

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solely to the matter of furnishing security for his appearance. If that were so, the section would fall within the same principles of decisions as under order XXXVIII, rule 5, that the mere furnishing of security or payment of money into Court as security for the appearance of the defendant does not create a lien or ear-mark it, for the purpose of the action. But what happens when the defendant does appear under a warrant is this, that the Court may make alternative orders:

“The Court shall order him either to deposit in Court money or other property sufficient to answer the claim against them, or to furnish security for his appearance at any time when called upon while the suit is pending.”

It seems to us that there are two alternative courses open. One is the defendant may give security for his appearance; such security will be merely conditional for his appearance in Court and could not be said to be to the credit of the suit or ear-marked to the general purposes of the suit. It is a specific security. The alternative is that he may deposit money or other property sufficient to answer the claim. We think that it is not security for his appearance, but is an alternative by which liberty is given to him to pay into Court sufficient money to meet the suit and we think that payment would be ear-marked to the suit and would be subject to the lien of the plaintiff in the event of his success. As was pointed out during the argument, the words are “to deposit in Court money . . . to furnish security . . .” not, “to furnish other security” which one would expect if the deposit mentioned in the first part of the rule is merely an alternative way of furnishing security mentioned in the second part. We think that the first alternative described by the rule is undoubtedly the one pursued in this case, that is, the money was paid into Court to the general credit of the action, as such, charged with lien on the plaintiff obtaining a decree in his favour and we think that neither the assignee of the bankrupt's estate nor the general body of creditors nor any specific creditor has a claim which can prevail over the title of the plaintiff.

The result is, the appeal is allowed and the suit dismissed with costs throughout. The Official Receiver (out of the estate) and the plaintiffs will pay the costs.

K.R.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Spencer.*

HARRY MEREDITH (PLAINTIFF), APPELLANT,

v.

V. K. ABDULLA SAHIB AND FOUR OTHERS (DEFENDANTS),
RESPONDENTS.*

Contract to purchase and ship goods—C.I.F. contracts, nature of—C.I.F. contract with ordinary vendor and with commission agent, difference between—Outbreak of war, effect of—Liability of vendor and vendee—Special terms as to risk in contract, effect of—Indian Contract Act, sec. 222.

E. & Co., who were commission agents, entered into a contract with the defendants under which they undertook to purchase and ship certain goods "on account and risk" of the defendants, and did ship them under a C.I.F. contract on board a German ship. Owing to the outbreak of war during their transit, the goods did not arrive at their destination until long after due time. On defendants' refusal to accept the goods, they were sold by the plaintiff, the liquidator of E. & Co., who sued the defendants for damages for breach of contract; the defendants denied the liability.

Held, that E. & Co., being commission agents of the defendants, were entitled, both under the special terms of the contract and under the general law of agency embodied in section 222 of the Indian Contract Act, to recover damages for breach of contract;

In an ordinary C.I.F. contract between vendors and vendees, the tender of a bill of lading after the contract of affreightment has been dissolved by the outbreak of war is not such a tender as the vendees are bound to accept, and they are not bound to pay for the goods. *Arnhold Karberg & Co. v. Blythe Green Jourdain & Co.* (1916), I.K.B., 495, followed.

Where, however, goods are purchased from a commission agent, though he is regarded for some purposes as a principal as any other vendor under a C.I.F. contract, yet the relationship of principal and agent still subsists for all other purposes; the true principle is that the assimilation is only to be carried so far as is necessary to give necessary efficacy to the transaction.

Ireland v. Livingston (1871-2) L.R., 5 H.L., 395, *Cassaboglou v. Gibb* (1883) 11 Q.B.D., 797, *Williamson v. Barbour* (1877) 9 Ch.D., 529, referred to.

APPEAL against the judgment and decree of COUTTS TROTTER, J., in Civil Suit No. 1 of 1917.

The plaintiff, who was the liquidator of Messrs. J. H. Elliott & Co., sued to recover damages for breach of certain contracts

made with the defendants, under which the former undertook to purchase and ship certain goods 'on account and risk of the defendants,' and did ship them under C.I.F. contracts on board a German ship. The material terms of the contract were as follows :—

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MADRAS,
30th July 1913.

Messrs. J. H. Elliott & Co., Limited.

Dear Sirs,

"I (we) hereby request you to purchase and ship for me (us), if possible, the undermentioned goods on my (our) account and risk upon the terms stated below :—

It shall be optional with you to execute the whole or any part of this order.

If an order consists of more than one shipment, each shipment shall, in respect of any dispute or claim, be considered as a separate order, and a first or subsequent shipment being late or not shipped shall not entitle me (us) to refuse any of the following ones.

If any dispute arise with regard to this order, two European merchants, one to be appointed by each party, shall survey the goods, whose decision shall be final, and I (we) hereby agree to abide by it. Expenses of survey to be borne by the losing party. I (we) agree to deposit Rs. 32 as survey fees.

Terms of payment.—I (we) authorize you to draw upon me (us) for total amount of invoice at the sight mentioned below at current rate of exchange (or as may be otherwise hereafter stated), and such bill or bills I (we) hereby bind myself (ourselves) to accept on presentation and pay at maturity, or, at your option and upon notice being given to me (us), I (we) agree to pay you in cash the invoice amount, and in the event of my (our) failure to do so, I (we) hereby undertake to pay you all losses and expenses arising from such default.

I (we) agree when deliveries have been made to me (us) at any time, that should I (we) fail to pay the value of any goods delivered up 'against acceptance,' that you are at liberty to stop further deliveries, until such time as the former deliveries have been paid for; and should any rent or other charges be incurred for the non-deliveries, these charges will be paid by me (us), and you are at liberty to re-sell any such goods, not delivered, whenever you may think proper, and the differences I (we) hereby undertake to pay on demand.

* Original Side Appeal No. 57 of 1917.

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We further agree to accept your account sales as correct without further proof.

In the event of the goods arriving before the bill or bills become due, I (we) agree to pay the draft against same on arrival.

Should I (we) fail to accept or to pay at maturity such bill or bills, or to pay cash as before agreed, I (we) hereby authorize you to dispose of the documents or goods either by private sale or public auction on my (our) account and risk without notice, and I (we) hereby bind myself (ourselves) to make good any loss or deficiency that may arise from such sale and all expenses, together with usual brokerage and interest, waiving all claim to any advantage thereon. I (we) agree to pay you a commission of 5 per cent. on proceeds of such goods re-sold together with 12 per cent. interest on the draft amount from date of maturity till realization thereof. Packing, breakage, leakage, damage and shortage are at my (our) risk and expense.

In the event of the goods being shipped or arriving before or after the time hereinafter stipulated or other deviation from the terms of this indent whatsoever, I (we) agree to waive all claims to compensation or damages in consequence thereof. The date of bills of lading shall be taken as the date of shipment, and 'arrival' shall mean the arrival of the goods at Sangor.

If, owing to unforeseen circumstances, shipment be made fifteen days within the time stipulated, such deviation from time limit not to be considered a breach of contract.

In the event of the execution of this indent, on the shipment or arrival of the goods being delayed through strikes of workmen, failure of machinery, detention of vessel or cargo, or other causes, I (we) hereby agree that you may exceed the stipulations hereinafter mentioned and may execute and ship this indent as soon thereafter as possible, and I (we) agree to accept and pay for the goods without objection thereto, as though the conditions have been complied with. In the event of default by the manufacturers to deliver the whole or any part of the undermentioned goods, you have the option of cancelling such portion of this order or buying elsewhere. Further, you are at liberty to cancel this indent at your option, at any time, without notice to me (us).

No claims for incorrect outturn shall be entertained unless made within twenty-one days of the arrival of the steamer " . . .

Owing to the outbreak of war, the goods, though shipped on 20th July 1914, arrived at their place of destination, viz., Madras, on or about the 10th May 1916, as they were detained and had

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to be transhipped in different ships, etc., under the rules and regulations made in consequence of the war. The defendants refused to pay for, and take delivery of, the goods. The plaintiff-company had the goods sold in Madras and sued to recover damages from the defendants for breach of contract. The learned trial Judge (COURTS TROTTER, J.) dismissed the suit, holding that the contracts had been dissolved and the tender of the bills of lading, after the contract of affreightment had become dissolved by the outbreak of war was not a sufficient tender or performance so as to fix the defendants with liability for the risk. The plaintiffs preferred this appeal.

W. Barton for the appellant.

A. Suryanarayanaiah for the respondent.

The Court delivered the following JUDGMENTS:—

WALLIS, C.J.—This is an appeal by the plaintiff from the judgment of COURTS TROTTER, J., dismissing a suit brought by the plaintiff as liquidator of Messrs. J. H. Elliott & Co., Limited, to recover damages for breach of certain contracts made with the defendants by which Elliott & Co. undertook to purchase and ship certain goods 'on account and risk of the defendants' and did ship them under C.I.F.C.I. contracts on board a German ship. War broke out while the goods were still in transit, and the contracts of affreightment between the shippers and the German ship-owners were thereupon dissolved, with the result that, if these were ordinary C.I.F. contracts between vendors and vendees, then, as held by the learned Judge in accordance with the decision of the Court of Appeal in England in *Arnhold Karberg & Co. v. Blythe Green Jourdain & Co.* (1), the tender of the shipping documents including these bills of lading which had been dissolved as contracts of affreightment was not such a tender as the defendants were bound to accept under the C.I.F. contract, and the goods were thrown on to the vendors' hands. The only serious attempt to distinguish that case at the trial was on the ground that in the present case the bills of lading had been indorsed over to the defendants before the outbreak of war. As observed by the learned Judge, that fact is not proved. On the contrary, the Captain's copies, which have been filed, are to order of the shippers, and the fact that the National Bank on

(1) (1916) 1 K.B., 495.

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behalf of the plaintiff was able to recover the goods goes to show that there never was any such endorsement. Even if there were, I agree with the learned Judge that it would not make any difference. What I understand the Court of Appeal to have decided is, that tender by the vendors after the goods had been shipped of shipping documents including bills of lading which represent the goods was a good tender and performance by the vendor in a C.I.F. contract, but that he did not so perform his contract by delivering bills of lading which as contracts between the shippers and the ship-owner had become dissolved owing to the outbreak of the war.

No serious attempt seems to have been made at the trial to distinguish the present case on the more substantial ground that under the contract the goods, as pleaded in the plaint, were to be purchased and shipped on account and risk of the defendants, and the learned Judge has not dealt with that aspect of the case. As however the question arises on the pleadings and is purely one of law, and as cases of this kind are of infrequent occurrence in our Courts, we have allowed it to be taken before us. Now it is well settled that, where goods are purchased in this way from a commission agent under a C.I.F. contract, though the agent is regarded for some purposes as a principal just as any other vendor under a C.I.F. contract, yet the relation of principal and agent still subsists. *Ireland v. Livingston*(1), in which BLACKBURN, J. (as he then was) gave his well-known explanation of the nature of a C.I.F. contract when advising the House of Lords, was a case of this kind, and was disposed of by the House of Lords on a principle of the law of agency, viz., that, as the error arose from the principal's indistinctness of expression, he must bear the loss. The first case in which such an agent was assimilated to a vendor was *Feise v. Wray*(2), where he was allowed to exercise the right of stoppage in transit in respect of goods which he had bought and paid for; and the true principle would appear to be that the assimilation is only to be carried so far as is necessary to give business efficacy to the transaction. This I gather to have been the view of BRETT, M. R. and FRY, L. J., in *Cassaboglou v. Gibb*(3), where Lord BLACKBURN's observations

(1) (1871-2) L.R., 5 H.L., 895.

(2) (1802) 3 East, 93.

(3) (1888) 11 Q.B.D., 797.

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in *Ireland v. Livingston*(1) were considered. Otherwise the relation remains one of principal and agent as held in the last-mentioned case in assessing damages; and the agent remains accountable as held in *Williamson v. Barbour*(2) which has recently been applied to similar cases in this Court.

Now where, as in the present case, an agent is requested by his principals in the terms of the indents (Ex. A series) "to purchase for us the undermentioned goods on our account and risk" and does so, it appears altogether opposed to the principles of the law of agency to throw upon him the risk of the outbreak of war, while the goods are in transit on board a foreign ship, dissolving the contract of affreightment between the shipper and ship-owner and making it impossible for him to do what, according to the recent decision, a vendor under a C.I.F. contract is bound to do, viz., in the absence of a special contract to tender among the shipping documents bills of lading which are still valid contracts and will be enforceable by the vendee against the ship-owner. It was contended in that case that under the particular contract it was the duty of the buyers to take up and pay for the documents when tendered because the events that had happened consequent upon the war were at their risk. That, as observed by SWINFEN EADY, L.J., at the beginning of his judgment, was dependent entirely upon the true construction of the particular contract. In that case the Court was of opinion that it did not throw this risk upon the buyer. In this case there is the express stipulation that the goods are to be purchased and supplied on the buyer's account and risk. The whole transaction being thus at the risk of the buyer, I can see no reason for relieving him from the risk of what has happened. Even, if the word 'risk' were not mentioned in the contract, I think a special contract throwing this risk on the buyer could be inferred from the fact that the goods were to be purchased and shipped on account of the buyer, pursuant to the principle embodied in section 222 of the Indian Contract Act that

"the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in the exercise of the authority conferred upon him."

(1) (1871-2) L.R., 5 H.L., 895.

(2) (1877) 9 Ch.D., 529.

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To throw these goods on the agents' hands and leave them to bear the loss which has arisen by reason of the outbreak of war while the goods were in transit appears to be entirely opposed to, and inconsistent with, the general principles of the law of agency.

The cause of action is stated in the plaint to have arisen on the 10th and 17th August 1914 when the defendants refused to accept the drafts, on 23rd June 1916 when the defendants were informed the goods had arrived, and on the 29th August 1916 when the goods were re-sold. In June 1, 1916, the National Bank of India who held the shipping documents for the plaintiff entered into the agreement (Exhibit J) with Messrs. Graham & Co., therein called the representatives, who had been chosen with the sanction of the British Government to enter into an arrangement with the owners of the ship, which was sheltering at Cagliari, to obtain and tranship the goods; and in this way the National Bank obtained possession of the goods on payment of the charges incurred in releasing and forwarding them. This was the system resorted to in a very large number of cases, and was apparently the only means by which the goods could have been recovered and forwarded to their destination on behalf of the plaintiff. The defendants at first expressed their willingness to take the goods at the invoice price, but afterwards repudiated all liability; and the plaintiff, in the exercise of powers reserved in the contract, sold the goods and now seeks to recover shortfall of Rs. 3,259-0-3. The particulars have not been questioned, and I am of opinion that the plaintiff is entitled to recover them, and that the appeal must be allowed and the suit decreed with costs throughout.

SPENCER, J.

SPENCER, J.—I also am of opinion that in the case we are dealing with, there was a contract of agency and that this is sufficient to distinguish it from the cases of *Arnhold Karberg & Co. v. Blythe Green Jourdain & Co.*(1) and *Madhoram Hurdeo Das v. G. C. Sett*(2) which had to do merely with contracts between buyers and sellers.

I think that we must dispose of this appeal upon a consideration of the nature of the contract existing between the parties as it appears from the documentary evidence before us, and my

(1) (1916) 1 K.B., 495.

(2) (1918) I.L.R., 45 Calc., 28.

grounds for thinking that Messrs. J. H. Elliot & Co., Limited, were agents or brokers for the respondents are—

(1) that in the indents (Exhibits A, B and C) the respondents requested Elliott & Co. "to purchase and ship for us, if possible, the undermentioned goods *on our account* and risk":

(2) that there is a column in the indents providing for agents' commission and another column for the mark to be placed on the goods which was to be the mark of the respondents' firm:

(3) that in two out of three indents the price of the goods is not stated:

(4) that the bills of lading (Exhibits H series) show that the real shippers were Messrs. Vogler and Trummer, apparently a German firm carrying on business at Gothenburg in Sweden.

As in *Ireland v. Livingston*(1), I think that this transaction began as a contract of agency, although for certain purposes the agents may have been in the position of vendors when shipping goods to their principals. Therefore, although the contract of affreightment became impossible of performance owing to the goods being in an enemy ship at the outbreak of war and was thus dissolved, the contract of agency did not thereby come to an end, and this being so, as between the parties to this suit, the loss must fall upon the defendants both under the special terms of their contract and under section 222 of the Contract Act, rather than upon the innocent agents who honestly executed the orders of their principals. I agree that the appeal should be allowed with costs.

Messrs. King and Partridge—Solicitors for appellant.

K.R.

(1) (1871-2) L.R., 5 H.L., 395.

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APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Seshagiri Ayyar.*

1917,
December
19 and 1918,
April 15
and 18.

EYUNI RAGHAVACHARYULU AND FOUR OTHERS (PLAINTIFFS
NOS. 2, 4, 5, 6 AND LEGAL REPRESENTATIVE OF THE THIRD
PLAINTIFF), APPELLANTS,
v.

EPURI GOVINDASARI (DEFENDANT), RESPONDENT.*

Co-sharers—Lease by majority of common land—Validity of lease—Lease, whether binding on minority—Suit by minority in ejectment—Remedy, whether limited to partition only—Form of decree.

A majority of co-sharers in samudayam or common land cannot grant a perpetual lease of the common property.

Where a lease by some of the co-sharers is found to be invalid, the lessee is not entitled to be maintained in his possession, leaving it to those co-sharers objecting to his lease to sue for partition as their only remedy.

Where the lease is by some of the co-sharers to a person who is also a co-sharer, and the suit is by other co-sharers to eject the lessee, the proper decree to be passed is one declaring that the lease is not binding on the plaintiffs and directing recovery of possession by the latter on their own behalf and that of the other co-sharers.

Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi (1917) I.L.R., 40 Mad., 709 (P.C.), applied.

Watson and Company v. Ramchund Dutt (1891) I.L.R., 18 Cal., 10 (P.C.), explained.

SECOND APPEAL against the decree of T. A. NARASIMHA ACHARIYAR, the Temporary Subordinate Judge of Nellore, in Appeal No. 17 of 1915, preferred against the decree of S. RAMASWAMI AYYANGAR, the Additional District Munsif of Nellore, in Original Suit No. 85 of 1913.

The plaintiffs were the owners of 10½ shares out of 80 shares in a shrotriyam village in which the suit lands which were part of the dry lands of the village were included as the common property of all the sharers. Some of the other sharers (who were owners of 57 shares) gave a permanent and heritable lease of the suit lands to the defendant who was also a co-sharer and the karnam of the village on an annual rent of

* Second Appeal No. 1700 of 1917.

Rs. 150; the extent of lands given as 60 acres more or less in the lease deed was found to be 240 acres on actual measurement. The lease was granted in spite of the objection of the plaintiffs who formed only a minority of the co-sharers. The plaintiffs alleging that the lease was fraudulent and collusive and was not valid in law and binding on them, sued to eject the defendant as a trespasser, or in the alternative prayed for joint possession of the suit lands along with the defendant. The Court of first instance held that the lease was not binding on the plaintiffs and decreed joint possession to the plaintiffs along with the defendant. On appeal by the defendant, the lower Appellate Court reversed the decree and dismissed the suit, holding that the lease was valid and binding on the plaintiffs. The plaintiffs preferred this second appeal.

A. Krishnaswami Ayyar and M. Patanjali Sastri for the appellants.

L. A. Govindaraghava Ayyar and L. Venkataraghava Ayyar for the respondent.

The JUDGMENT of the Court was delivered by—

SESHAGIRI AYYAR, J.—The suit is by a few sharers of samudayam or common lands for ejectment against the defendant who has obtained a lease of it from the other sharers. The lessee is himself a co-sharer and the karnam of the village. The lease is a permanent one. The extent mentioned is 60 acres, but it has been found by both the lower Courts that it comprises nearly 240 acres. There is a clause in the lease to the effect that the property should be regarded as comprising only 60 acres although the actual measurement may be more or less. The District Munsif held that the lease was not binding and decreed joint possession to the plaintiffs with the defendant. On appeal the Subordinate Judge rightly held that the decree for joint possession was wrong. His view was that, as the lease was given by a majority of the shareholders, it is binding on the plaintiffs.

The principal question argued in second appeal is whether a majority of co-sharers can validly grant a perpetual lease of common property. The Courts below have found that it has not been proved that there is a custom authorizing the majority to impose their will upon the minority. It is now settled law that, unless for unavoidable necessity, a trustee cannot grant a

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permanent lease of trust property. See *Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi*(1). It has also been held that a karnavan of a Malabar tarwad cannot grant a permanent lease except under exceptional circumstances. The same rule applies to the managers of Hindu families. At best the position of the majority in this case can only be regarded as that of managers of joint property for themselves and on behalf of others. *Prima facie*, therefore, their action in granting a permanent lease is *ultra vires*. The learned vakil for the respondent referred to the fact that the lands were waste and that it was a prudent act of management to grant a permanent lease. Under the Madras Estates Land Act, in exceptional circumstances, the landlord for the time being is permitted to grant leases on favourable conditions. Even such a lease is not binding upon the successor. *A fortiori* a lease granted in perpetuity by a fraction of the share-holders should not be regarded as binding upon the dissenting minority. Mr. Govindaraghava Ayyar argued that, even if the lease is beyond the powers of the majority, the only remedy open to the plaintiffs is to sue for a partition of their shares. We are unable to agree with this contention. *Watson and Company v. Ramchund Dutt*(2) was strongly relied on. In that case the propriety of the lease was not questioned. What the Judicial Committee decided was that it was not open to some of the share-holders to claim joint possession with the lessees who were let in by the other co-sharers. *Lachmeswar Singh v. Manowar Hossein*(3) is also to the same effect. In *Madan Mohun Shaha v. Rajab Ali*(4) it was held that, a co-sharer being in possession, another co-sharer was not entitled to sue in ejectment against him. In *Dakhyayani Debi v. Mana Rau*(5) the Courts implied an assent on the part of the dissentients from the fact of their not objecting to the lease for over ten years. These authorities do not hold that, where a lease is found to be invalid, the lessee should be maintained in his possession leaving it to those objecting to his lease to sue for partition as their only remedy. In the present case, we are unable to agree with the learned vakil for the

(1) (1917) I.L.R., 40 Mad., 709 at p. 721 (P.C.).

(2) (1891) I.L.R., 18 Calc., 10 (P.C.).

(3) (1892) I.L.R., 19 Calc., 253 (P.C.).

(4) (1901) I.L.R., 28 Calc., 223.

(5) (1914) 19 C.L.J., 113.

respondent that it was a prudent act of management to grant a perpetual lease of such a large extent of property. We cannot help feeling that the karnam, who must have known more or less the real extent of the property he had taken on lease, took undue advantage of the ignorance of the other co-sharers in obtaining a permanent lease and in getting the clause, we have referred to already, inserted in it.

In our opinion, the proper decree to be passed is to declare that the lease is not binding on the plaintiffs and that they should be decreed possession for themselves and on behalf of the other co-sharers. We must therefore reverse the decree of the Courts below and grant a decree as above indicated. The plaintiffs are entitled to their costs against the defendant in this and in the lower Appellate Court. As they were content to have a decree for joint possession in the first Court, we make no order as to costs in that Court.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Spencer.

THANGATHAMMAL AND ANOTHER (DEFENDANTS NOS. 5 AND 9),
APPELLANTS,

v.

V. A. A. R. ARUNACHALAM CHETTIAR AND SEVEN OTHERS
(PLAINTIFF AND DEFENDANTS NOS. 1 TO 4 AND 6 TO 8),
RESPONDENTS.*

Hindu Law—Surety—Son's liability—Kinds of sureties—Surety for appearance, assurance and payment, meaning of—Tests of Yajnavalkya, construction of—Debt contracted prior to surety-bond—Effect on son's liability.

Where a Hindu executed a surety-bond stating that he would make the debtor pay within two months the amount due on a promissory note already executed by the latter and that, in default of payment by the debtor, he would pay.

Held, that the surety was one for payment; that the sons of the surety were liable under Hindu law for the payment and that it made no difference that

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the money had already been lent to the creditor before the surety-bond was executed.

Suretyship, according to the texts of Yajñavalkya, is of three kinds, viz., for appearance, for assurance and for payment: in the last case the surety's sons are also liable to pay his surety-debts.

According to the Mitakshara, the suretyship by way of assurance consists of a general warranty of credit, but a surety for payment is one who says, 'If he does not pay, then I myself will pay'.

Tukaram Bhat v. Gangaram (1899) I.L.R., 23 Bom., 454; *Rasik Lal Mandal v. Singheswar Rai* (1912) I.L.R., 39 Cal., 843, referred to.

APPEAL against the decree of A. S. BALASUBRAHMANYA AYYAR, the Subordinate Judge of Trichinopoly, in Original Suit No. 42 of 1916.

The plaintiff sued to recover Rs. 7,672 due to him on a promissory note executed by the first defendant on 7th April 1913, and impleaded his undivided sons as defendants Nos. 2 to 4; on account of the first defendant's failure to pay the amount due, the plaintiff gave him a registered notice by post on 18th May 1914; thereupon one Audinarayana Pillai, the deceased husband of the fifth defendant and alleged adoptive father of the ninth defendant, executed a varthamanam bond on 15th July 1914 agreeing that he would cause payment of the sum then due under the pro-note by the first defendant within two months and that, on the first defendant's failing to do so, he would himself pay the same to the plaintiff. On the failure of the first defendant and Audinarayana Pillai in paying the amount, the plaintiff brought this suit to recover the amount from the first defendant, his sons as well as the widow and the alleged adopted son of Audinarayana Pillai, who were joined as defendants Nos. 5 and 9, respectively. The latter pleaded that the surety-bond was not a genuine document and also that they were not liable under the Hindu Law. The other defendants raised other pleas regarding their liability for the debt. The Sub-Judge, who tried the suit, decided against the contentions of the defendants Nos. 5 and 9 as well as of the other defendants and decreed the suit for the plaintiff. The fifth and ninth defendants preferred an appeal (A.S. No. 80 of 1917) to the High Court, while the other defendants preferred the connected appeal (A.S. No. 155 of 1917); the latter appeal being principally on questions of fact, the judgment of the High Court thereon has been omitted from this report.

R. Kuppuswami Ayyar, S. Krishnaswami Ayyangar, K. R. Rangaswami Ayyangar and V. Pattabhirama Ayyar for the appellants.

The Hon. Mr. T. Rangachariar and K. S. Ganesa Ayyar for eighth respondent.

A. Krishnaswami Ayyar for first respondent.

The JUDGMENT of the Court was delivered by—

SPENCER, J.—In Appeal No. 80 of 1917 at the hearing of SPENCER, J. this appeal, two contentions were raised—

(1) that the varthamanam or guarantee (Exhibit M) alleged to have been written by fifth defendant's husband Audinarayana Pillai was not genuine:

(2) that owing to the nature of the transaction which Exhibit M evidenced, the heirs of the guarantor are not liable under Hindu Law.

On the first point, we do not find the least reason to doubt the correctness of the learned Subordinate Judge's finding of fact. The circumstance that, during Audinarayana's lifetime a notice of demand setting out his liability under the varthamanam was sent to him and he did not repudiate his liability, tells strongly against the present theory that it is a forgery. It was again mentioned in the subsequent promissory note (Exhibit Q) in a sentence which may have been written after the stamp was affixed but not necessarily after Audinarayana had signed across the stamp.

The attempts made to prove an *alibi* for the first defendant on the day when Exhibit M was executed by means of certain post cards do not in our opinion in the least detract from the genuineness of that document.

The determination of the second point depends upon the application to the facts of this case of the Hindu Law as to the liability of sons of persons who have stood sureties for others. Verses 53 and 54 of Yajñavalkya run as follows:

दर्शनप्रत्यये दाने प्रातिभाष्यं विधीयते ।

आद्यौ तु वितथे दाप्यावितरस्य सुता अपि ॥

दर्शनप्रतिभूर्यत्र मृतः प्रात्ययिकोऽपि वा ।

न तत्पुत्रा ऋणं दद्युर्दानाययः स्थितः ॥

which are translated by Mr. Gharpure in his collections of Hindu Law texts thus:

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—
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"Suretyship is ordained for appearance, assurance and for payment. The first two, however, should be made to pay in case of default while in the case of the last even the sons (should be made to pay). Where a surety for appearance or a surety by assurance dies, the sons of such a one must not pay (but) in the case of a surety for payment, they should pay."

It is argued that the fifth defendant was under Exhibit M a surety for assurance (pratyaye) not for payment (dana) and that the fact that the money had already been lent to the debtor when the surety bond was executed is an indication of this. According to the illustration given in the Mitakshara when commenting upon the above verses, the suretyship by way of assurance consists of a general warranty of credit, but a surety for payment is one who says: "If he does not pay, then I myself will pay." The distinction between these two classes of sureties is further explained in Colebrooke's Digest, volume I, page 164, and has been discussed fully by RANADE, J., in *Tukaram Bhat v. Gangaram*(1). In *Rasik Lal Mandal v. Singherwar Rai*(2) it was held that a surety obligation for payment was binding on the son even where the creditor's claim against the principal debtor did not arise out of a loan from the creditor to the debtor.

In Exhibit M, the promise which Audinarayana Pillai made was in these words:

"I shall make the said Veera Pillai pay the amount due under the said promissory note within two months from this date. In default of payment as aforesaid by the said person within the said time, I shall pay the amount of principal and interest due on the said promissory note and get back the said promissory note and the surety bond and the title-deeds."

There could hardly be a more definite promise to pay, if the debtor failed to pay, than this, and therefore this falls under the third class of suretyship, that for payment (dana), and it makes no difference that the money had already been lent to the debtor when the surety executed the bond.

Defendants Nos. 5 and 9 are therefore liable to pay out of the family assets in their hands.

The appeal is dismissed with costs of plaintiff and eighth defendant (two sets).

K.R.

(1) (1899) I.L.R., 23 Bom., 454.

2) (1912) I.L.R., 39 Cal., 848.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

AMMANI AMMA AND FIVE OTHERS (PLAINTIFFS), APPELLANTS,

v.

PADMANABHA MENON AND FIFTEEN OTHERS (DEFENDANTS),
RESPONDENTS.*

Malabar Law—Right of a member of a tarwad to separate maintenance—Female member marrying under Malabar Marriage Act (IV of 1896)—Act whether bar to her claim for maintenance from tarwad.

The right of every member of a Malabar tarwad to be maintained out of the tarwad property is based on his or her right as a co-proprietor in the same and a female member of the tarwad is not deprived of such right by reason of her marriage under the provisions of the Malabar Marriage Act (IV of 1896).

SECOND APPEAL against the decree of A. NARAYANAN NAMBIYAR, Subordinate Judge of Palghat at Calicut, in Appeal No. 849 of 1914, against the decree of K. A. KANNAN, District Munsif of Palghat, in Original Suit No. 344 of 1913.

The first plaintiff and her children who were members of a Malabar tarwad, brought this suit against the other members of the tarwad for arrears of maintenance. The defendants pleaded *inter alia* that the plaintiffs had no right to a separate maintenance and that, as, during the period for which maintenance was claimed, the first plaintiff's husband who married her under the Malabar Marriage Act (IV of 1896) was maintaining the plaintiffs, they were not entitled to claim maintenance from the tarwad for the same period. Upholding this plea, both the lower Courts dismissed the suit. The plaintiffs preferred this second appeal.

The arguments appear from the judgment.

J. L. Rozario for appellants.

C. V. Anantakrishna Ayyar for respondents.

The Court delivered the following JUDGMENT:—

SESHAGIRI AYYAR, J.—The suit is by a female member of a tarwad and her children for maintenance against the tarwad; the defence is that, as the first plaintiff's marriage has been

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* Second Appeal No. 2065 of 1915.

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registered under Act IV of 1896, she and her children should entirely look to the husband of the first plaintiff for maintenance and not to the tarwad. The question is said to be one of first impression; the learned vakils on both sides have advanced to us very full arguments on the question. In our opinion, the view of the lower Appellate Court is wrong.

At the outset, it might be mentioned that the expression 'maintenance' is loosely applied to this class of cases. The allowance claimed by an anandravan of a Malabar tarwad or by a junior member of a joint Hindu family is not as a dependant upon the owner of the property but as one who in his own right is entitled to participate in the income. The common law in both cases having vested the management in the senior member, the claim for separate allowance is an index of proprietorship and not founded upon moral or quasi-legal obligations or inability to maintain himself or herself. The authorities to which Mr. Rozario drew our attention have established this position with practical unanimity. In *P. Teyan Nair v. P. Raghavan Nair*(1) it was held that the possession of separate property should not be taken into account in considering whether a member of the tarwad was entitled to separate allowance. This decision proceeded on the theory that each member had a right to a share in this income. *Thayu v. Shun-gunni*(2) has to some extent qualified the above decision by pointing out that where the tarwad has not sufficient income to maintain all the members decently, the fact that one of them has other means of livelihood will be a factor that can be taken into account. Here again the right to claim the allowance even where there are other means seems to have been accepted. In *Achutan Nair v. Kunjunni Nair*(3) it was distinctly stated that the right to an allowance should be based on the right of co-ownership of property. *Maradevi v. Pam-makka*(4) accepts this principle as well founded. In *Naku Amma v. Raghavu Menon*(5) it was held that a member of a tavazhi was entitled to sue the tavazhi for an allowance even though he was being maintained by the main tarwad. This is another illustration of the principle of co-ownership. This latter

(1) (1882) I.L.R., 4 Mad., 171.

(3) (1903) 13 M.L.J., 499.

(2) (1882) I.L.R., 5 Mad., 71.

(4) (1913) I.L.R., 36 Mad., 203.

(5) (1915) I.L.R., 38 Mad., 79.

decision was affirmed by the Full Bench in *Chakka Kannan v. Kunhi Pokker*(1). Thus it is clear that the right of a member of a tarwad for an allowance is an incident of co-proprietorship in the property of the tarwad and that consequently that right cannot be denied unless circumstances show that the tarwad is not in a position to give a separate allowance.

In this appeal the question whether the plaintiffs were justified in living away from the tarwad house, whether there are circumstances which would justify the allotment of an allowance when they do not choose to live with the other members and whether the claim for arrears is sustainable have not been gone into. Those questions will have to be dealt with by the lower Appellate Court.

Mr. Anantakrishna Ayyar mainly relied upon sections 17 and 18 of Act IV of 1896. The learned vakil argued that the term 'maintenance' suggested that it is subsistence allowance and that if that subsistence is given by another who is bound by law to provide it, the tarwad is absolved from liability. This argument ignores the weight of the consideration we have set out, namely, that the claim by a tarwad member is of the character of proprietary right to a share in the income. It is true, as pointed out by the learned vakil, that clause (2) of section 17 only leaves unaffected the customary right, if any, against the tarwad but the right secured by clause (1) is a personal right, a right given by the statute against persons who comply with certain formalities. Such a right cannot take away the right of property.

Section 18 was relied on as showing that the father or the husband is alone entitled to maintain the children or the wife. That section introduces an exception to the general rule that the natural guardian of an anandravan is the karnavan. The legislature has recognized that the welfare of the minor wife or the minor children would be safer in the hands of those who are more nearly connected by blood than the karnavan. It has at the same time imposed a limitation upon the husband or the father by enacting it as a condition precedent to guardianship that they should manifest their interest in the welfare of the minor by making some sacrifice. This section only provides

(1) (1916) I.L.R., 39 Mad., 317.

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for guardianship of person and leaves guardianship of property untouched.

We do not think these provisions were intended to deprive a member of a tarwad of his or her rights in the tarwad.

For these reasons we must reverse the decree of the lower Appellate Court and remand the appeal for disposal on the merits.

Costs will abide the result.

N.B.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield
and Mr. Justice Seshagiri Ayyar.

VITTA TAYARAMMA (PLAINTIFF), APPELLANT,

v.

CHATAKONDU SIVAYYA AND TWO OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Conversion of a Hindu widow to Muhammadanism and marriage with a Muhammadan—Section 2 of Hindu Widows' Re-marriage Act (XV of 1856)—Forfeiture of Hindu husband's estate.

Held, by the Full Bench (SESHAGIRI AYYAR, J., dissenting) that a Hindu widow, who becomes a Muhammadan, forfeits under the Hindu Law, by her re-marriage, her interest in her Hindu husband's estate. *Murugai v. Viramakali* (1877) I.L.R., 1 Mad., 226, followed.

Moniram Kolita v. Keri Kolitani (1880) I.L.R., 5 Cal. 776 (P.C.), distinguished; *Chowdappa v. Narasamma* (1917) 23, M.L.T., 81, overruled.

Held further, by WALLIS, C. J. (OLDFIELD, J., and SESHAGIRI AYYAR, J., contra)—She forfeits also under section 1 Act XV of 1856, which only embodied the existing law on the subject.

Per SESHAGIRI AYYAR, J.—Neither by Hindu Law nor by section 2 of Act XV of 1856, which is only an enabling Act, does she forfeit her interest.

SECOND APPEAL against the decree of J. W. HUGHES, the District Judge of Cuddapah, in Appeal No. 196 of 1914, preferred against the decree of S. NILAKANTAM PANTULU, the District Munsif of Proddatur, in Original Suit No. 574 of 1913.

* Second Appeal No. 484 of 1917 (F.B.).

The facts are given in the first paragraph of the Order of Reference of KRISHNAN, J.

M. O. Parthasarathi Ayyangar and M. O. Tirumala Achariyar, for appellant.

T. V. Subba Rao for first respondent.

This Second Appeal was heard in the first instance by PHILLIPS and KRISHNAN, JJ., who made the following ORDERS OF REFERENCE TO A FULL BENCH:—

PHILLIPS, J.—In this case the sole question for decision is whether a Hindu widow, who becomes a Muhammadan and is then married to a Muhammadan, forfeits by her re-marriage her right to her first husband's estate. There is no reported decision of this Court directly in point and the views held by the Calcutta and Allahabad High Courts are conflicting. In *Matungini Gupta v. Ram Rutton Roy*(1), a bench of five Judges of the Calcutta High Court (one dissenting) answered the question in the affirmative, by reason of section 2 of the Hindu Widows' Re-marriage Act (XV of 1856), whereas the decisions of the Allahabad High Court are to the contrary effect (vide *Abdul Aziz Khan v. Nirma*(2), on the ground that section 2 of Act XV of 1856 is applicable only to Hindu widows as such and is not applicable to Hindu widows who have ceased to be Hindu. It has also been held in Allahabad that section 2 of Act XV of 1856 does not apply to the re-marriage of Hindu widows, who are permitted by the rules of their caste to re-marry, in *Hamid-un-Nissa Bibi v. Nazir-un-Nissa*(3), and in *Mula v. Partab*(4). In the later case the Judges had hesitation in accepting the view, but followed the uniform course of decisions in their Court. Upon this latter point, this Court has taken a different view, and so long ago as 1877 it was held in *Murugai v. Viramakali*(5), that a widow of the Maraver caste, in which caste re-marriage is allowed, who has re-married has no claim to the property of her first husband. This decision was based not on section 2 of Act XV of 1856, but upon the general principles of Hindu Law. The principle relied on in that case was that a widow takes the life interest of her deceased husband upon the fiction that she is

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(1) (1892) I.L.R., 19 Cal., 289 (F.B.). (2) (1913) I.L.R., 35 All., 466.
(3) (1910) I.L.R., 31 All., 170. (4) (1910) I.L.R., 32 All., 439.
(5) (1877) I.L.R., 1 Mad., 226.

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a surviving portion of her husband. This decision was followed by SUNDARA AYYAR, J., in *In re Duraisawmy Thevan*(1), but he relied upon Act XV of 1856 and the same view was held in *Rasul Jehan Begum v. Ram Surun Singh*(2), and in *Vithu v. Govinda*(3).

In a recent case in this Court *Chowdappa v. Narasamma*(4), SESHAGIRI AYYAR and NAPIER, JJ., have followed the decision in *Abdul Aziz Khan v. Nirma*(5), and declined to follow *Matungini Gupta v. Ram Rutton Roy*(6), as being opposed to the ruling of the Privy Council in *Moniram Kolita v. Keri Kolitani*(7), that a widow does not forfeit her estate by reason of subsequent unchastity. If, however, the principle of Hindu Law relied on in *Murugayi v. Viramakali*(8), is to be applied, i.e., that a widow continues to be a surviving portion of her husband, her re-marriage, by which she becomes a portion of her new husband, does far more to remove the fiction than mere unchastity. The question of whether a widow, who had been degraded or out-casted on account of unchastity forfeits her interest was left undecided. The decision in *Murugayi v. Viramakali*(8), and subsequent cases do not appear to have been referred to in *Chowdappa v. Narasamma*(4) which was apparently decided solely on the construction of Act XV of 1856, and therefore I think it is advisable that the general question before us should be referred to a Full Bench of this Court for decision. I would like to add with respect that it appears to me that even under section 2 of Act XV of 1856 a Hindu widow who re-marries as a Muhammadan loses her rights to her first husband's property. There is nothing in section 2 which restricts its provisions to the re-marriage of Hindu widows as such, and I can see no reason for importing these words into the section merely because the Act as a whole deals with re-marriage of Hindu widows. While the Act as a whole is intended to legalise widow re-marriages, section 2 specifically provides that re-marriage, though legal, shall entail a certain disability, and this disability is not in terms restricted to a re-marriage contracted while still a Hindu. But for the widow's conversion to Muhammadanism, her re-

(1) (1912) 15 I.C., 602.

(3) (1898) I.L.R., 22 Bom., 321.

(5) (1913) I.L.R., 35 All., 466.

(7) (1880) I.L.R., 5 Cal., 776 (P.C.).

(2) (1895) I.L.R., 22 Cal., 589.

(4) (1917) 23 M.L.T., 81.

(6) (1892) I.L.R., 19 Cal., 289 (F.B.).

(8) (1877) I.L.R., 1 Mad., 226.

marriage would entail forfeiture and there is nothing in the Act to suggest that such conversion is to remove her disability. If it were not for the decision in *Chowdappa v. Narasamma*(1), I would, with all respect, follow the decision of the Calcutta High Court; but in view of that decision of this Court, I would refer the following question to a Full Bench:—

“Does a Hindu widow, who becomes a Muhammadan and marries a Muhammadan, by her re-marriage forfeit her interest in her first husband's estate?”

KRISHNAN, J.—In the suit from which this second appeal arises, plaintiff sued for a declaration of his title to a house and for the recovery of its possession. The house originally belonged to one Pullayya, a Kapu by caste, and on his death his widow the fifth defendant inherited a widow's estate in it under the Hindu Law. Some ten years before suit she became a Muhammadan and soon after, married a Muhammadan husband in the *nikka* form. It may be mentioned here that Kapus do not allow re-marriage of widows in their caste; but the fifth defendant married a Muhammadan. Plaintiff's title is based on a sale-deed executed to him by the fourth and the fifth defendants. The fourth defendant was the sole next reversioner of Pullayya at the time of plaintiff's sale, but at the time the fifth defendant re-married, he and his brother, the father of defendants Nos. 2 and 3, now deceased, were the next reversioners equally entitled. The contesting defendants claim under defendants Nos. 2 and 3. The question therefore arises whether by her re-marriage the fifth defendant forfeited her rights in her first husband's property; for if she did, the plaintiff has got only the fourth defendant's half share in the property; otherwise he will be entitled to at least a life estate in the whole property and his suit in ejectment must be decreed in full. The lower Courts held that the fifth defendant's re-marriage had worked a forfeiture and gave a decree only for half the property; plaintiff has appealed to us and has contended that there was no such forfeiture.

The point for decision is thus, as stated by my learned brother, “whether a Hindu widow who becomes a Muhammadan and contracts a valid marriage according to Muhammadan rites

(1) (1917) 23 M.L.T., 81.

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forfeits her rights in her Hindu husband's estate?" It is conceded that her conversion did not *per se* affect her rights injuriously as they were saved by Act XXI of 1850. But it is argued for the respondents that a forfeiture was caused either by section 2 of Act XV of 1856 or if that did not apply, by the ordinary Hindu Law.

The applicability of section 2 may be considered first. In doing so, it must be borne in mind that there are two different classes of widows with reference to whom the question has been considered in the decided cases—the one class consisting of Hindu widows who belong to castes which permit re-marriage of widows in the caste itself; the other class consisting of widows who originally belonged to a caste which did not permit such re-marriage but who subsequently obtained the right of re-marriage by conversion to a different religion. The cases of these two classes do not seem to be parallel and different considerations apply. The widows of the second class could have re-married only under the Act so long as they remained Hindu; but they could no longer do so after their change of religion; whereas the widows of the first class need not, and usually do not, take advantage of the Act to justify their re-marriage at any time though there is nothing to prevent them from doing so. Judicial opinion has differed as to whether when the latter class re-marries under a caste custom, the Act and particularly section 2 thereof apply to them at all; vide *Har Saran Das v. Nandi*(1), *Ranjit v. Radha Rani*(2), in *Gajadhar v. Kaunsilla*(3), and in *Mula v. Partab*(4), holding that they do not apply and in *Vithu v. Govinda*(5), and *In re Duraisawmy Thevan*(6), to the contrary. This question need not, however, be decided in the present case as it is one of a widow of the second class. The above authorities have thus no direct bearing on the case except in so far as they construe the language of section 2.

In the case before us we have to consider whether section 2 applies to the case of widows of the second class re-marrying according to their new religion, and if so, whether we should adopt a strictly literal construction of the section or a limited one confining

(1) (1889) I.L.R., 11 All., 330.

(3) (1909) I.L.R., 31 All., 161.

(5) (1898) I.L.R., 22 Bom., 321.

(2) (1898) I.L.R., 20 All., 473.

(4) (1910) I.L.R., 32 All., 489.

(6) (1912) 15 I.C., 1602.

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it to cases of re-marriage under the Act. The authorities bearing on the point are a Full Bench decision of the Calcutta High Court in *Matungini Gupta v. Ram Rutton Roy*(1), where a majority of Judges held that section 2 applied and the subsequent marriage caused a forfeiture, a decision of a Bench in Allahabad in *Abdul Aziz Khan v. Nirma*(2), and a decision of a Bench of our own Court in *Chowdappa v. Narasamma*(3) both of which held that section 2 did not apply. After a careful consideration I am inclined to follow the latter view.

It seems to me that having regard to the scope and object of the Act as stated in the preamble and seeing that it is a purely enabling Act, its provisions should not be applied to affect the property of persons who do not and could not take advantage of it. The fifth defendant having remained as a Muhammadan had nothing to do with the Act. But it is argued that, though this may be so, the language of section 2 is wide enough to make it applicable independent of the Act itself. Ordinarily the provisions of an Act must be construed with reference to its scope and object. We must therefore see whether the language of section 2 is clear enough to justify a departure from this rule. If we turn to the section it speaks of forfeiture on 're-marriage.' Does it mean re-marriage in any form whatever or only re-marriage under the Act? I am inclined to think it is the latter. It will be seen from its language that a strictly literal construction of the section will make it applicable even to a Christian or Muhammadan or other non-Hindu widow who was never a Hindu at all, but who happened to inherit by virtue of a will of her husband or other testamentary disposition a limited interest in his property, without an express permission from him to re-marry. I take it no one will contend that the section should be construed in this very wide manner to include persons who were never Hindus at all. It is clear, therefore, that some limitation must be placed on the words of the section and the only logical way to do it, is, it seems to me, to take the scope and object of the Act and construe the section accordingly. We must look to the preamble and to the scheme of the Act generally to see what its scope and object are—See Maxwell on Interpretation of Statutes, Fifth Edition, page 69 *et seq.* It is clear as already stated that

(1) (1892) I.L.R., 19 Cal., 289 (F.B.). (2) (1913) I.L.R., 35 All., 466.

(3) (1917) 23 M.L.T., 81.

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the Act is an enabling one intended to remove disabilities of certain persons in the matter of re-marriage and to give them new rights regarding it. A reference to the various sections of the Act shows that the scheme of the Act is that, after authorizing re-marriage under section 1, it deals with the conditions and consequences of such re-marriage in the following sections. The word 're-marriage' in section 2 should therefore, I think, be reasonably read as referring only to a re-marriage under the Act and not to any re-marriage whatsoever.

In the judgment of the Full Bench in *Matungini Gupta v. Ram Rutton Roy*(1), there is no discussion of the question at all. The learned Chief Justice merely says "section 2 includes all widows who are within the scope of the Act, that is to say, all persons who being Hindus become widows". Though this case was followed in *Rasul Jehan Begum v. Ram Surun Singh*(2), the learned Judges there based the forfeiture on the Hindu Law and not on the Act.

The reasoning in the Full Bench case in *Vithu v. Govinda*(3), has no doubt a bearing on this part of the case, though that case itself is one relating to the first class of widows. Mr. Justice RANADE says that section 2 should be construed literally because "so far as the section is concerned the law has only declared what was an universal practice and this fact must have been present to the mind of legislature and explains the omission of all qualifying words." With all deference I am unable to follow this method of interpretation nor am I satisfied that the practice of widows forfeiting their right in their first husband's property on re-marriage is so universal in India as is stated. If there are castes which allow widows to re-marry and keep their estates at the same time, and I am not sure there are not any, I can see no reason to think that legislature in enacting Act XV of 1856 intended to interfere with the rights of such widows. If section 2 is taken to cover such cases, we cannot escape the conclusion that such rights are abrogated. I think clearer and more direct language should be required before such an inference can be drawn. With all respect, I am unable to adopt the reasoning of the learned Judge.

(1) (1892) I.L.R., 19 Calc., 289 (F.B.). (2) (1895) I.L.R., 22 Calc., 589.
(3) (1898) I.L.R., 22 Bom., 321.

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As already stated I am inclined to follow the ruling of our own High Court in *Chowdappa v. Narasamma*(1) and of the Allahabad Court in *Abdul Aziz Khan v. Nirma*(2), in so far as they hold that section 2 does not apply to a Hindu widow re-marrying after conversion; but with all respect, I am not prepared to follow them when they hold further that no forfeiture at all was caused by the re-marriage for I am inclined to think that a forfeiture is caused under the Hindu Law. I shall now consider this question.

My learned brothers in the above Second Appeal hold that the decision of the Privy Council in *Moniram Kolita v. Keri Kolitani*(3), is conclusive on the matter as they treat the widow's re-marriage as amounting at the highest only to 'being false to the bed of her husband', and they decided that no forfeiture was therefore caused. With all respect I am unable to follow this view. The authorities cited to us are all against it, and they have not been considered by my learned brothers. The case in *Murugayi v. Viramakali*(4), held on a consideration of the principles of the Hindu Law that in the case of a Maraver widow re-marrying, she forfeited her life estate there being no custom to the contrary in the caste. This view was followed by the referring Judges, WILSON and BANERJI, JJ., in *Matungini Gupta v. Ram Rutton Roy*(5), who state their reasons for their view in full and I agree with them and need not re-state those reasons. In fact section 2 of the Act is based upon a recognition by legislature that a Hindu widow's estate is ordinarily forfeited under the Hindu law by her re-marriage. This view and the Madras case were both followed by another Bench in Calcutta in *Rasul Jehan Begum v. Ram Surun Singh*(6). For some reason not apparent, the Allahabad High Court has not considered this position at all. The Bombay decision in *Vithu v. Govinda*(7) as already pointed out, expressly proceeded on the footing that the usual practice among Hindus was to treat the widow's estate as terminated by re-marriage. The authorities except the Second Appeal above referred to are all in favour of the view I am taking.

(1) (1917) 23 M.L.T., 81. (2) (1913) I.L.R., 35 All., 466.
(3) (1880) I.L.R., 5 Calc., 776 (P.C.). (4) (1877) I.L.R., 1 Mad., 226.
(5) (1892) I.L.R., 19 Calc., 289 (F.B.). (6) (1895) I.L.R., 22 Calc., 589.
(7) (1898) I.L.R., 22 Bom., 321.

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I shall now examine the reasons given in *Chowdappa v. Narasamma*(1) for the view taken in it. The Privy Council case will no doubt be conclusive on the matter if the view that the widow's re-marriage amounts at the highest only to the adoption of a life of unchastity is correct. With all respect I am entirely unable to endorse this view of her position. I think it is wrong to treat the life of a re-married woman as necessarily a life of unchastity and nothing more. There is a clear and broad distinction between unchastity and re-marriage; the former is an uncertain and changeable course of conduct, while the latter is a definite legal step by which the woman ceases to be any longer the widow of the deceased. This is pointed out by both WILSON, J., and BANERJI, J., in *Matungini Gupta v. Ram Rutton Roy*(2). An observation in *Gajadhar v. Kaunsilla*(3) may also be referred to. It was suggested that the effect of the re-marriage should be considered from the point of view of the Hindu Law and as that law does not recognize or sanction the marriage of a Hindu widow with a Muhammadan, such marriage should be treated as having no effect in changing the widow's status. It seems to me that this is an erroneous way of looking at the question. The status of an individual has to be decided with reference to his personal law at the time. There can be no doubt that after her conversion the fifth defendant was governed by the Muhammadan Law as to her marriage—see section 16 of the Civil Courts Act—and therefore her second marriage was a perfectly valid one. She can therefore no longer be treated as a widow. A woman cannot be a married woman for certain purposes and a widow for others. I am therefore of opinion that her widowhood was terminated for all purposes and she cannot be treated as an unchaste widow under the Hindu Law.

On this view, the Privy Council case is easily distinguishable as their Lordships were not dealing in it with a case of re-marriage at all. All that was decided in that case was that chastity was not a necessary condition for the continuance of the widow's estate after it had become vested, but it was not decided that the continuance of widowhood itself was not necessary.

(1) (1917) 23 M.L.T., 81.

(2) (1892) I.L.R., 19 Cal., 289 (F.B.).

(3) (1909) I.L.R., 31 All., 161 at p. 165.

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Relying on the observations of PRINSEP, J., in *Matungini Gupta v. Ram Rutton Roy*(1) it was next urged that as the determination of the widow's estate under the Hindu Law on re-marriage is based on the legal fiction that she takes her estate as the surviving half of her husband's body and as conferring spiritual benefits on him by her acts and as this fiction comes to an end on her conversion, it can no longer be relied on to divest her estate. The answer to this seems to me to be that the Hindu widow's estate is by its very nature an estate subject to limitations, one of which is a liability to forfeiture on re-marriage or cessation of widowhood. The condition is inferred from the origin of the estate and is one that attaches itself to the estate from its very commencement. Unless therefore the condition is abrogated by some subsequent event, it must continue to attach to the estate in the widow's hands, always. Act XXI of 1850 which saved the estate from forfeiture on conversion had no effect on this condition and nothing else has been shown as affecting it. It is therefore not necessary to apply the legal fiction at the time of the forfeiture.

It is true, as pointed out by PRINSEP, J., in the same case, that there is an anomaly in a widow losing her estate by her re-marriage when she does not do so by leading a notoriously unchaste life. But this anomaly exists equally in the case of marriages under Act XV of 1856 and under the caste custom. The existence of the anomaly does not seem to me to be an argument against forfeiture on re-marriage. Such a forfeiture is consistent with the notions of the Hindus generally.

For the above reasons, I am of opinion that the fifth defendant, the widow in this case, lost her rights in the plaint house on her marrying her Muhammadan husband, the forfeiture being caused under the Hindu Law and not by section 2 of Act XV of 1856. The question is an important one on which there has been a considerable difference of opinion and in fact we are differing from the view in *Chowdappa v. Narasamma*(2) as to the final result. I therefore agree to the Order of Reference to the Full Bench proposed by my learned brother.

(1) (1892) I.L.R., 19 Cal., 289 at p. 300 (F.B.).

(2) (1917) 23 M.L.T., 81.

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M. O. Parthasarathi Ayyangar for appellant.—The question must be answered in the negative. There is no forfeiture either by reason of Hindu Law or by section 2 of Act XV of 1856. Hindu Widows' Marriage Act contemplates only marriage between *Hindus*. If the Act does not apply, then the question is whether under the Hindu Law she loses her right by change of religion, i.e., by conversion to Muhammadanism. She does not. The opinion of WILSON, J., in *Matungini Gupta v. Ram Rutton Roy*(1) that section 2 of the Act only embodies the well-recognized principle of Hindu Law is wrong. There is no such principle of Hindu Law; by her marrying as a Hindu a Muhammadan which is no legal marriage under the Hindu Law, she only leads an unchaste life and unchastity does not work a forfeiture. The decision to the contrary in *Marugayi v. Viramakali*(2) is wrong. The decision of the Privy Council in *Moniram Kolita v. Keri Kolitani*(3) decides this point in my favour.

[Chief Justice.—That was not a case of re-marriage.]

The Allahabad cases quoted in the Order of Reference are all in my favour. The latest case of this Court in my favour is *Chowdappa v. Narasamma*(4).

T. V. Subba Rao for the first respondent.—There is a forfeiture both under the Hindu Law and under section 2 of Act XV of 1856. In the Allahabad cases the applicability of general Hindu Law is not considered. Hindu Law prohibits such re-marriage. *Smriti Chandrika* in Chapter I, section 1, sub-section 4, lays down that a widow as soon as she marries ceases to be the other half of her husband and hence forfeits her inheritance. Though mere degradation on account of unchastity will not work a forfeiture, yet becoming an outcaste either for that reason or for any other does: *Subbaraya Pillai v. Ramaswami Pillai*(5) and *Vedammal v. Vedanayaga Mudaliar*(6).

The Court expressed the following

OPINIONS :

WALLIS, C. J. WALLIS, C.J.—I agree with the conclusion of KRISHNAN, J., in his Order of Reference that, independently of section 2

- (1) (1892) I.L.R., 19 Calo., 289 (F.B.).
(2) (1877) I.L.R., 1 Mad., 226. (3) (1880) I.L.R., 5 Calo., 776 (P.C.).
(4) (1917) 23 M.L.T., 81.
(5) (1900) I.L.R., 23 Mad., 171. (6) (1908) I.L.R., 31 Mad., 100.

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of Act XV of 1856, the widow of a Hindu forfeits her husband's estate on re-marriage. This was, in my opinion, decided by this Court in *Murugayi v. Viramakali*(1), a decision which, as I shall show, has been repeatedly approved in this and other High Courts. That decision did not, as was contended before us, proceed on any proof of a custom of forfeiture on re-marriage in the particular caste, but on general principles of Hindu Law, though in support of its conclusion the Court referred, as the Bombay Court did in a later case, to the fact that the extensive enquiry the results of which are recorded in Steele's Hindu Castes showed that among the very numerous classes of Hindus who practised re-marriage in the Deccan such a forfeiture was an invariable incident of re-marriage. In *Matungini Gupta v. Ram Rutton Roy*(2) following and relying on the decision of this Court, WILSON and BANERJI, JJ., in their Orders of Reference, to which they adhered in their subsequent judgments, expressed the opinion that section 2 of Act XV of 1856 was merely declaratory, and the same view was expressed in *Rasul Jehan Begum v. Ram Surun Singh*(3) and by RANADE, J., delivering the judgment of the Full Bench of the Bombay Court in *Vithu v. Govinda*(4). In *Har Saran Das v. Nandi*(5) which was followed in *Ranjit v. Radha Rani*(6), it was held that a widow who, according to the custom of her caste, was entitled to re-marry did not forfeit her husband's estate on re-marriage on the ground that the case was not governed by section 2 of Act XV of 1856. The contention that the estate was liable to forfeiture independently of the section was not raised in those cases. When it was raised by Pandit Sundar Lal in *Gajadhar v. Kaunsilla*(7), STANLEY, C.J., and BANERJI, J., were inclined to accept it but for the earlier decisions, as to which they again expressed their doubts in *Mula v. Partab*(8). *Abdul Aziz Khan v. Nirma*(9) only followed the earlier decisions without comment. The decision in *Murugayi v. Viramakali*(1) has therefore been approved by the Calcutta and Bombay Courts, and would have been approved by STANLEY, C.J., and BANERJI, J., in Allahabad but for the earlier decisions of that

- (1) (1877) I.L.R., 1 Mad., 226. (2) (1892) I.L.R., 19 Calo., 289 (F.B.).
(3) (1895) I.L.R., 22 Calo., 589. (4) (1898) I.L.R., 22 Bom., 321.
(5) (1889) I.L.R., 11 All., 330. (6) (1898) I.L.R., 20 All., 476.
(7) (1909) I.L.R., 31 All., 161. (8) (1910) I.L.R., 32 All., 489.
(9) (1913) I.L.R., 35 All., 466.

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Court. I think we should be very slow to interfere with a decision which has stood so long and is supported by so much authority, and with great respect I cannot agree with the conclusion of a Bench of this Court in *Chowdappa v. Narasamma*(1) that it must be considered to have been overruled by the decision of the Privy Council in *Moniram Kolita v. Keri Kolitani*(2) that a Hindu widow does not forfeit her widow's estate by reason of unchastity committed after succeeding to the estate. In *Matungini Gupta v. Ram Rutton Roy*(3) that contention was overruled by WILSON and BANERJI, JJ., with whom I respectfully agree. No question of re-marriage was raised before the Privy Council and, as observed by WILSON, J., there is a very broad distinction between misconduct on the part of a widow as a widow, and her ceasing to be a widow. In this state of the authorities I think the decision in *Murugayi v. Viramakali*(4) ought not to be overruled by this Court.

Considering the question apart from authority, I am of the same opinion. In his *Principles of Hindu Law*, page 173 (1st edition), Mr. Ghose cites a text of Manu IX 191, "But if two (sons) begotten by two (different men) contend for the property (in the hands) of their mother, each shall take to the exclusion of the other, what belonged to his father." And he also cites another text to the same effect attributed to Vishnu but not to be found in the recension that has come down to us. These texts can hardly refer to the estate which the widow took only in default of male issue. But whatever may have been the rule in archaic times when re-marriage was permitted, I think, considering the ideas which in later Hinduism underlay the prohibition of widow re-marriage as far as possible and the encouragement of *sati*, that the retention by a widow of her deceased husband's estate is altogether incompatible with her renunciation of her status as his widow; and I respectfully agree with the opinion of the Bombay High Court in *Vithu v. Govinla*(5) that the invariable rule among so many castes in the Deccan that re-marriage when permitted entailed the forfeiture of the first husband's estate is merely an illustration of that essential incompatibility, which was again recognized by the

(1) (1917) 23 M.L.T., 81 (F.B.).

(3) (1892) I.L.R., 19 Cal., 289.

(2) (1880) I.L.R., 5 Cal., 776 (P.C.).

(4) (1877) I.L.R., 1 Mad., 226.

(5) (1898) I.L.R., 22 Bom., 321.

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legislature when it enacted Act XV of 1856. As regards Act XXI of 1850, I agree with the opinion of WILSON, J., in *Matungini Gupta v. Ram Rutton Roy*(1), that, though that Act relieved the widow of a Hindu from forfeiture of her widow's estate on her abjuration of Hinduism, it did not enlarge the nature of that estate, so as to relieve her from forfeiture in the event of her renouncing her status of widow by re-marriage.

The construction of section 2 of Act XV of 1856 is not free from difficulty and has occasioned much difference of opinion, but on the whole I hesitate to differ from the liberal construction put upon the section by the Full Benches of the Calcutta and the Bombay Courts. The words 'any widow, . . . upon her re-marriage' in section 2 are, I am inclined to think, wide enough to cover the case of any widow of a Hindu re-marrying, whether or not her marriage would otherwise be prohibited by any custom or interpretation of Hindu Law, and whether the re-marriage was to a Hindu or to a member of another religion. As observed by WILSON, J., the legislature was well aware of the existence of such re-marriages by the widows of Hindus, and must, I think, have considered that the case for enforcing the forfeiture on re-marriage was in the first case as strong as, and in the second case much stronger than, in the case for enforcing it as regards the re-marriages which were legalized by section 1. The words 'any widow' in section 2 are certainly wider than was necessary, if it was intended to confine the operation of the section to the last mentioned class of marriages only. Having regard to the generality of the language, the fact that the section was in substance though not in form declaratory, and the incongruity which would result from holding re-marriages by the widows of Hindus to persons of another religion to be outside its scope, I think the more extensive and beneficial construction should be adopted. On both grounds therefore I would answer the question in the affirmative.

OLDFIELD, J.—We have been asked to answer the question OLDFIELD, J. referred in the affirmative (1) with reference to section 2, Act XV of 1856 and (2) with reference only to Hindu Law.

I regret that I cannot concur in the judgment just delivered and adopt the first of these grounds of decision. The section is

(1) (1892) I.L.R., 19 Cal., 289, at p. 291 (F.B.).

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worded generally as dealing with the rights and interests of 'any widow.' One construction of this expression, that it includes widows of whatever nationality or creed, has not been pressed and is excluded alike by the language of the preamble of the Act, to which I return, and the incongruity of the results, which it would involve. We have then to assume that the widows in question were originally Hindu widows and to choose between the contentions that the section relates only to those who re-marry as such or that it deals also with re-marriages after apostacy, solemnized by the rites of other creeds.

It would follow from the latter construction that the legislature intended to deal in Act XV of 1856 with the problem, not only of Hindu widow re-marriage, but also of disability due to "renunciation of or exclusion from the communion of any religion", with which it had dealt recently in Act XXI of 1850. Yet the later Act contains no reference, express or implied, to the earlier, although the former declares and the latter exempts from forfeiture and although re-marriage, the event contemplated in the one, would, in many cases, be connected closely with the renunciation or exclusion dealt with in the other. So also the preamble to Act XV of 1856, which is full, refers only to Hindu widows, to the advisability of enabling Hindus, who may be so minded, to adopt the custom of re-marriage and to the justice of relieving such Hindus and removing obstacles to the re-marriage of Hindu widows; and the references to Hindus in sections 1, 3 and 6 are clear, the last, in which Hindu ceremonies are prescribed, being particularly unambiguous. The wider construction, for which plaintiff contends, has in fact been based on no explicit extension of the subject-matter of the Act to widows in the other sections, which no doubt include section 2, and only on the general references in them. In the circumstances, these references must, in my opinion, be read as qualified by the context. The conjecture of WILSON, J., in *Matungini Gupta v. Ram Rutton Roy*(1) that they were intended to apply to the class of widows, who might change their faith, seems to me (with all respect) unwarranted, since, as the learned Judge observes, the legislature knew, not only of the existence of such widows, but also that they could already marry again without its assistance; and

(1) (1892) I.L.R., 19 Calc., 289 (F.B.).

there is no reason for the assumption that it intended to deal with their position in an enactment passed statedly to give such assistance to widows, who required it. I am therefore constrained to hold that the Act is inapplicable to the present case and to turn to the general law as a ground of decision.

The Hindu Law is, as this and other High Courts have held since *Murugayi v. Viramakali*(1), that a widow's re-marriage entails forfeiture of her husband's estate. And I respectfully agree with the learned Chief Justice that there is no reason for departure from this long current of authority. But those cases dealt with re-marriage by the widow as a Hindu; and it is argued that a re-marriage, even after the widow's conversion with the ceremonies of her new faith must be regarded, as it would be by Hindu Law, as no marriage and the widow's conduct as mere unchastity, which with reference to *Moniram Kolita v. Keri Kolitani*(2) entails no forfeiture. This view has been taken lately by a Bench of this Court in *Chowdappa v. Narasamma*(3) and is regarded by SESHAGIRI AYYAR, J., in his judgment, which I have had the advantage of reading, as consistent with the decision in *Sundari Letani v. Pitambari Letani*(4). But, with all respect, I cannot follow this application of the authorities. The last cited dealt with a case of real unchastity, since the person concerned was not a widow, but had gone through a Muhammadan ceremony of marriage after being deserted, not divorced, by her Hindu husband, who was still alive. And in *Moniram Kolita v. Keri Kolitani*(2) there was no question of a re-marriage, which could on any view be regarded as legal, but only of a temporary illicit connexion. The judgment is based on the ancient texts and considerations of convenience. But the former were not dealing, and in the state of contemporary society could have no occasion to deal with non-Hindu re-marriages; and the latter, based on the insecurity of titles created by the widow, if they could be disturbed on proof of immorality which is essentially secret and which the reversioners would be interested to promote, are irrelevant, when the question is of a connexion, contracted publicly and authorized by the general law. I need offer no general opinion

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(1) (1877) I.L.R., 1 Mad., 226.

(3) (1917) 23 M.L.T., 81.

(2) (1880) I.L.R., 5 Calc., 776 (P.C.).

(4) (1905) I.L.R., 32 Calc., 871.

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at present regarding the effect of the marriage of a Hindu with a non-Hindu woman or the position of their issue. In the case before us, authority being wanting, it is sufficient for me to express my respectful concurrence in the ground of decision proposed by the learned Chief Justice, the incompatibility between renunciation of a widow's status and retention of a widow's estate; and I do so the more willingly, because I can thus avoid the conclusion that a marriage is invalid for one purpose, although it is valid for all others.

I would answer the question in the affirmative.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—I regret I am unable to agree with the conclusion of the learned Chief Justice and OLDFIELD, J. I do not wish to add much to the judgment of myself and of NAPIER in *Chowdappa v. Narasamma*(1) on the question whether section 2 of Act XV of 1856 would deprive a Hindu widow embracing Muhammadanism and afterwards marrying a Muhammadan of the estate which she inherited from her Hindu husband. I agree generally with OLDFIELD, J., on this question. The belief that a Hindu widow adds insult to injury to the memory of her deceased husband by apostasy first and by subsequent marriage with a person belonging to a different faith, is not a ground for reading into section 2 of Act XV of 1856 words which are not to be found there. The Act was intended to give relief to a certain class of people and not to penalize others; and Courts are not at liberty to supply a defect of this kind by indirect legislation. I therefore adhere to the view that I took in *Chowdappa v. Narasamma*(1) on this question.

On the question of the applicability of Hindu Law, I wish to make a few observations in addition to what I stated in the Second Appeal already referred to. It is said that the Hindu Law does not countenance inheritance by a person who has not been true to the bed of her deceased husband. I do not dissent from this view so long as it can be said that the party against whom this rule of Hindu Law is to be applied is within the pale of that Law. There is a great deal to be said for the position taken up by Mr. Justice BANERJI in *Matungini Gupta v. Ram Rutton Roy*(2), on the question of Hindu Law. But it need scarcely be added that the Hindu widow who has embraced Muhammadanism and has married a Muhammadan is not subject

(1) (1917) 23 M.L.T., 81.

(2) (1892) I.L.R., 19 Calc., 289 (F.B.).

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to Hindu law. In *Sundari Letani v. Pitambari Letani*(1), the Court had to consider the case of a Hindu daughter who had become a Muhammadan and had subsequently married a Muhammadan. The point was whether her children were legitimate and could inherit to the estate of their Hindu grandfather. "The woman was abandoned but not divorced by her husband". Her position was thus stated by the learned Judges:—

"She is in the position of an unchaste daughter who could not inherit according to Hindu Law."

I think the same principle is applicable to the widow in the present case.

There are three incidents in the life of this woman. The first was when she inherited the estate of her husband after his death. In the Order of Reference, Mr. Justice KRISHNAN says that section 2 of Act XVI of 1856 is based upon a recognition by legislature that a Hindu widow's estate is ordinarily forfeited under the Hindu Law by her re-marriage. Even if I assent to this view, I fail to see how this conclusion touches a re-marriage while the widow has become a Muhammadan convert. It was contended that the right of Hindu widow to inherit her husband's property is dependent upon a text of Brahaspati to this effect.

"He who has left a widow surviving him has got the half of his body verily alive, and when half of his body is alive, who else shall take his property?"

The metaphor is undoubtedly picturesque. But it would not be safe to deduce principles of law by parity of reasoning from such a figure of speech. Granting that the reason of a widow inheriting to her deceased husband in preference to divided members of the coparcenery is based solely upon this principle, it can only apply to a state of things which came into existence on the death of her husband. At that moment either by reason of this figure of speech or by reason of the more prosaic statement of the law contained in Yagnyavalkya Smriti which is to the following effect—

"Wife (widow), daughter, father, mother, brother, their sons, gotraja (of the same family), Bandhus, disciple and Brahmacharins of the same school, each succeeding one is heir in the absence of the person immediately preceding him in the order of enumeration,—

(1) (1905) I.L.R., 32 Calc., 871.

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this is the law in respect of the inheritance to the property of a sonless deceased person of whatever caste", the widow inherited the estate. The second stage in her life was her conversion to Muhammadanism which is found to have been subsequent to the death of her husband. If the Hindu Law had not been legislated upon, there could hardly be any doubt that conversion to a different faith would have entailed forfeiture of the estate inherited by the woman. But Act XXI of 1850 which was designed to preserve the rights of persons who exercised their liberty of conscience in entering the fold of another religion maintained the rights of the widow to continue in possession of her deceased husband's property. Section 1 distinctly says "so much of any law or usage within the territories of the East India Company as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion ceases to be enforced as law in the Courts of East India Company". So under this Act the widow who had embraced Muhammadanism could not be deprived of the rights which she possessed prior to her conversion. Her inheritance subsisted. The third stage in her career was her marrying a Muhammadan. I fail to see how this step can deprive her of what she obtained under the Hindu Law and what the legislature preserved to her under Act XXI of 1850. I am unable to find anything in the Hindu Law or in Act XXI of 1850 which can have this effect. It is hardly necessary to refer to cases in which it has been held that under the Hindu Law properties once vested in a male or a female cannot be divested by reason of the fact that if the subsequent state of life had existed at the time of the devolution of interest he or she would not have inherited the property. The well-known case of *Moniram Kolita v. Keri Kolutani*(1) laid down that principle in unequivocal terms. One sentence from the judgment may be quoted as bearing upon conversion :

"The widow has never been degraded or deprived of caste. If she had been, the case might have been different, subject to the question as to the construction of Act XXI of 1850; for upon degradation from caste, before that Act, a Hindu, whether male or

(1) (1880) I.L.R., 5 Calc., 776 (P.C.).

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female, was considered as dead by the Hindu Law, so much so that libations were directed to be offered to his manes as though he were naturally dead."

Following this decision all the High Courts have held that property once vested under similar circumstances, cannot be divested. In *Abilakh Bhagat v. Bhekhi Mahto*(1), which was a case of a person becoming insane after inheritance had vested in him, Mr. Justice GHOSH said that the principle of *Moniram Kolita v. Keri Kolutani*(2) was applicable to that case. In *Sanku v. Puttamma*(3), the same principle was followed. *Deo Kishen v. Budh Prakash*(4), is also to the same effect. It was a decision of five Judges and they affirm the proposition that under Hindu Law subsequent conduct does not put an end to the rights once properly acquired. *Murli Singh v. Jai Singh*(5), follows this ruling. Much reliance was placed in the argument before us on *Murugayi v. Viramakali*(6). The judgment is based upon custom. It was the case of a person who was within the pale of Hinduism. I fail to see how that case affects the present question. I may draw attention to the observations of Mr. GHOSH in his book on Hindu Law wherein he says that Manu does not lay down that re-marriage while still a Hindu would deprive a Hindu widow of the inheritance once vested in her. Although the principle of *stare decisis* must be respected, I am not satisfied that in the present case we would be violating the rule of law laid down in *Murugayi v. Viramakali*(6), by holding that the widow marrying a Muhammadan does not forfeit the estate which came to her from her Hindu husband. Moreover cases of this description are of rare occurrence, and when a very important principle relating to the applicability of Hindu Law is debated, I fail to see how a decision, passed forty years ago on a different set of circumstances, can be regarded as binding authority with reference to facts of a totally different character. For all these reasons, in my opinion, the answer to the question must be in the negative.

N.B.

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| (1) (1895) I.L.R., 22 Calc., 864. | (2) (1880) I.L.R., 5 Calc., 776 (P.C.). |
| (3) (1891) I.L.R., 14 Mad., 289. | (4) (1883) I.L.R., 5 All., 509. |
| (5) (1908) 5 A.L.J., 115 (F.B.). | (6) (1877) I.L.R., 1 Mad., 226. |

